A TREATISE

ON THE

LAW AND PROCEEDINGS

IN

BANKRUPTCY

BY

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SECOND EDITION

CINCINNATI
THE W. H. ANDERSON CO.
1904

This Volume is with great respect

dedicated to the

HONORABLE HORACE H. LURTON,

Presiding Judge of the

United States Circuit Court of Appeals,

for the Sixth Circuit.

PREFACE.

At the time the first edition of this work was published the present Act had not been construed by the courts. I relied upon the constructions placed on similar provisions of prior acts, so far as it was applicable, to determine the meaning of the Act of 1898. Since then nearly every provision of that Act has been construed by the courts and many important questions have been authoritatively answered by the Supreme Court, so that now it is possible to present the law as declared by the courts passing directly on questions arising under the present Act and the amendement of February 5, 1903.

In making the present revision I have preserved the plan, including chapter and sections, adopted in the former edition which is as follows: To consider the power of congress upon the "subject of bankruptcies" under the constitution, the organization and jurisdiction of the courts of bankruptcy, and then to follow step by step, in its natural course, a proceeding in bankruptcy, from its inception, through the court of bankruptcy and the appellate court. Under the present Act proceedings by a debtor, by creditors against a common debtor, and to have a partnership declared bankrupt differ in the mode of instituting them. After an adjudication and order of reference the proceedings are substantially the same, irrespective of how or by whom commenced.

By this arrangement the several provisions relating to the same proceeding, which are separated in the Act itself, are collected: so that the attorney may have before him all parts of the statute and the authorities relating to the particular question, which is being investigated.

A large share of whatever approval this revision is awarded by the profession, is due to Mr. Oliver S. Bryant, of the Cincinnati Bar, who greatly aided in its preparation.

Cincinnati, May 1, 1904.

Frank O. Loveland.

ANALYTICAL TABLE SHOWING WHERE EACH CLAUSE OF THE BANKRUPT ACT IS CONSIDERED IN THIS TREATISE.

Section	Clause	Page of Treatise.
1	(1)	Meaning of "Person against whom a petition is filed."
	(2)	233.
	(3)	790.
	(4)	631, 636.
	(5)	129.
	(6)	147.
	(7)	111, 276, 279, 349, 632.
	(8)	33.
	(9)	189, 219, 269, 322.
	(10)	76.
	(11)	283, 309.
	(12)	754.
	(13)	377.
	(14)	171, 203, 317, 584, 738, 820.
	(15)	161, 165, 196, 387, 574.
	(16)	Meaning of "Judge."
	(17)	177.
	(18)	132, 134.
	(19)	141, 172, 190, 246.
	(20)	Meaning of "Petition."
	(21)	Meaning of "Referee."
	(22)	656.
	(23)	604.
	(24)	422.
	(25)	161, 381, 561, 572.
	(26)	Meaning of "Trustee."
	(27)	142.
	(28)	Words in masculine gender.
	(29)	Words importing plural.
	(30)	Words importing singular.
2		25, 33, 70, 174, 603.
	(1)	114, 173, 199, 206, 224, 247, 251, 424, 632.
	(2)	341.
	(3)	117, 132, 211, 212.
	(4)	125, 353, 638, 665.
	(5)	117, 132, 211, 213, 214, 702.
	(6)	90.
	(7)	701, 711.
	(8)	735.
	(9)	682, 697, 698.
	(10)	118.
	(11)	428, 442.
	(12)	785.
	(13)	116, 632, 638, 666, 667, 675, 747.
	(14)	646.
	(15)	88, 211, 214, 633.
	(16)	116, 343, 617, 619, 638, 667, 747.
	(17)	349, 356, 660.
	(18)	357, 715.
	(19)	See Sec. 32.
3		169, 185.
	a	153, 156, 159, 168, 195, 248, 392.
	b	152, 170, 195, 196, 198, 202, 224, 247.
	c	15, 155, 161, 194, 225.
	d	155.
	e	216, 217.
4		172, 194, 777.
	a	28, 141, 246.
	b	141, 142, 147, 199, 224, 246.
5		142, 243.
	a	247.
	b	255, 270.
	c	152, 244, 249, 251, 253.
	d	255, 352.
	e	192, 255.
	f	243, 256, 720.
	g	256.
	h	244, 245.
6		376, 424, 439, 440, 442.
7		274, 631.
	(1)	273, 631, 632.
	(2)	617, 631.
	(3)	178, 633.
	(4)	632, 633.

Section	Clause	Page of Treatise.
7	(5)	367, 395.
	(6)	633.
	(7)	633.
	(8)	131, 177, 178, 180, 182, 221, 371, 429, 433, 439, 634, 653.
	(9)	612, 617, 618, 623.
	a	625, 653.
8		146, 396.
9		632, 633, 638.
	a	638, 639.
	b	111, 614, 640, 642.
10		646.
11		77.
	a	88, 94, 211.
	b	95, 359.
	c	95, 359.
	d	361.
12		677.
	a	679.
	b	682, 684.
	c	691.
	d	111, 686, 688, 692.
	e	693, 695.
13		697.
	a	111.
14		111, 736, 739, 788.
	a	738.
	b	688, 689, 738, 744, 746, 748, 750, 753, 754.
	c	694, 754.
15		111, 785, 786, 787, 788.
16		70, 244, 295, 315, 401, 694, 756.
17		639, 694, 754, 756, 760.
	(1)	762.
	(2)	764, 766, 767, 768.
	(3)	758, 768.
	(4)	769, 771, 774.
18		204.
	a	132, 210.
	b	112, 210, 222, 228.
	c	177, 227, 233, 786.
	d	111, 230.
	e	112, 236.
18	*f*	110, 114, 130, 236.
	g	110, 112, 114, 130, 184, 186,
19		102, 196, 223, 226, 819.
	a	157, 210, 230.
	b	157.
	c	664, 753 787.
20		115, 177, 201, 330, 360, 642.
	a	627.
21		343, 616.
	a	232, 615, 626, 629, 667.
	b	232, 344, 629.
	c	344, 630.
	d	113, 735.
	e	367, 371.
	f	693, 697, 783.
	g	696.
22	*a*	110, 111, 185, 235.
	b	110.
23		75, 76
	a	103.
	b	81.
	c	83, 125, 353, 638.
24		75, 795.
	a	790, 807, 808.
	b	807, 808, 812, 813, 814.
25		102, 809, 818.
	a	346, 807, 813, 820, 823.
	b	796.
	c	828.
	d	797, 799, 803.
26		716.
	a	354, 698.
	b	700.
	c	700.
27		698, 703, 716.
	a	354.
28		269, 736.
29		655.
	a	353, 655, 656, 661.
	b	656, 660, 662, 747.
	c	125, 663, 664.
	d	665.

Section	Clause	Page of Treatise.
30		112, 845.
31		171, 203, 317, 387, 390, 584, 738, 820.
32		228, 252.
33		107, 348.
34		107, 109.
35		108.
36		109.
37		107.
38		109, 110, 114.
	(1)	112, 114, 186.
	(2)	115, 614.
	(3)	112, 117, 130, 212, 217.
	(4)	111, 117, 621, 684, 691, 699.
	(5)	115, 124, 344, 620.
39	*a*	122.
	(1)	721, 732, 122.
	(2)	179, 187, 239, 122.
	(3)	122.
	(4)	280, 122,
	(5)	125, 622, 122.
	(6)	122.
	(7)	122.
	(8)	125, 123.
	(9)	124, 344, 620, 123.
	(10)	123.
	b	114, 713.
40		126, 338, 721.
41		115, 116, 343, 619, 666, 667, 747.
	a	313, 617, 619, 622, 628, 638.
	b	111, 622, 671.
42	*a*	124.
	b	124.
	c	124, 735.
43		107, 109.
44		113, 210, 275, 276, 279, 348, 349, 350, 358, 698, 789.
45		210, 348, 349.
46		348, 351, 358, 654.
47	*a*	348.
	(1)	717.
	(2)	355, 360, 701, 716.
	(3)	353.
	(4)	353, 732.
	(5)	353.
	(6)	352.
	(7)	718.
	(8)	734.
	(9)	356, 732.
	(10)	352, 717, 721.
	(11)	429, 439.
	b	356.
	c	353, 362, 367.
48		348, 362.
49		348.
50		348.
	a	109.
	b	109, 350, 351.
	c	109, 278, 350.
	d	109, 350, 351.
	e	350.
	f	350.
	g	109, 351.
	h	109, 351.
	i	350, 351.
	j	350.
	k	350.
	l	109.
	m	351.
51		130, 183.
52	*a*	131.
	b	132.
53		134.
54		134.
55		210.
	a	268, 269.
	b	113, 273, 274, 275.
	c	274.
	d	279.
	e	279.
	f	280, 734.
56		273, 277.

Section	Clause	Page of Treatise.
56	*a*	269, 280, 681.
	b	190, 194, 269, 270, 271, 369, 601, 604.
57		321.
	a	322, 326, 330.
	b	330, 339.
	c	337.
	d	272, 337, 338, 340.
	e	271, 283, 331,
	f	283, 340.
	g	283, 324, 332, 331, 345, 598.
	h	331, 604, 705, 710.
	i	296, 298, 323, 332, 730.
	j	284, 730, 763.
	k	273, 341, 342, 345.
	l	346, 356.
	m	299, 324, 355.
	n	302, 320, 325.
58		
	a	122, 239, 269, 280, 358, 618, 681, 685, 691, 700, 703, 705, 706, 707, 711, 716, 718, 721, 734, 737.
	b	769.
	c	123, 132, 269.
59		
	a	172, 176.
	b	190, 193, 199.
	c	111, 131, 182, 198, 201.
	d	190, 199.
	e	192.
	f	219.
	g	187, 190, 239.
60		159, 162, 386, 560, 563, 571, 581, 589, 591, 594, 716.
	a	582.
	b	355, 360, 369, 561, 562, 577, 580, 606, 611.
	c	317.
	d	355, 586.
61	*a*	354.
62		131, 725.
63	*a*	193, 281, 318, 761.
	(1)	289, 293, 764.
	(2)	301.
	(3)	301.
63	(4)	293, 301.
	(5)	290, 292, 766.
	b	282.
64		242.
	a	354, 723.
	b	135, 561, 725, 726, 727.
	c	698, 730, 789.
65		
	a	718, 720.
	b	718, 723.
	c	719, 720, 722.
	d	722.
	e	720.
66		733.
	a	356.
67		563, 716.
	a	369, 562, 599, 602.
	b	356, 561, 600.
	c	561, 562, 563, 569, 570, 607.
	d	369, 562, 591, 599, 727.
	e	159, 355, 381, 389, 393, 562, 595, 605.
	f	154, 355, 369, 388, 562, 563, 566, 569, 600, 607.
68		317.
	a	329.
	b	315, 316.
69		112, 117, 132, 216, 217, 219.
70		118, 182, 385, 563, 716.
	a	365, 366, 367, 376, 427, 429, 433.
	(1)	377.
	(2)	378.
	(3)	379.
	(4)	381, 382, 384.
	(5)	394, 408.
	(6)	417, 420.
	b	441, 712, 713, 715.
	c	369, 605, 713.
	d	369, 698, 789.
	e	360, 384, 389, 605, 611, 716.
	f	369, 693, 696.
71		129.
72		363.

TABLE OF CONTENTS.

CHAPTER I.

A BRIEF HISTORY OF BANKRUPT LAW.

		PAGE.
§ 1.	Bankrupt laws of the Romans	1
2.	Bankrupt laws of other countries	2
3.	English bankrupt laws	4
4.	Bankrupt laws of the United States	6
5.	The act of 1800	7
6.	The act of 1841	10
7.	The law of 1867	12
8.	A brief comparison of the acts of 1867 and 1898	13

CHAPTER II.

THE POWER OF CONGRESS AND THE STATES TO ENACT BANKRUPT LAWS.

§ 9.	The power of congress to enact bankrupt laws	17
10.	Power of the state to enact bankrupt and insolvent laws	20
11.	Power of the states to enact bankrupt and insolvent laws... tion of a contract	20 21
12.	The effect of a national bankrupt law upon state insolvent laws	23
13.	The effect of a national bankrupt law upon general assignment laws of the states	29

CHAPTER III.

THE COURTS OF BANKRUPTCY AND THEIR TERRITORIAL JURISDICTION.

§14.	Bankruptcy courts created	33
15.	Territorial jurisdiction	33

CHAPTER IV.

THE JURISDICTION OF COURTS OF BANKRUPTCY.

§16.	The statutory jurisdiction	67
17.	The general extent of bankruptcy powers	69
18.	Bankruptcy jurisdiction exclusive	75
19.	Limitations to the exercise of jurisdiction	78

PAGE

§20. Jurisdiction of plenary suits at law and in equity 30
21. Ancillary proceedings in other districts 86
22. Power to stay proceedings in other courts 87
23. Power to obtain possession of property 96
24. When a circuit court may have jurisdiction of bankruptcy proceedings 101
25. Jurisdiction of circuit courts at law and in equity 103

CHAPTER V.

REFEREES.

§26. The appointment, removal and districts of referees..... 107
27. Qualifications of referees 107
28. The oath and bond of a referee 109
29. General powers of referees 109
30. Power to make an adjudication 114
31. Power to administer oaths and examine witnesses..... 115
32. Power to take possession and release the bankrupt's property 117
32*a*. Review of referee's rulings by judge 118
33. The administrative duties of referees 122
34. Records of referees.... 124
35. Offenses of referees 125
36. Compensation of referees 126

CHAPTER VI.

CLERKS, MARSHALS, ETC.

§37. Duties of the clerks 129
38. Compensation and expenses of clerks 131
39. Marshals 132
40. Compensation and expenses of marshals 132
41. Duty of the attorney-general to report annually..... 133
41*a*. Attorneys 134

CHAPTER VII.

WHO MAY BE BANKRUPTS.

§42. Voluntary Bankrupts 141
43. Involuntary Bankrupts 141
44. Aliens 143
45. Infants 144
46. Lunatics 145
47. Married women 146
48. Corporations 147

CHAPTER VIII.

ACTS OF BANKRUPTCY.

§49. Who may commit an act of bankruptcy 152
50. What are acts of bankruptcy? 153
50*a*. Insolvency as an act of bankruptcy 155
51. First: Fraudulent transfers 159

PAGE

§52. Second: Preferences created by the debtor 161
53. Third: Preferences created by legal proceedings 164
54. Fourth: Assignment for the benefit of creditors 167
55. Fifth: Voluntary petition 169
56. Computing time 170

CHAPTER IX.

PROCEEDINGS IN VOLUNTARY BANKRUPTCY.

§57. Who may file a voluntary petition 172
58. In what court the petition is to be filed 174
59. The petition 176
60. Schedules 178
61. Of filing the petition and schedules 182
62. The order of adjudication and reference 184
63. Amendments to petition and schedules 186
64. Voluntarily dismissing a petition 187
65. Proceedings subsequent to the adjudication 188

CHAPTER X.

INVOLUNTARY PROCEEDINGS.

§66. Who may institute involuntary proceedings 189
67. Against whom a petition may be filed 194
68. In what court an involuntary petition is filed 197
69. The petition 198
70. The time and manner of filing the petition 201
71. The writ of subœna 203
72. In what cases a subpœna is necessary 204
73. The service of a subpœna 205
74. The return of the subpœna 207
75. Service by publication 208
76. How to object to an irregularity of service or subpœna.... 209
77. Interlocutory orders to protect the estate 210
77*a*. Receivers in bankruptcy 212
78. Temporary injunction or restraining order 214
79. The seizure of the debtor's property 216
80. Appearing for the purpose of becoming a party to the proceedings 219
81. Schedules 221
82. Pleading to the petition 222
83. The answer 224
84. The order of proceeding where petitions are filed in different districts 228
85. The order of proceeding where two or more petitions are filed in the same court 229
86. The reply 229
87. The hearing or trial 230

PAGE

§88. Order of adjudication 233
89. Proceedings to set aside an adjudication 234
90. Order of reference 235
91. Proceedings on default 236
92. Amendments in involuntary proceedings 237
93. Dismissing a petition 238
94. Involuntarly proceedings as to grounds for suit for damages 241
94*a*. Costs 241
95. Proceedings subsequent to the adjudication 242

CHAPTER XI.

PROCEEDINGS PECULIAR TO PARTNERSHIPS.

§ 96. Partnership bankruptcy generally 243
96*a*. Individual petition by or against a partner 244
97. When a partnership may be adjudged bankrupt..... 246
98. How to institute proceedings to have a partnership declared bankrupt 248
98*a*. The adjudication and reference in partnership cases 253
99. The administration of partnership estates 255
100. What is firm and individual property respectively 258
101. What are firm and individual debts respectively 260
102. The effect of a discharge 265

CHAPTER XII.

MEETINGS OF CREDITORS.

§103. Proceedings after a reference generally 268
104. The time and manner of calling the first meeting of creditors 268
105. Who are entitled to vote at the first creditor's meeting.... 269
106. How to conduct the first meeting of creditors 273
107. Notice to trustee 278
108. Other meetings of creditors 279

CHAPTER XIII.

WHAT DEBTS ARE PROVABLE.

§109. Provable debts defined 281
110. What is "a debt" 283
111. Equitable debts 285
112. Contingent demands and liabilities not debts 286
113. Debts which are a fixed liability provable 287
114. What constitutes a fixed liability absolutely owing 288
115. Judgment debts provable 289
116. Debts evidenced by an instrument in writing 293
117. Interest 299
118. Costs 301
119. Debts founded upon contract 301
120. Rent 304

PAGE

§121. Mutual debts and credits 307
122. What are "mutual debts" and "mutual credits" 309
123. What mutuality is necessary..... 311
124. The debts and credits must be in the same right 313
125. Set-offs must be provable debts 315
126. Debts acquired by purchase as set-offs 316
127. Rights of preferred creditor to set-offs 317
128. Torts 318
129. Debts barred by the statutes of limitations 319

CHAPTER XIV.

HOW TO PROVE DEBTS.

§130. Necessity of proof 321
131. Who may make the proof 322
132. The time within which debts may be proved 325
133. The manner of making the proof 326
134. Proof by a secured creditor 331
135. Proof by creditors who have received preferences 332
136. What is a surrender of a security or preference?..... 334
137. Filing proofs of debts 337
138. Amendments and withdrawal of proof 338
139. Allowance of claims 340
140. Re-examination of claims 342
141. How to review the final allowance or rejection of a claim.. 346

CHAPTER XV.

TRUSTEES.

§142. Appointment and qualifications 348
143. Bonds of trustees 350
144. Duties of a trustee 351
145. Removal of trustee 356
146. Suits which may be prosecuted or defended by trustees 358
147. Limitations of actions by or against trustees 361
148. Compensation and expenses of trustees..... 362

CHAPTER XVI.

WHAT PASSES TO THE TRUSTEE.

§149. Title to bankrupt's property 365
150. The possession of the bankrupt's property 370
151. Trustees not bound to take incumbered interest 371
152. Property of other persons in the possession of the bankrupt 372
153. What property passes to the trustee generally 376
154. Documents 377

PAGE

§155. Patents, copyrights and trade-marks 378
156. Powers of appointment, etc. 379
157. Property fraudulently transferred by the bankrupt 381
158. Transfers in fraud of creditors 382
159. Transfers to prefer creditors 385
160. Property transferred to hinder, delay or defraud creditors.. 389
161. Transfers void as to creditors under state laws 393
162. Real and personal property 394
163. Interest in real estate 395
164. Dower and curtesy 396
165. Leaseholds 396
166. Growing crops, fixtures and good-will 402
167. Goods and chattels generally 403
168. Shares of stock 405
169. Membership in exchanges, franchises and privileges.....406
170. Negotiable instruments 407
171. Pensions 408
172. Insurance policies 408
173. Property held by the bankrupt as trustee 411
174. Trust property in which the bankrupt has a beneficial interest 414
175. After-acquired property 415
176. Rights of action upon contracts for injury, etc., to property 417

CHAPTER XVII.

EXEMPTIONS.

§177. By what laws exemptions are governed..... 422
178. Constitutionality of clause providing for exemptions..... 426
179. Title to exempt property 427
180. Jurisdiction of a court of bankruptcy over exempt property 428
181. Liens on exempt property 430
182. Who may claim exemptions 432
183. Waiver of exemption 433
184. Waiver to exemption in property fraudulently conveyed... 435
185. Dower 437
186. How to set apart exemptions 439
187. What property is exempt generally..... 442
188. Exemption laws of the several states and territories 444

CHAPTER XVIII.

PREFERENCES AND LIENS.

§189. The general nature of preferences and liens 560
190. Valid preferences and liens 561
191. Invalid preferences and liens 562

PAGE

192. Preferences by judgments, attachments, levies, etc..... 563
193. Dissolution of liens 570
194. Preferences by transfers 571
195. Payments 584
196. Sales 589
197. Mortgages 591
198. Pledges 597
199. As to liens generally 599
200. Mechanics' liens 601
201. Admiralty liens 603
202. Rights of a secured creditor 604
203. Suits to set aside fraudulent conveyances and preferences. 605

CHAPTER XIX.

EXAMINATIONS.

§204. When a bankrupt may be examined 612
205. When persons other than bankrupts may be examined.... 614
206. How to obtain an order for an examination 615
207. Notice of examination to bankrupts, creditors and witnesses 617
208. How an examination is made 619
209. Upon what topics the bankrupt may be examined..... 623
210. Upon what topics witnesses, other than bankrupts, may be examined 626
210*a*. Examination of witnesses residing without the district.... 628
210*b*. When testimony upon an examination may be used..... 630

CHAPTER XX.

THE BANKRUPT—DUTIES AND EXTRADITION.

§211. Who is a bankrupt 631
212. Duty to attend meetings 631
213. Duty to comply with the orders of the court 631
214. Duty with respect to claims against his estate 633
215. Duty to execute papers 633
216. Duty to prepare a schedule of his debts and assets 634
217. Duty to submit to an examination 634
218. Protection from arrest 635
219. When a bankrupt may be arrested 638
220. Proceeding to release a bankrupt from imprisonment. Habeas corpus 642
221. Extradition of bankrupts 646
222. Proceedings to remove a bankrupt from one district to another 648
223. Proceedings before a United States commissioner..... 648
224. Proceedings before the judge for an order of removal..... 650
225. The order of court granting or refusing a warrant 652
226. Habeas corpus 653
227. Abatement 653

CHAPTER XXI.

OFFENSES.

		PAGE
§228.	Generally	655
229.	Misappropriation of property by the trustee	655
230.	Concealment of property by a bankrupt	656
231.	False oath or account	660
232.	Presenting false claims	661
233.	Receiving property from a bankrupt	662
234.	Extorting money for forbearing to act	662
235.	Offenses by referees	636
236.	What court has jurisdiction of criminal proceedings	663
237.	Practice and procedure	664

CHAPTER XXII.

PROCEEDINGS IN CONTEMPT.

§238.	The power to commit	666
239.	Nature of the proceedings	670
240.	Practice, pleadings and procedure	671

CHAPTER XXIII.

COMPOSITIONS AND ARBITRATIONS.

§241.	The general nature of a composition	677
242.	The power of congress to provide for compositions	678
243.	Composition provisions should not be construed broadly	678
244.	When a bankrupt may offer terms of composition	679
245.	Creditors' meeting to consider terms of composition	680
246.	Application for confirmation	682
247.	Objections to a confirmation	685
248.	The hearing of objections	691
249.	The order of confirmation	692
250.	The effect of a confirmation of a composition	693
251.	Proceedings after a confirmation of a composition	695
252.	Setting aside a confirmation	697
253.	Arbitration and compromise	698

CHAPTER XXIV.

HOW TO REDUCE THE ESTATE TO MONEY.

§254.	The general power of trustee to sell	701
255.	Unencumbered property	703
256.	Encumbered property	704
257.	When a secured creditor may apply to have property, on which he has a lien, sold	708
258.	Disputed property	711
259.	Sale of perishable property	711

PAGE

§260. The sale 712
261. Setting aside a sale 714
262. Costs of sale 715
263. Of preferences and debts 715

CHAPTER XXV.

THE DISTRIBUTION OF THE ESTATE.

§264. The general plan of distribution 717
265. Who are entitled to share in the estate 719
266. How and when dividends are declared 720
267. Debts which have priority 723
268. Dividends are not subject to attachment 731
269. The manner of paying dividends 732
270. Unclaimed dividends 733
271. The settlement of the estate 733
272. The record of the referee to be transmitted to the court.... 735

CHAPTER XXVI.

DISCHARGE.

§273. Application for a discharge 736
274. When and where the petition is filed 737
275. Who may oppose a discharge 738
276. How to oppose a discharge 739
277. The specification of grounds in opposition to a discharge.. 742
278. Grounds for opposing a bankrupt's discharge 744
279. First ground for opposing a discharge, that bankrupt is guilty of an offense..... 747
280. Second ground of opposing a discharge, that books of account are fraudulently withheld or are not kept..... 748
281. Pleading to a specification..... 752
282. The hearing of objections to a discharge..... 752
283. The order granting a discharge..... 754
284. The general nature and effect of a discharge..... 755
285. The effect of a discharge upon liens..... 755
286. The effect of a discharge on foreign creditors..... 756
287. The effect of a foreign discharge on American debts..... 758
288. In what court the effect of a discharge is determined.. 759
289. What debts are released by a discharge..... 760
290. The effect of a discharge on debts due the United States.. 762
291. The effect of a discharge upon judgments against the bankrupt 764
292. The effect of a discharge upon debts not scheduled..... 768
293. Debts created by fraud or embezzlement..... 769
294. Fiduciary debts 771
295. Debts created by misappropriation..... 775
296. Co-debtors not discharged 776

PAGE
§297. The effect of a new promise upon a discharged debt.... 779
298. Pleading a discharge 782
299. Revoking discharges 784
300. The effect of revoking a discharge..... 788

CHAPTER XXVII.

APPELLATE PROCEEDINGS.

§301. The appellate courts 790
302. Appellate jurisdiction at law and in equity to revise the action of federal courts..... 790
303. Appellate jurisdiction at law and in equity to revise the action of a state court..... 793
304. Jurisdiction of the supreme court of appeals in bankruptcy 795
305. Writs of certiorari from the supreme court..... 797
306. Certiorari to complete records..... 797
307. Certiorari to remove a case for review..... 799
308. The application for writ of certiorari to remove a case to the supreme court 801
309. Certifying questions to the supreme court..... 803
310. Appeals to the supreme courts of the territories..... 807
311. The twofold jurisdiction of the circuit court of appeals.. 807
312. The supervisory powers of the circuit courts of appeals.... 808
313. Application to superintend and revise matters of law.... 812
314. Appellate jurisdiction in bankruptcy of the circuit courts of appeals 816
315. Time within which an appeal must be taken..... 820
316. How to take an appeal in bankruptcy..... 821
317. Parties to an appeal 823
318. Petition for appeal 827
319. Assignments of error 827
320. Bond on appeal 828
321. Supersedeas 829
322. Citation 830
323. The record 833
324. Amendments to the record..... 835
325. Perfecting an appeal and filing the record..... 836
326. Proceedings in a circuit court of appeals..... 838
327. Death of a party..... 840
328. The mandate 842
General Orders 843
Official forms 865
Bankrupt Act of 1898..... 1119
Bankrupt Law of 1867..... 1207
Table of Cases 1243
Index 1311

THE LAW AND PROCEEDINGS IN BANKRUPTCY.

CHAPTER I.

A BRIEF HISTORY OF BANKRUPT LAW.

§ 1. Bankrupt laws of the Romans.

In very early times the debtor was at the mercy of his creditors.[1] He might be imprisoned or suffer bodily torture, as his creditors willed.

The first steps toward a system of bankruptcy were taken with the object of relieving the debtor. These laws in some cases were carried to such an extent as to work great injustice to the creditors. The rights of the creditors were then again considered, but in connection with the rights of the debtor. Then for the first time appeared the chief principles of the law of bankruptcy, namely, that when a man is unable to pay his just debts the property remaining to him rightly belongs to his creditors, and ought to be distributed ratably among them towards the satisfaction of their debts. It was later that the debtor was released from future liability in respect

[1] Mr. Justice Blackstone, in his Commentaries (Vol. 2, pp. 472, 473), refers to the early Roman laws on this subject. The laws of the twelve tables provided that the creditors might cut the debtor's body in pieces, and each of them take his proportionate share. Other laws provided that the creditors might imprison the debtor in chains, or subject him to stripes and hard labor at their mercy, and sometimes sell him, his wife and children into perpetual slavery. Later, it is true, an equally vicious law was enacted for the benefit of the debtor, which provided that if an insolvent debtor would *swear* that he had not enough left to pay his debts, he should not be required to give up even that which he had in his possession.

to those debts, although from the first he was relieved from corporal punishment.

The first law resembling in any marked degree a bankrupt law, as it is understood at the present time, is found in the Roman law of cession—*cessio bonorum*. It was introduced by Julius Cæsar, and provided that if a debtor yielded up all his fortune to his creditors he was secured from being dragged to a goal "*omni quoque corporali cruciatu semoto.*"[1]

The law of cessions extended to all classes of persons, much like the present bankrupt law of the United States, but it did not release or discharge the debt or exempt the future acquisitions of the debtor from execution for the debt.[2] It merely exempted the debtor from imprisonment and corporal punishment.

§ 2. Bankrupt laws in other countries.

Similar laws were introduced in other continental countries in Europe. Chancellor Kent, writing in the first quarter of the present century, said:[3] "And it may be laid down as the law of Germany, France, Holland, Scotland, England, etc., that insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. In many parts of Germany, as we are informed by Huberus and Heineccius, a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future property. But in Germany the *cessio bonorum* has the severe operation of depriving the insolvent of his remedy for a personal trespass committed prior to the cession, so far as pecuniary compensation is in question." According to the Spanish law, property which the debtor acquired after his cession was not *all* liable for his debts, but only so much of it as exceeded the amount necessary for his support.[4]

[1] 2 Black. Com. 473.

[2] 1 Kent Com. 422–3. In Fitzgerald v. Phillips, 4 Martin (La.), O. S. 292, Judge Derbigny cites the *cessio bonorum* (l. 4, 5 and 6) of the Roman law to the effect that only so much of the property acquired after a cession as exceeded the amount necessary to the debtor's support was liable for his debts prior to the cession.

[3] 1 Kent Com. 423.

[4] But the early law of Louisiana, which was also founded on the civil law, contained no such exemption. Fitzgerald v. Phillips, 3 Martin, O. S. 588; s. c. 4 Martin, O. S. 292.

It is not within the scope of this sketch to consider the bankrupt laws of all countries. While the present act was pending, the judiciary committee of the House of Representatives took no little pains to ascertain from different sources what other countries had done in respect to bankruptcy legislation. This committee reported to congress December 16, 1897, that the following countries have bankruptcy laws: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Costa Rica, Denmark, England, France, Germany, Guatemala, Haiti, Honduras, Ireland, Italy, Liberia, Mexico, Netherlands, Norway, Paraguay, Portugal, Roumania, Russia, Scotland, Spain, Sweden, Turkey, Uruguay and Wales. The committee did not ascertain whether or not there was a bankruptcy law in Chile, Columbia, Dominican Republic, Hawaii, Japan, Korea, Peru, Syria, Switzerland or Venezuela. It will be observed that, aside from China and possibly Japan, there are no countries of any considerable importance but what have bankruptcy laws in the modern sense of the word.

"In China the various foreign nationalities, except the United States, have bankruptcy laws which are enforced against their nationals, those of Germany being very strict, and others perhaps less so. . . . There never was such a law in existence among the Chinese as a bankruptcy law. All delinquents in China pass into the dishonored class, and are soon put under process of coercive termination of a business career, and are subject to punishment by bamboo blows. The laws against bankrupts in China are, theoretically, very severe, a failure of $1,500 to $5,000 entailing banishment, and from $5,000 upward, summary decapitation. No distinction is made between fraudulent bankruptcy and unavoidable ones."

In Guadeloupe there is no relief whatever for a bankrupt.

In Siam "there are no bankruptcy laws, as we understand them. When a man's assets fall short of his liabilities he either compounds with his creditors or leaves the country hurriedly. If taken, his own person and those of his family may be held until the debt be paid."

§ 3. **English bankrupt laws.**

The bankrupt law was an innovation on the common law. The English system of bankruptcy was borrowed directly from continental jurisprudence.[1] "We have fetched," said Lord Coke, "as well the name as the wickedness of bankrupts from foreign nations."[2] The English word bankrupt is derived from the Italian, *banca rotta*, meaning a broken bank or bench.[3]

The English system of bankruptcy originated in 1542 with the statute of 34 and 35 Henry VIII., chap. 4. It has been frequently modified by subsequent legislation, but it has never been abolished during any period since that time. Originally a bankrupt was considered a criminal offender.[4]

The law of Henry VIII. was directed against debtors, whether traders or not, who sought fraudulently to evade the payment of their debts, or, as it was expressed in the act, "who, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown or keep their houses, not minding to pay, or return to pay, any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience." The next statute was that of 13 Elizabeth, chap. 7. By this statute the law of bankruptcy was restricted to traders, and certain acts were

[1] 2 Blackstone's Com. 472.

[2] 4 Inst. 277.

[3] See Skeat's Etym. Dic., subject, Bankrupt; Century Dic., subject, Bankrupt; 2 Blackstone's Com. 472.

"It is said to have been the custom in Italy to break the bench, or counter, of a money-changer upon his failure; but the allusion is probably figurative, like *break*, *crash*, *smash*, similarly used in English." — *Century Dic.*, BANKRUPT.

Mr. Justice Blackstone suggests another derivation, when he says:

"Some choose to adopt the word *route*, which in French signifies a trace, or track, and tells us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence (34 Hen. VII., c. 4), 'against such persons as do make bankrupt' is a literal translation of the French idiom, *qui font banque route*." — 2 Blackstone's Com. 472 N.

[4] 2 Blackstone's Com. 471.

prescribed, called acts of bankruptcy, upon the committing of which a trader became liable to be adjudged a bankrupt.

It was not until the statutes of 4 Anne, chap. 17, and 10 Anne, chap. 15, that the bankrupt law lost its criminal nature. The bankrupt law then became an equitable system. The bankrupt, upon surrendering his property and conforming to the requisitions of the bankrupt law, was entitled to a certificate of discharge. This was obtained only with the consent of a specified majority of his creditors. When it was issued it released him from liability for his prior debts.

In 1825, by the general bankrupt act of 6 George IV., chap. 16, the former statutes were consolidated and many important alterations introduced.

In the year 1831 an important change was made in the mode of administering the bankrupt law. Courts of bankruptcy were established by the statute of 1 and 2 William IV., chap. 56. Before this time the law had been administered by the lord chancellor or by commissioners appointed by the chancellor. This statute removed the jurisdiction of bankrupt cases in the first instance from the court of chancery to that of bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence. Other important alterations were introduced. Thus under this statute there was no deed of assignment of the bankrupt's property, but the property vested in the assignees by operation of law under their appointment.

This statute was followed by 5 and 6 William IV., chap. 29, and by 5 and 6 Victoria, chap. 122, which further modified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the bankrupt law consolidation act of 1849. This was amended in a few particulars by the act 15 and 16 Victoria, chap. 77, and by the bankruptcy act, 1854. A further amendment of the law of bankruptcy, known as the "Bankrupt Act, 1861," 24 and 25 Victoria, chap. 134, abolished the court for the relief of insolvent debtors and transferred its jurisdiction to the court of bankruptcy. By this act non-traders were made subject to the law of bankruptcy. By the "Bankruptcy Amendment Act, 1868," 31 and 32 Victoria, chap. 104, further changes were made.

After unsuccessful attempts in several successive sessions of parliament to reform the bankrupt laws, the general bankrupt act of 32 and 33 Victoria, chap. 71, was passed in 1869. This act in turn was followed by an act entitled "An act to amend and consolidate the laws of bankruptcy," 46 and 47 Victoria, chap. 52, passed in 1883, to take effect from the first of January, 1884. This act, with its amendments, comprises all the statute law relating to bankrupts, except the provisions for the punishment of fraudulent debtors, which are contained in the Debtors' Act of 1869, 32 and 33 Victoria, chap. 62, which were not repealed by the act of 1883.[1] This act of 1883 has been several times amended. The principal amendments are: the act of 50 and 51 Victoria, chaps. 57 and 66, passed September 16, 1887; the act of 51 and 52 Victoria, chap. 62, passed December 24, 1888; the act of 53 and 54 Victoria, chap. 71, passed August 18, 1890, and the act of 60 and 61 Victoria, chap. 19, passed July 15, 1897.

It is not, however, within the scope of this work to discuss the English acts at length, or to follow step by step the development of the present system of bankruptcy in England. For this purpose the reader is referred to modern works on English bankrupt laws.[2]

§ 4. Bankrupt laws of the United States.

Congress has established four systems of national bankruptcy in this country. The first system originated with the act of April 4, 1800,[3] which was repealed December 19, 1803.[4] There was no national bankruptcy act thereafter until the act of August 19, 1841.[5] This statute was repealed within two years after its passage,[6] and again the nation was without a uniform system of bankruptcy. The third general

[1] "By the Bankruptcy Act, 1883, the Bankruptcy Act, 1869, is repealed, subject to provisions for carrying out proceedings pending under it. But the Debtor's Act, 1869, remains in force, subject only to such alterations as were necessary for adapting it to the new Bankruptcy Act." (Robson. Bank., page 21.

[2] Robson's Law and Practice in Bankruptcy (1894); Williams' Bankruptcy Practice (1898).

[3] 2 Stat. at L. 19.

[4] 2 Stat. at L. 248.

[5] 5 Stat. at L. 440.

[6] Act of March 3, 1843, 5 Stat. at L. 614.

act was passed March 2, 1867,[1] by the 39th Congress. The system established by this statute existed eleven years, and was terminated September 1, 1878, by the act of June 7, 1878.[2] The present statute, establishing a uniform system of bankruptcy throughout the United States, was passed July 1, 1898,[3] and amended by the Act of Feb. 5, 1903.[3*]

It may be observed that each of these systems differed materially from all the others, although necessarily similar in many respects. It may be, therefore, of interest in considering the present statute to review briefly the principal provisions of the former legislation in the United States on the subject of bankruptcies.

§ 5. The Act of 1800.

The first national bankrupt act[4] was confined to "any merchant, or other person, residing in the United States, actually using the trade of merchandise, by buying and selling in gross or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer."[5] Under this act proceedings in bankruptcy could be instituted only by a creditor—involuntary bankruptcy—and not by the insolvent himself. There was no provision in this act for voluntary bankruptcy.

Under this statute bankruptcy proceedings could be commenced only after the person to be adjudged a bankrupt had committed an act of bankruptcy specified in the act.

The act provided that it should constitute an act of bankruptcy if a person liable to be adjudged a bankrupt, "with

[1] 14 Stat. at L. 517.

[2] 20 Stat. at L. 99, 1 Supp. 170.

[3] 30 Stat. at L. 544. This statute is printed in full at the end of this volume.

[3*] 32 Stat. at L. 797.

[4] Act of April 4, 1800. 2 Stat. at L. 19.

Cases arising under or construing this act are: Tucker v. Oxley, 5 Cranch, 34; Harrison v. Sterry, 5 Cranch, 289; Comegys v. Vasse, 1 Pet. 193; Richards v. Ins. Co., 8 Cranch, 84; Woods v. Owings, 1 Cranch, 239; Blight v. Ashley, No. 1541 Fed. Cas., s. c. Pet. C. C. 15; Barnes v. Billington, No. 1015 Fed. Cas., s. c 1 Wash. C. C. 29; Marks v. Barker, No. 9096 Fed. Cas., s. c. 1 Wash. C. C. 178; Humphreys v. Blight, No. 6870 Fed. Cas., s. c. 1 Wash. C. C. 44, 4 Dall. 370; Lucas v. Morris, No. 8587, Fed. Cas., s. c. 1 Paine, 396.

As to the powers of Congress, see also Sturges v. Crowninshield, 4 Wheat. 122; Sec. 9, *post*.

[5] Act of April 4, 1800, 2 Stat. at L. 19 Sec. 1.

intent unlawfully to delay or defraud his or her creditors, depart from the state in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she can not be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose land or effects being attached by process issuing out of or returnable to any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she may be arrested at or before the return day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt."[1]

Within six months after such act had been committed a petition for a commission of bankruptcy might be preferred by a creditor or partnership whose single debt amounted to one thousand dollars, or by two creditors whose debts amounted to fifteen hundred dollars, or by more than two creditors whose debts amounted to two thousand dollars.

Under the act of 1800, proceedings in bankruptcy were instituted by filing a petition for a commission of bankruptcy in the district court for the district in which the debtor

[1] 2 Stat. at L. 21, Sec. 1.

resided. The judge of the district court thereupon issued such commission, appointing commissioners of such bankrupt not exceeding three in number.[1] Immediately upon taking the oath prescribed by the act, they proceeded to execute the commission and to administer the estate of the bankrupt.

The administration of the estate in brief was as follows: Upon due examination and sufficient cause shown against the person charged, the commissioners declared him to be a bankrupt, and took into their possession all of his real and personal property, together with his deeds, books of account, papers, etc. They held the same until an assignee was chosen by the creditors at a meeting called for that purpose. It was the duty of the assignee to hold the title to the estate and to collect the assets of the bankrupt. Within one year after the commission issued the assignee was required to report the amount of moneys in his possession at a meeting of the commissioners and creditors duly called by notice. The commissioners in their judgment declared the first dividend at this meeting. This was paid to all creditors who had proved their claims before the commissioners. Provisions were made for similar dividends subsequently, until the whole estate of the bankrupt had been distributed *pro rata* among the creditors.

The commissioners reported to the court what had been done in making their return of the commission. The debtor was thereupon entitled to be discharged from all debts by him due and owing at the time he was declared a bankrupt. A certificate of discharge was issued by the court to such bankrupt, which might be pleaded in bar of any claims which had been or might have been proven before the commissioners.

The life of this act was limited to five years, but owing to the inconvenience of reaching federal courts this system became unpopular, and the act was repealed by the act of December 19, 1803.[2]

[1] By Sec. 14 of the Act of April 29, 1802, 2 Stat. at L. 164, provision was made for general commissioners of bankruptcy to be appointed by the President of the United States.

[2] 2 Stat. at L. 248.

§ 6. The Act of 1841.

The second act[1] provided for voluntary as well as involuntary bankruptcy.

Any person whatsoever residing in the United States owing debts which were not created in consequence of a defalcation as a public officer, or an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, was entitled under this act to be declared a bankrupt upon his own request and to have his estate administered accordingly.

Any person being a merchant, or using the trade of merchandise, or a retailer of merchandise, or any banker, factor, broker, underwriter or marine insurer owing debts to the amount of not less than two thousand dollars, was liable to be declared a bankrupt at the request of one or more of his creditors to whom he owed debts amounting in the whole to not less than five hundred dollars, provided he had committed an act of bankruptcy.

An act of bankruptcy was defined in these words, "whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter or marine insurer, shall depart from the state, district or territory of which he is an

[1] Act of August 19, 1841, 5 Stat. at L. 440.

The following are cases under the act: Nelson v. Carland, 1 How. 265; Chapman v. Forsyth, 2 How. 202; Lessee of Waller v. Best, 3 How. 111; *Ex parte* The City Bank of New Orleans, 3 How. 292; Nugent, Assignee, v. Boyd, 3 How. 426; Black v. Zacharie, 3 How. 483; Shawhan v. Wherrett, 7 How. 627; *In re* Shouse, Crabbe, 482, s. c. No. 12815, Fed. Cas.; Wakeman v. Hoyt, 5 Law Rep. 309, s. c. No. 17051, Fed. Cas.; Albany Exch. Bank v. Johnson, 5 Law Rep. 313, s. c. No. 131, Fed. Cas.; Atkinson v. Farmers' Bank, Crabbe, 529, s. c. No. 609, Fed. Cas.; *In re* Bonnet, 1 N. Y. Leg. Obs. 310, s. c. No. 1632, Fed. Cas.; Fisher, et al., v. Currier, 5 Law Rep. 217, No. 4818, Fed. Cas.; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, s. c. No. 7496, Fed. Cas.; Stewart v. Loomis, No. 13433, Fed. Cas.; Baldwin v. Rosseau, 1 N. Y. Leg. Obs. 391, s. c. No. 803, Fed. Cas.; *In re* House, 1 N. Y. Leg. Obs. 348, s. c. No. 6735, Fed. Cas.; *Ex parte* Potts, Crabbe, 469, s. c. No. 11344, Fed. Cas.; Barton v. Tower, 5 Law Rep. 214, s. c. No. 1085, Fed. Cas.; *Ex parte* Galbraith, 1 N. Y. Leg. Obs. (note) 5, s. c. No. 5187, Fed. Cas.; Gassett, et al., v. Morse, 3 N. Y. Leg. Obs. 350, s. c. No. 5264, Fed. Cas.; Hutchins v. Taylor, 5 Law Rep. 289, s. c. No. 6953, Fed. Cas.

inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, or evidence of debt."[1]

Proceedings under this act were instituted by a petition filed by the bankrupt, setting forth a list of his creditors, with the amounts due each, together with an inventory of his property and assets of every description; or by a petition filed by a creditor, stating the nature of the act of bankruptcy, the amount of his debts, and alleging the total indebtedness of the bankrupt to be more than two thousand dollars.

This petition was filed and all proceedings in the case were had in the district court for the district in which the person supposed to be a bankrupt resided or had his place of business. The court appointed an assignee, in whom the title to all the bankrupt's property, real, personal and mixed, vested by operation of law. The assignee proceeded to collect the assets of the bankrupt, prosecute and defend suits, and had general authority to sell, manage and dispose of the estate. Proof of debts and claims were made before the court, either by oral testimony or depositions. In order to secure a speedy settlement and close the proceedings, it was made the duty of the court to order and direct a collection of the assets and a reduction of the same into money and a distribution thereof at as early a period as practicable, consistently with a due regard to the interests of the creditors.

A bankrupt who made a *bona fide* surrender of his property and complied with the orders and directions of the court was entitled to a certificate of discharge from all his debts. This was to be decreed and allowed by the court which had declared him a bankrupt. There were several exceptions to this rule, but they are not important in this connection.

[1] 5 Stat. at L. 442.

The same objection was raised to this act that had been made to the act of 1800, for the nation was still in its infancy, and the means of transportation were exceedingly limited. But in addition to this, the following is found in the report of the judiciary committee in the 52d Congress, first session, in its discussion of the act of 1841: "That law became the subject of political contention, and was repealed, to take effect March 3, 1843."[1]

§ 7. Law of 1867.

The act of 1867,[2] with its subsequent amendments,[3] established a system of national bankruptcy, which was in full operation for eleven years. Although the act of 1867 differs in many respects from that of 1898, there are many points of similarity between the two statutes. The courts were frequently called upon to construe the provisions of the act of 1867 and its amendments. Many questions, which will arise under the present act, may be considered settled by these decisions. Although many decisions under the former act are not controlling with reference to very many provisions of the present act, yet very many of them are important in throwing light upon the meaning of terms and provisions employed. It is obvious that certain provisions were introduced in the present act for the purpose of settling disputed questions and to avoid judicial construction of provisions of the prior act. The cases decided under the act of 1867 therefore become

[1] Act of March 3, 1843, 5 Stat. at L. 614.

See Report of the House Committee on Judiciary, 55th Congress, 2d session, discussing the Act of 1898.

[2] Act of March 2, 1867, 14 Stat. at L. 517.

[3] The principal amendment to this act was passed June 22, 1874, 18 Stat. at L. 178, and at the same time a complete substitute for the act was enacted in title sixty-one of the Revised Statutes. The provisions of the amendment of 1874 are incorporated in the Revised Statutes, edition of 1878. The Act of 1867 was also amended by the Act of July 27, 1868, 15 Stat. at L. 227; by the Act of June 30, 1870, 16 Stat. at L. 173; by the Act of July 14, 1870, 16 Stat. at L. 276; by the Act of June 8, 1872, 17 Stat. at L. 334; by the Act of Feb. 13, 1873, 17 Stat. at L. 436; by the Act of March 3, 1873, 17 Stat. at L. 577; by the Act of Feb. 18, 1875, 18 Stat. at L. 320; by the Act of July 26, 1876, 19 Stat. at L. 102, and by the Act of Feb. 27, 1877, 19 Stat. at L. 252.

important in construing the present statute. To intelligently use the earlier decisions in construing and applying the present act, it will be necessary to constantly consult the text of the act itself, and to compare it with similar provisions of the act of 1898. For this purpose the act of 1867, as revised and amended, is printed in full in another place.[1] It is therefore unnecessary to state the general scheme of this system here. The reader is referred to the act itself for such information.

The principal objection to the act of 1867 was the great expense of administering it, and in some parts of the country the inefficiency of the officers appointed to assist the courts in executing the law. It was repealed, to take effect September 1, 1878.[2]

The next national system of bankruptcy in this country was established by the act of July 1, 1898.[3]

§ 8. **A brief comparison of the Acts of 1867 and 1898.**

SIMILARITY OF THE ACTS.—The general scope and objects sought to be accomplished by these two statutes are substantially the same. In both instances congress evidently intended to legislate fully on "the subject of bankruptcies." Each statute provides that proceedings may be instituted by the insolvent or by his creditors. In other words, each statute establishes voluntary as well as involuntary bankruptcy.

The principal ends of each statute are to provide a system of bankruptcy, the object of which is, *first*, to ascertain whether the person whose affairs are drawn in question has become a bankrupt; *second*, if so, to take into legal custody all his property and assets of every description for the purpose of making a fair and just distribution among his creditors; *third*, to protect the creditors from frauds and unjust preferences; *fourth*, to ascertain the amount due to the several creditors and their priority; *fifth*, to relieve the bankrupt from his load of debts and to discharge him free to acquire property, which shall not be liable to the payment of ante-bankrupt debts. In short, the acts seek to enable every honest debtor, irrespective of whether he becomes bankrupt

[1] See page 865, *post*.

[2] Act of June 7, 1878, 20 Stat. at L. 99, 1 Supp. 170.

[3] 30 Stat. at L. 544. This act, as amended Feb. 5, 1903, 32 Stat. at L. 397, is also printed in full at page —, *post*.

upon his own or the petition of his creditors, to have fair treatment and a speedy consideration of his rights; and that the creditors shall have their claims considered, allowed, and the assets of the debtor ratably divided.

The administration of each law is confided to particular United States courts, designated as courts of bankruptcy. These courts act to a large extent through special officers, subject to have their action reviewed by the judge. In 1867 these officers were called registers and assignees; in 1898 they are called referees and trustees. The action of the courts of bankruptcy under each act is subject within limits to review by the appellate courts of the United States.

POINTS OF DIFFERENCE BETWEEN THE ACTS.—The act of 1898 differs in many respects from the act of 1867. The chief points of difference between the acts may be briefly stated as follows:

First, Under the act of 1867 a person could take advantage of voluntary bankruptcy only when his debts exceeded the amount of three hundred dollars. Under the present act all limitation is removed as to the amount of indebtedness. He may even proceed without expense upon filing an affidavit of his poverty.

Second, Under the act of 1867 corporations could take the benfit of their voluntary provisions. A corporation can not institute proceedings to declare itself a bankrupt under the present act.

Third, Under the act of 1867, as amended, any person owing debts provable in bankruptcy exceeding the amount of three hundred dollars could be proceeded against by one of his creditors, but under the act of 1898 a person must be indebted to the amount of one thousand dollars or more in order to be adjudged a bankrupt.

Fourth, Under the act of 1867 a person might become a bankrupt although solvent,[1] but solvency may be pleaded

[1]By reference to Section 5021 of the Revised Statutes it will be seen that the act of 1867, as amended, provides that any banker, broker, merchant, trader, manufacturer, or miner, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days shall be deemed to have committed an act of bankruptcy, and to have become liable to be

in bar of any proceeding in bankruptcy under the act of 1898.[1]

Fifth, Another important difference between the two acts is in the time when the property passes out of the bankrupt. Under the act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of law under the act of 1898 as of the date of the adjudication in bankruptcy.

Sixth, Another difference in the manner of administering the bankrupt's estate is the more convenient number of officers. Under the act of 1867 one or more registers were appointed for the district, but the act of 1898 provides for at least one referee in each county in the state.

Seventh, The act of 1867 provided no means of arbitration in addition to the regular course in bankruptcy.[2] Under the present act the majority of all creditors, whose claims have been allowed, may secure the possession of the property, and obtain for the debtor a dismissal of the case. In addition to this, provision is also made for the arbitration and for the compromise of controversies.

Eighth, Under the act of 1867 the "operative, clerk and house servant" were allowed priority over other claims to an amount not exceeding fifty dollars for labor performed. Under the present act the amount is fixed at three hundred dollars to each claimant.

Ninth, Under the act of 1867, as amended, no discharge was granted to a debtor whose assets did not equal fifty per-centum of the claims proved against his estate, for which he was held liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors was filed in the case at or before the time of the hearing of the

adjudged a bankrupt. He may be worth a million dollars over and above his liabilities, and yet such a failure for fourteen days would make him liable to the involuntary provisions of the act; or if he fraudulently stopped payment of his commercial paper, that constituted an act of bankruptcy at once.

[1] B. A. 1898, Sec. 3*c*.

[2] It, however, was introduced by the amendment of June 22, 1874, 18 Stat. at L. 178, Sec. 17. R. S., Sec. 5103.

application for a discharge. Under the act of 1898 no assent is required from the creditors. If the debtor has acted dishonestly by committing certain acts forbidden in the act he will not be discharged; if he has acted honestly he will be. The granting or withholding of it is dependent upon the honesty of the man, not upon the value of his estate.

Tenth, Another point of difference between the two acts will be noticed in a comparison between the fees allowed. The expense of the proceedings is very much reduced in the act of 1898.

There are other differences which will be referred to hereafter as the various questions arising under the present statute are discussed.

CHAPTER II.

THE POWER OF CONGRESS AND THE STATES TO ENACT BANKRUPT LAWS.

§ 9. **The power of Congress to enact bankrupt laws.**

The power of congress to establish a system of bankruptcy depends, like the other powers of congress, solely upon the constitution of the United States. The only provision in the constitution relating to such legislation is that "congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[1]

This has been construed by the courts to be a grant of plenary power.[2] Under the authority of this provision congress has full power to legislate on "the subject of bankruptcies," with the one qualification that its laws thereon shall be uniform throughout the United States.

It is therefore necessary to consider what is meant by "the subject of bankruptcies." It was contended at one time that the framers of the constitution intended to restrict the laws of congress with such scope only as the English bankrupt laws had when the constitution was adopted. But the courts ruled that the subject was not so limited.[3]

[1] U. S. Const. Art. 1, Sec. 8, clause 4. See Story on the Constitution, Secs. 1105–1115.

[2] *In re* Klein, 1 How. 277, note; Silverman's case, No. 12855, Fed. Cas., s. c. 1 Saw. 410; *In re* California Pac. R. Co., No. 2315, Fed. Cas., s. c. 3 Saw. 240; *In re* Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180; *In re* Irwine, 1 Penn. L. J. 291; Kunzler v. Kohaus, 5 Hill, 317; *In re* Reiman No. 11673, Fed. Cas., s. c. 7 Ben. 455.

In Parmenter Mfg. Co. v. Hamilton, 51 N. E. 529, the Supreme Court of Massachusetts, construing the present act, and speaking of the power of congress to pass a bankrupt law superseding state insolvent laws, said: "Of the power of congress to pass an act having this effect there can be no doubt." See also, *In re* Bruss Ritter Co., 90 Fed. Rep. 651.

[3] *In re* Reiman, No. 11673, Fed. Cas., s. c. 7 Ben. 455; *In re* Klein, 1 How. 277, note; *In re* Silverman, No. 12855, Fed. Cas., s. c. 1 Saw. 410.

Again, it was contended that it was restricted to bankrupt laws as distinguished from insolvent laws. But it may be regarded as settled that the subject of bankruptcies, as used in the constitution, includes both bankrupt and insolvent laws.[1] Speaking of this distinction, Mr. Justice Marshall observed:[2] "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." And Judge Cowen, after reviewing the definition of bankruptcy, said:[3] "Looking thus at the uniform popular acceptation of the word from earliest times, and in all English countries, and supposing that to be the true one, I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States.'"

It has also been held that the power of the national legislature is not limited to bankrupt laws relating to any particular class of persons, as traders, merchants, etc., but that congress may pass laws applying to all or any persons within the United States.[4]

Congress has power also to modify the obligation of contracts in the legitimate exercise of the power to establish bankrupt laws.[5] This is incidental to the power directly

[1] *In re* Klein, 1 How. 277, note; Thompson v. Alger, 53 Mass. 442; Kunzler v. Kohaus, 5 Hill, 317; Keene v. Mould, 16 Ohio 12; McCormick v. Pickering, 4 N. Y. 276; Rowan v. Holcomb, 16 Ohio, 463; Loud v. Pierce, 25 Me. 233; Lalor v. Wattles, 8 Ill. 225; State Bank v. Wilborn, 6 Ark. 35; Reed v. Vaughn, 15 Mo. 137; Cutter v. Folsom, 17 N. H. 139; *In re* Irwine, 1 Penn. L. J. 291; Morse v. Hovey, 1 Sandf. Ch. 187.

[2] In Sturgis v. Crowninshield, 4 Wheat. 195.

[3] In Kunzler v. Kohaus, 5 Hill, 321.

[4] Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, s. c. 37 C. C. A. 210; Hanover Nat. Bank v. Moyses, 186 U. S. 181; *In re* Klein, 1 How. 277, note; *In re* California Pac. R. Co., No. 2315, Fed. Cas., s. c. 3 Saw. 240; Sweatt v. Boston, etc., R. Co., No. 13684, s. c. 3 Cliff. 339; Winter v. Iowa, etc., R. Co., No. 17890, Fed. Cas., s. c. 2 Dill, 487; Kunzler v. Kohaus, 5 Hill 317.

[5] *In re* Klein, 1 How. 277, note; Kunzler v. Kohaus, 5 Hill 317; Sackett v. Andrews, 5 Hill 327; Keene v. Mould, 16 Ohio 12; McCormick v. Pickering, 4 N. Y. 276; Loud v. Pierce, 25 Me. 233; *In re* Reiman, No. 11675, Fed. Cas., s. c. 12 Blatch. 562.

given by the constitution. Hence congress may provide for the discharge of a debtor, releasing him from contracts existing at the time the law is passed. An act of congress may be constitutional, when, if the same act was passed by a state legislature, it would be unconstitutional.[1]

Another incident growing out of this delegated power is the authority to commit the execution of the system to the courts of the United States, and to prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation.[2]

It may be observed that the extent to which this power shall be exercised rests in the discretion of congress, subject only to the qualification that such laws shall be uniform through the United States. The uniformity required relates to national legislation only, and therefore the laws of the several states, as those regulating exemptions, may be left in force so long and to such extent as congress may see fit.[3]

The power of congress to establish laws on the subject of bankruptcies is exclusive, while exercised, but when or so far as it is not exercised its existence does not defeat state legislation.[4] The effect of a national bankrupt law is to suspend

[1] The Constitution expressly prohibits states from passing laws "impairing the obligation of a contract." Const., Art. 1, Sec. 10.

In re Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180. Judge Dick, speaking of the Bankruptcy Act of 1867, said: "If this state had adopted the present bankrupt law it would have been unconstitutional, as it impairs the obligation of contracts and affects the rights of citizens of other states. Congress, however, could adopt the very language and principles of such state law and enact it as a national law, and such action would be constitutional; as it would constitute a system of bankruptcy uniform among the states."

[2] Mitchell v. Mf. Co., No. 9662, Fed. Cas., s. c. 2 Story, 648; Goodall v. Tuttle, No. 5533, Fed. Cas., s. c. 3 Biss. 219; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552.

[3] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209, Fed. Cas., s. c. 1 Dill, 45; *In re* Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180; *In re* Jordan, No. 7515, Fed. Cas., s. c. 10 N. B. R. 427; *In re* Kean, No. 7630, Fed. Cas., s. c. 2 Hughes, 322; *In re* Rouse, Hazard & Co., 41 Law Bul. (Cinti.) 34, s. c. 1 Nat. Bank News, 75.

[4] Sturges v. Crowninshield, 4 Wheat. 122; Baldwin v. Hale, 1 Wall, 228; Cook v. Moffat, 5 How. 295. See also Power of States, Sec. 10, *post*.

only, not to extinguish state laws.[1] The disability is removed when the act of congress is repealed, and the state laws become immediately operative without reenactment.[2]

The Bankruptcy Act of 1898 is constitutional and valid legislation.[2*]

§ 10. **Power of the states to enact bankrupt and insolvent laws.** Prior to the adoption of the constitution of the United States the several "states could exercise almost every legislative power, and among others, that of passing bankrupt laws."[3] They retained all such powers after its adoption, except those expressly granted to the national government. A part of the powers so granted are to be exercised exclusively by congress, and the subject is completely taken away from the state legislatures. Other powers were yielded by the states to be exclusively exercised by congress, provided that body saw fit to legislate upon the subject. But until the national legislature exercised this power, the state legislatures retained the power to enact laws on the same subject. The power to pass laws on "the subject of bankruptcies" is of the latter class of grants.[4]

It is well settled that the several states may pass bankrupt and insolvent laws, subject to two restrictions only:[5]

First, A state has no power to enact a bankrupt law im-

[1] *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Hieskill, No. 13594, s. c. Crabbe, 525; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Pr., N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass. 1.

[2] Baldwin v. Hale, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; Tua v. Carriere, 117 U. S. 209.

[2*] Hanover Nat. Bank v. Moyses, 186 U. S. 181; Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, 37 C. C. A. 210.

[3] Chief Justice Marshall, in Sturges v. Crowninshield, 4 Wheat. 122. See also Blanchard v. Russell, 13 Mass. 1.

[4] This rule is now well settled by judicial decisions. Sturges v. Crowninshield, 4 Wheat. 122; Tua v. Carriere, 117 U. S. 201; Ogden v. Saunders, 12 Wheat. 273, 275, 280, 306, 310, 314, 335, 369; see Hale v. Baldwin, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; and the many cases recognizing the right of the states to pass bankrupt and insolvency laws, when there is no bankrupt law in existence.

An opposite opinion has been entertained by jurists, see Ogden v. Saunders, 12 Wheat. 267 to 270; Golden v. Prince, No. 5509, Fed. Cas., s. c. 3 Wash. C. C. 313.

[5] Sturges v. Crowninshield, 4 Wheat. 120; Farmers and Mechanics Bank v. Smith, 6 Wheat. 130; Ogden v. Saunders, 12 Wheat. 213; Baldwin v. Hale, 1 Wall. 223; Tua v. Carriere, 117 U. S. 201; Woodhull v. Wagner, No. 17975, Fed. Cas., s. c. Bald. 296.

pairing the obligation of contracts, whether there is a national bankrupt act or not.

Second, The other restriction depends solely upon the action of congress. The moment it establishes a system of national bankruptcy, the state law, in so far as it is in conflict with the act of congress, is superseded and limited by the national act, so long as it is in force.

§ 11. State bankrupt laws with reference to impairing the obligation of a contract.

The constitution expressly forbids a state passing any law impairing the obligation of a contract.[1] This prohibition applies to bankrupt laws and acts as a general limitation upon the power of the state legislature, whether there is a national bankrupt law in force or not. Yet each state, so long as it does not impair the obligation of any contract, has the power by its laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.[2]

A state has no power to enact a bankrupt law which operates to discharge a debtor from a contract entered into previous to its passage.[3] This is true, whether the parties to the contract are citizens of the same or different states.[4] The reason for this rule is that the effect of such a law is to terminate the obligation under a contract, which was not and could not have been made in view of the statute, because it was not in existence at the time the contract was made.

Whether a state may pass a bankrupt law which shall discharge a debtor from contracts entered into *after* the passage of the act has been the subject of much discussion. From the decisions it may be stated that a fair and ordinary exercise of the power to pass bankrupt laws by the state does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. Whether such a state

[1] U. S. Const., Art. 1, Sec. 10.

[2] Smith v. Union Bank, 5 Pet. 518, 526; Crapo v. Kelly, 16 Wall. 610, 630; Denny v. Bennett, 128 U. S. 489, 498; Walworth v. Harris, 129 U. S. 355; Geilinger v. Philippi, 133 U. S. 246, 257; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 22.

[3] Sturges v. Crowninshield, 4 Wheat. 122; Farmers and Mechanics Bank v. Smith, 6 Wheat. 130.

[4] Farmers and Mechanics Bank v. Smith, 6 Wheat. 130.

statute is repugnant to the constitution or not depends upon the citizenship of the parties to the contract. It was held by a divided court in the case of *Ogden* v. *Saunders*[1] that a state bankrupt law discharging the person and property of the debtor does not violate the obligation of a contract entered into subsequent to its passage by citizens of that state. The reason is, that the citizens of a state are subject to its laws, and contracts made by them within its territory are made with reference to such laws. The principle established by this case has never been overruled nor extended in subsequent cases. It has been uniformly held that a state bankrupt or insolvent law could have no effect upon a contract made, either within or without such state, between citizens of different states.[2] The reason for this is, that the state has no jurisdiction beyond its own territory, and can not affect a contract entered into by a person of another state who can not be presumed to act with reference to the laws of a state of which he is not a citizen. Such state laws are held not to apply to contracts by citizens of the same state unless made within such state.[3] It makes no difference that the contract entered

[1] 12 Wheat. 213. In this case, Saunders, a citizen of New York, drew bills on Ogden in New York, which were accepted and protested there. Ogden was afterwards discharged under the insolvent laws of New York, passed previous to the contract of acceptance. He pleaded this discharge to an action brought against him in the district court of Louisiana. A majority of the court decided that the bankrupt or insolvent law was not a law impairing the obligation of that contract, but overruled his plea of discharge under that act.

See also Springer v. Foster, No. 13266, Fed. Cas., s. c. 2 Story, 383, in which Judge Story stated the settled doctrine of the supreme court to be that no state insolvent law can discharge the obligation of any contract made in the state, except such contracts as are made between citizens of that state. He refers to the case of Ogden v. Saunders, *supra*, to support this proposition.

[2] Boyle v. Zacharie, 6 Pet. 348; Suydam v. Broadnax, 14 Pet. 67; Cook v. Moffatt, 5 How. 295; Baldwin v. Hale, 1 Wall. 223; Springer v. Foster, No. 13266, Fed. Cas., s. c. 2 Story, 383; Woodhill v. Wagner, No. 17975, Fed. Cas., s. c. Baldwin, 296.

[3] McMillan v. McNeill, 4 Wheat. 209. But see Marsh v. Putnam, 3 Gray, 551, where the contracting parties were citizens of the state passing the insolvent law; also Blanchard v. Russell, 13 Mass. 1.

into between a citizen of one state and a citizen of another is made payable where the insolvent law exists.[1]

If, however, the creditor makes himself a party to proceedings under the insolvent law he will be bound by them, like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was excluded by the constitution from being affected by the law.[2]

§ 12. The effect of a national bankrupt law upon state insolvent laws.

Another restriction upon the operation of state insolvent laws arises when congress establishes a system of bankruptcy. As soon as a national bankrupt act goes into effect the state law must yield so far as it conflicts with the act of congress.

It is well settled by the decisions, both federal and state, that the effect of a national bankrupt law is to suspend the operation of any state bankrupt or insolvent law regulating the assignment and distribution of the property of insolvents, and affecting the same persons, property and rights that would be affected by proceedings under the bankrupt act.[3] But the act of congress does not repeal such state laws. They immediately become operative, without reenactment, upon the repeal of the act of congress.[4]

The first inquiry naturally is, when did the bankrupt act of 1898 take effect to suspend the insolvent and bankrupt laws of the several states? Of this there can be little doubt. The act expressly provides that it "shall go into full force and effect upon its passage," which was July 1, 1898. But "no

[1] Baldwin v. Hale, 1 Wall. 223; Baldwin v. Bank of Newberry, 1 Wall. 234; Gillman v. Lockwood, 4 Wall. 409.

[2] Clay v. Smith, 3 Pet. 411; Gilman v. Lockwood, 4 Wall. 409; Baldwin v. Hale, 1 Wall. 223; Perley v. Mason, 64 N. H. 6.

[3] *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Heiskill, No. 13594, s. c. Crabbe, 525; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Pr., N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass. 1; Parmenter Mf. Co. v. Carpenter, 51 N. E. 529; Bruss-Ritter Co., 90 Fed. Rep. 651; *In re* Gutwillig, 90 Fed. Rep. 475.

[4] Baldwin v. Hale, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; Tua v. Carriere, 117 U. S. 209.

petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof."[1] In this respect the present act differs from that of 1867, which fixed the date at which the act took effect for some purposes as June 1, 1867.[2] It also differs in like respect from the act of August 19, 1841, which provided that the act should take effect from and after the first day of February, 1842.[3] It is expressly provided by the act, however,

[1] Last clause of the Act of July 1, 1898. *In re* Bruss-Ritter Co., 90 Fed. Rep. 651; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. Rep. 691; *In re* Rouse. Hazard & Co., 91 Fed. Rep. 96; *In re* Curtis, 91 Fed. Rep. 737; Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, s. c. 37 C. C. A. 210.

In Parmenter Mf. Co. v. Hamilton, 51 N. E. Rep. 529, the Supreme Judicial Court of Massachusetts, construing the present statute, said:

"The language is materially different from that of the bankruptcy act of 1867 and from that of the earlier bankruptcy law of 1841. The argument that the change in question was intentional is almost irresistible. The act is 'to go into full force and effect upon its passage'; that is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (Sec. 3), to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (Sec. 4), and to have preferences and liens governed by the provisions of it (Secs. 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions, and four months in the case of involuntary petitions. Whenever the proceedings are commenced the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act."

[2] Act of March 2, 1867, 14 Stat. at L. 541, Sec. 50; Traders Bank v. Campbell, 14 Wall. 94; Martin v. Berry, 37 Cal. 208; Day v. Bardell, 97 Mass. 246; Chamberlain v. Perkins, 51 N. H. 340.

[3] Act of August 19, 1841, 5 Stat. at L. 449, Sec. 17; Griswold v. Pratt, 9 Met. 16.

that proceedings commenced under the state insolvency laws before July 1, 1898, shall not be affected by the national act.[1]

The reason that state bankruptcy and insolvency laws are inoperative is not because the proceedings under them are less plenary, but for the sole reason that a different tribunal is selected than that provided by congress.[2] General jurisdiction of bankruptcy proceedings is conferred upon courts specified as courts of bankruptcy.[3] This jurisdiction must necessarily be exclusive of the state courts.[4]

It may be contended that the bankrupt law does not suspend proceedings under the state law until proceedings are instituted in a court of bankruptcy.[5] But if this were so "the law would be imperfect, and all the evils would be experienced of two different systems of distributing the assets of insolvent debtors, with the strongly objectionable feature that one of those systems, the state insolvent law, was of such a character as to be liable to have the proceedings under it superseded by proceedings being instituted under the other at the election of the insolvent or of his creditors, if a case existed for compulsory bankruptcy."[6] Another objection to such a construction is, that it would defeat the very object of the national bankrupt system, namely, uniformity through-

[1] Last clause of the Act of July 1, 1898.

[2] Globe Ins. Co. v. Cleveland Ins. Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, where Judge Emmons used substantially the language of the text.

In Platt v. Preston, No. 11219, s. c. 19 N. B. R. 241, Judge Choate said:

"As to the general assignment, it is insisted that it is not *per se* a fraud upon the bankrupt law, but void if actual intent to defraud or to defeat the law shall be shown. This may still be regarded as being an open question in the supreme court of the United States. Mayer v. Hellman, 91 U. S. 496. But the great weight of authority at present is, that a general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law, defeating the operation of the law, because it provides for the administration of the estate in a different way from that provided by the bankrupt law, and by an assignee selected by the bankrupt himself."

[3] B. A. 1898, Sec. 2. See also Jurisdiction of Courts of Bankruptcy, Sec. 16, *et seq.*, *post.*

[4] R. S. Sec. 711, clause 6.

[5] Bostwick v. Burnett, 74 N. Y. 317; Sadler v. Immel, 15 Nev. 265; Ostrander v. Meunch, 12 Fed. Rep. 562; Reed Brothers & Co. v. Taylor, 32 Iowa, 209.

[6] Judge Dewey, in Griswold v. Pratt, 9 Met. 16; see also cases cited in note next below.

out the United States; some cases would be instituted under the national bankrupt act and others proceed under the laws of the various states, provided no objection was raised to such proceedings in the state court. Clearly it was not the intention of the framers of the constitution or of congress when it enacted this act to have in existence two distinct and diverse systems affecting the same property and rights, leaving it to the option of the debtor to look to one or the other at his pleasure.[1]

Under the act of 1841, as well as under the act of 1867, this question does not appear to have been directly decided by the supreme court of the United States,[2] for the reason

[1] Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; *In re* Klein, 1 How. 277, note; *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Globe Ins. Co. v. Cleveland Ins. Co., 5486, Fed. Cas., s. c. 14 N. B. R. 311; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Hieskill, No. 13594, s. c. Crabbe, 525; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Prac. N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass. 1; Parmenter Mf. Co. v. Hamilton (Mass.), 51 N. E. Rep. 529; Bruss-Ritter Co., 90 Fed. Rep. 651.

See also discussion with reference to general assignment laws next section below.

[2] In Mayer v. Hellman, 91 U. S. 502, the question is referred to, but the court expressly declined to express an opinion.

In Reed v. McIntyre, 98 U. S. 507, the court held that property in the hands of an assignee was not liable to an attachment sued out and levied after the assignment and prior to bankruptcy proceedings.

In Boese v. King, 108 U. S. 379, the court held that creditors, who permitted a debtor to surrender his property for distribution and to proceed under a state insolvent act until they acquired preferences over the other creditors under the bankrupt act, were estopped, in a proceeding by the receiver of such creditors to set aside such distribution to question the legality of the proceeding. But Mr. Justice Matthews, with whom concurred Justices Miller, Gray and Blatchford, dissented upon the ground that the state law being inoperative no title under it could pass, and that the judgment creditors who had acquired a lien upon the fund in the hands of the assignee were entitled to appropriate it as the property of their debtor to the payment of their claims. These decisions, together with decisions of the justices holding the circuit courts, indicate that the supreme court was divided at that time upon the question whether the bankrupt law *ipso facto* made proceedings under the state law invalid.

probably that the supreme court had no appellate jurisdiction in bankruptcy.[1] The weight of authority in the circuit courts (having final jurisdiction of bankruptcy cases) as well as in the state courts, is to the effect that the national bankrupt law of 1867 *ipso facto* suspended all state legislation upon the subject of bankruptcies.[2] The same rule has been applied under the present act.[3]

[1] Cleveland Insurance Co. v. Globe Ins. Co., 98 U. S. 366; N. O., etc., R. Co. v. Delamore, 114 U. S. 506.

[2] Judge Emmons, in the well-considered case of the Globe Insurance Co. v. Cleveland Insurance Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, lays down the rule that "if the state statute authorizes a transfer of all a debtor's property for equal distribution among his creditors, in the language of many of the cases 'acting upon the same persons and property,' a transfer under it is void; not because the proceedings are less plenary, but for the sole reason that a different tribunal is selected than that provided by congress."

See also *In re* Beisenthal, No. 1236, Fed. Cas., s. c. 14 Blatch. 146; *In re* Independent Insurance Co., No. 7017, Fed. Cas., s. c. Holmes, 103; Macdonald v. Moore, No. 8763, Fed. Cas., s. c. 8 Ben. 579; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; *In re* Stubbs, No. 13557, Fed. Cas., s. c. 4 N. B. R. 376; Platt v. Preston, No. 11219, s. c. 19 N. B. R. 241; Van Nostrand v. Carr, 30 Md. 128; Rowe v. Page, 54 N. H. 194; Chamberlain v. Perkins, 51 N. H. 340; Martin v. Berry, 37 Cal. 208; Shears v. Solhinger, 10 Abb. Prac., N. S. 287.

But see *contra* Reed Bros. & Co. v. Taylor, 32 Iowa, 209; Cook v. Rogers, 31 Mich. 391; Langley v. Perry, No. 8067, s. c. 2 N. B. R. 596; Sedgwick v. Place, No. 12622, Fed. Cas., 1 N. B. R. 673; Bostwick v. Burnett, 74 N. Y. 317; Sadler v. Immel, 15 Nev. 265.

[3] The Parmenter Manufacturing Co. v. Hamilton, 51 N. E. Rep. 529; *In re* Bruss-Ritter Co., 90 Fed. Rep. 651; *In re* Smith, 92 Fed. Rep. 135; *In re* Curtis, 91 Fed. Rep. 737; Ketcham v. McNamara, 72 Conn. 709; 6 Am. B. R. 160; *In re* Macon Sash Door & Lumber Co., 7 Am. B. R. 66.

In Parmenter Manufacturing Co. v. Hamilton, *supra*, the Supreme Judicial Court of Massachusetts used this language:

"The question in this case is, whether this act so far superseded the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. . . . . .

The plain implication is, that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute."

It is clear that any person or corporation not subject to the act of 1898 may take the benefit of an insolvent state law.[1] Any person who owes debts, except a corporation, may become a voluntary bankrupt.[2] This provision of the act limits the jurisdiction of the state courts to corporations which are not liable to be adjudged bankrupts upon the petition of creditors. Such are, *first*, corporations *not* "engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of $1,000 or over." In this class may be included corporations not for profit, such as religious and benevolent societies, social clubs and municipal corporations; *second*, banks incorporated under state or territorial laws. National banks are also excluded from the operation of the bankrupt act, but congress has provided another method of winding up the affairs of an insolvent national bank.[3]

If proceedings in insolvency are instituted in a state court after the law of 1898 went into effect, by what steps is it possible to transfer the property and proceedings to a court of bankruptcy? Two plain remedies exist. *First*, If it be a case in which the debtor may be adjudged a bankrupt on petition of a creditor—involuntary bankruptcy—proceedings may at once be instituted in a court of bankruptcy by the creditors. Such proceedings supersede the proceedings in the state court.[3*] If the state court refuses to yield, the question of how far a court of bankruptcy may interfere with a state court arises. This is discussed in another place.[4] *Second*, If the case in the state court is not properly within involuntary bankruptcy, under the act of 1898, but is a case within the voluntary provisions of that act, the procedure is different. Clearly a person can not be directly compelled to voluntarily go into a court of bankruptcy. If the state court holds jurisdiction after a proper objection has been made by any of the creditors, the case may be taken to the highest court of the state in which it is reviewable. If such court decides

[1] As to who may be adjudged bankrupts under the Act of 1898, see Secs. 42, *et seq.*, *post*.

[2] B. A. 1898, Secs. 4*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[3] R. S. Secs. 5220 to 5243.

[3*] *In re* Macon Sash, Door & Lumber Co., 7 Am. B. R. 66; Ketcham v. McNamara, 6 Am. B. R. 160, 72 Conn. 709.

[4] How far a court of bankruptcy may interfere with a state court, Secs. 22 and 23, *post*.

in favor of the jurisdiction of the state court, this decision may be reviewed by the supreme court of the United States.[1]

§ 13. The effect of a national bankrupt law upon general assignment laws of the states.

Under the act of 1841 is was generally conceded that a general assignment for the benefit of creditors was unlawful from and after the date that the act went into effect.[2] Under the act of 1867 a difference of opinion existed with reference to the effect of the act upon state laws regulating assignments for the benefit of creditors.[3]

It will be observed that it is insolvent and bankrupt laws only which are suspended by the act of 1898. A state statute which is merely declarative of principles of enforcing a trust substantially such as a court of chancery would apply in the absence of any statutory provision is not such a law.[4]

There is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the courts, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy,

[1] R. S. Sec. 709.

[2] See McLean v. Johnson, No. 8883, Fed. Cas., s. c. 3 McLean, 202; McLean v. Meline, No. 8890. Fed. Cas., s. c. 3 McLean, 199; *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Griswold v. Pratt, 9 Met. 16; *In re* Breneman, No. 1830. Fed. Cas., s. c. Crabbe, 456.

Speaking of this act, Judge Emmons, in Globe Insurance Co. v. Cleveland Insurance Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, observes:

"Under the law of 1841 several decisions of this precise question were made. During the administration of that law, when at the bar, we had occasion to examine it. Few doctrines were more generally acquiesced in at that time than that general assignments for the benefit of creditors had become unlawful. Every lawyer of large practice will be enabled to say that the practice was abandoned throughout the country. The local judgments were then less frequently reported than now, or they would have been as numerous in the books as they are under the law of 1867." But see *ex parte* Ziegenfuss, 2 Iredell (N. Car.) 463.

[3] See note 2, page 27.

[4] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Watts and Sachs, 190 U. S. 1; Mayer v. Hellman, 91 U. S. 502. The Ohio law was under consideration in this last case.

and such is undoubtedly superseded by the act of congress in question.[5] The other derives its potency, not from the law, but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations.

Proceedings therefore under a general assignment law of a state (not a bankruptcy or insolvency law strictly so-called) or under a common law deed are not void, whether bankruptcy proceedings are instituted or not.[6] If no bankruptcy proceedings are instituted within four months the state court may proceed to administer the estate and the proceedings cannot be assailed by a trustee in bankruptcy subsequently appointed or by the creditors.[7]

The bankruptcy act makes a general assignment for the benefit of creditors [8] or the appointment of a receiver by a state court [9] an act of bankruptcy. It has been held that an assignee, under a deed of general assignment and the execution of which deed is the act of bankruptcy upon which an adjudication is made although the assignee has qualified and is acting under the orders of the state court, does not hold the estate of the bankrupt adversely to the trustee in bankruptcy.[10] If proceedings in bankruptcy are instituted within four months after the general assignment or the appointment of the receiver

[5] Parmenter Manf. Co. v. Hamilton, 51 N. E. Rep. 528; *In re* Smith, 92 Fed. Rep. 135; *In re* Etheridge Furniture Co., 92 Fed. Rep. 329; *In re* Richard, 94 Fed. Rep. 633; Ketcham v. McNamara, 72 Conn. 709, 6 Am. B. R. 160; *In re* Macon Sash, Door & Lumber Co., 7 Am. B. R. 66. But see Boese v King, 108 U. S. 379.

[6] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Sievers, 91 Fed. Rep. 366; *In re* Romanow, 92 Fed. Rep. 510; 1 Am. B. R. 461.

[7] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; Mayer v. Hellman, 91 U. S. 496; Boese v. King, 108 U. S. 379; Patty-Joiner & Enbank Co. v. Cummins, (Texas Sup. Ct.) 4 Am. B. R. 269, 57 S. W. Rep. 566.

[8] B. A. 1898, Sec. 3, as amended Feb. 5, 1903, 32 Stat. at L. 797; West Co. v. Lea, 174 U. S. 590.

[9] B. A. 1898, Sec. 3, clause 4, as amended by the act of February 5, 1903, 32 Stat. at L. 797.

[10] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 645; 2 Am. B. R. 383.

As to when a receiver does not

such state proceedings are void as against the trustee of the bankrupt so far as it interferes with his administration of the property of the debtor.[11]

The general rule is that where the property of a debtor has gone into the custody of a state court, its right to control and administer it for the purpose of that suit is superior to that of the bankruptcy court, provided such suit was commenced and the seizure made before the beginning of the four months period.[12] If the suit in the state court was begun and the seizure made within that period the right of the bankruptcy court over the property is not only superior, but after the adjudication is exclusive, providing proper steps are taken by the trustee to obtain possession of the property for the purpose of administering it.[13] The trustee should apply to the state court for an order to deliver to him the assets of the debtor.[14] The state court will regularly pass such an order in a proper case.

hold adversely, see *In re* Watts & Sachs, 190 U. S. 1.

[11] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; West Co. v. Lea, 174 U. S. 590; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Armour Packing Co. v. Brown (Minn.), 79 N. W. Rep. 522; Lumber Co. v. Sawyer (Minn.), 78 N. W. Rep. 1038.

[12] Consult Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177; Frazier v. Southern Loan & Trust Co., 99 Fed. 707; 40 C. C. A. 76, where the suits in the state courts had been instituted more than four months before the commission of the acts of bankruptcy, and consequently the state courts were not deprived of jurisdiction over the property.

In Pickens v. Roy, 187 U. S. 180, the court, in referring to the rules governing cases of priority of jurisdiction, imputes to Judge Goff the following language, which is approved:

"The bankruptcy act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

Though there is error in the citation, as Judge Goff did not sit in Frazier v. Southern Loan & Trust Co., 99 Fed. 707; 40 C. C. A. 76, the language is found in Pickens v. Dent, 106 Fed. 657; 45 C. C. A. 522, the decision in which was under review in Pickens v. Roy, and there affirmed.

[13] *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35.

[14] *In re* Knight, 125 Fed. Rep. 35; *In re* Watts & Sachs, 190 U. S. 1.

If the state court refuses to order its assignee for the benefit of creditors to deliver assets in his possession to the trustee in bankruptcy, the trustee may apply to the court of bankruptcy for an order to bring in the assignee under the assignment, which constitutes an act of bankruptcy, and require him to deliver to the trustee assets of the estate which came into his possession under the assignment,[15] but the assignee cannot be required by a summary order on notice to pay over money, which he has paid out in the administration of the estate in the state court,[16] or the trustee may proceed to have the conveyance to the assignee set aside under Sec. 67*e*,[17] or he may apply to the court of bankruptcy for an order to stay proceedings in the state court.[18]

[15] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; *In re* Thompson, 122 Fed. Rep. 174; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312; *In re* Knight, 125 Fed. Rep. 35.

[16] Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A., 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; *In re* Klein & Co., 8 Am. B. R. 559, 116 Fed. Rep. 523; *In re* Carver & Co., 7 Am. B. R. 539; *In re* Manning, 10 Am. B. R. 497.

[17] Randolph & Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Gutwillig, 90 Fed. Rep. 475, s. c. 92 Fed. Rep. 337; Davis v. Bohle, 92 Fed. Rep. 325.

[18] *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35.

CHAPTER III.

THE COURTS OF BANKRUPTCY AND THEIR TERRITORIAL JURISDICTION.

§ 14. Bankruptcy courts created.

The statute creates courts of bankruptcy by conferring jurisdiction in bankruptcy on the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska.[1]

The jurisdiction in bankruptcy is conferred upon existing courts instead of being vested in new tribunals. But these courts, when acting as courts of bankruptcy, are none the less separate and distinct courts, and exercise powers and jurisdiction separate and distinct from their powers and jurisdiction as originally constituted, to the same extent as if they were separate and distinct tribunals.[2]

The courts of bankruptcy are courts of record, having a limited jurisdiction, but are not inferior courts, in the technical sense of those words, whose judgments, taken alone are to be disregarded.[3]

§ 15. Territorial jurisdiction.

The several courts of bankruptcy have the same territorial limits respectively as the courts upon which bankruptcy jurisdiction is conferred now have, or as they may hereafter be changed.[4] Each state and territory is divided into judicial districts. In many states there are two or more districts,

[1] B. A. 1898, Sec. 1, clause 8, and Sec. 2.

[2] See Norris' Case No. 10304, Fed. Cas., s. c. 4 N. B. R. 35.

[3] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411; Kennedy v. Bank, 8 How. 586; *In re* Williams, 120 Fed. Rep. 38.

[4] B. A. 1898, Sec. 2.

and some of the large districts are again divided into divisions. When a district consists of a state, its boundaries vary as those of the state vary.[5] A court of bankruptcy is established by the act of 1898 in each judicial district, whether it consists of one or more divisions.

A court of bankruptcy, like a court of equity, is deemed always open for filing papers, issuing process, making orders, etc. The Bankruptcy Act seems to contemplate that from the filing of the petition to the closing of the estate, the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered and which have no terms.[6] Bankruptcy proceedings may be entertained and determined in vacation, in chambers, and during the respective terms of the courts created courts of bankruptcy.

The time and place of holding the several district courts are given below, in connection with the counties comprising the several districts. It has been found necessary in many districts, where court is held at different places in the district to designate certain days, in addition to the regular term days, on which the judge will be present at these several places for the purpose of hearing bankruptcy matters.

The judicial districts by states are as follows:

ALABAMA (fifth circuit) is divided into three districts, called the northern, middle and southern districts.

The northern district is divided into three divisions, called the northern, eastern and southern divisions of the northern district.

The northern division of the northern district consists of the counties of Colbert, Cullman, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan and Winston.

The eastern division of the northern district consists of

[5] *Ex parte* Devoe Manufacturing Co., 108 U. S. 401.

[6] *In re* Ives (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. Rep. 911; *In re* Lemon Gale Co. (C. C. A., 6th Cir.), 112 Fed. Rep. 296, 7 Am. B. R. 291; *In re* Bimberg, 121 Fed Rep. 942.

The time and place of holding district courts are the second Mondays in June and December, at Batesville; the second Mondays in March and October, at Helena; and the first Mondays in April and October, at Little Rock.

The western district is divided into the Texarkana division and the Fort Smith division.

The Texarkana division of the western district includes the counties of Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Calhoun and Union.

The Fort Smith division of the western district comprises the counties of Benton, Boone, Carroll, Crawford, Franklin, Johnson, Logan, Madison, Montgomery, Newton, Polk, Sebastian, Scott, Washington and Yell.

The time and place of holding the district courts are: At Texarkana, second Mondays in May and November; at Fort Smith, second Mondays in January and June.

CALIFORNIA (ninth circuit) is divided into two districts called the northern and southern districts.

The counties in the northern district are Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, Eldorado, Glenn, Humboldt, Inyo, Lake, Lassen, Marin, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehema, Trinity, Tuolumne, Yolo and Yuba. The time and place of holding district courts are: San Francisco, first Monday in March, second Monday in July and first Monday in November.

The counties of the southern district are San Luis Obispo, Fresno, Tulare, Kern, Santa Barbara, Ventura, Los Angeles, San Bernardino, San Diego, Orange, Riverside, Madera and Kings. The time and place of holding district court is the second Monday in January and the second Monday in August, at Los Angeles.

COLORADO (eighth circuit) constitutes one judicial district.[1] Suits removed from state courts in Archuleta, Conejos,

[1] Act of June 26, 1876, 19 Stat. at L. 61.

fifty-fourth meridian line south to the west side of Tohtankella Mountain and to the Yukon river; thence in a southeasterly direction to the western side of Mount McKinley; thence in a southwesterly direction to the most northern point of Lake Clark; thence along the northwest side of Lake Clark to the sixtieth degree of north latitude; thence west along said degree of latitude to Kuskokwim bay. This division shall also include the mainland west of said bay and all the islands north of the fifty-ninth degree of north latitude.

The third division shall consist of all that portion of the district of Alaska not included within the first or second divisions of said district as hereinbefore described.

The time and place of holding courts are the first Monday in May, at Sitka, and the first Monday in November, at Wrangell.

ARIZONA (ninth district) is divided into four districts.[7]

The counties in the district are: First district, Cochise, Pima and Santa Cruz.

Second district, Pinal, Gila and Graham.

Third district, Maricopa and Yuma.

Fourth district, Yavapai, Apache, Coconino, Navajo and Mohave.

The time and place of holding courts are: First district: First Mondays in April and October, at Tucson. Second district: First Mondays in May and November at Florence. Third district: Second Mondays in April and October, at Phœnix. Fourth district: First Mondays in June and November, at Prescott.

ARKANSAS (eighth circuit) is divided into two districts, called the eastern and western districts.

The eastern district is divided into three divisions, called the eastern, northern and western divisions.

The eastern division of the eastern district (returnable to Helena) includes the counties of Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, St. Francis and Monroe.

[7] Act of Feb. 11, 1891, 26 Stat. at L. 747.

Manatee, Lee, De Soto, Hillsboro, Hernando, Polk and Pasco.

The time and place of holding district courts are second Monday in February, at Tampa; first Mondays in May and November, at Key West; first Monday of December, at Jacksonville.

GEORGIA is divided into two districts, the northern district and the southern district.

The northern district is divided into two divisions, called the eastern division of the northern district and the western division of the northern district.

The eastern division of the northern district comprises the counties of Banks, Bartow, Campbell, Clarke, Clayton, Chattooga, Carroll, Cobb, Coweta, Catoosa, Cherokee, Dade, Dekalb, Douglas, Dawson, Elbert, Fannin, Fayette, Franklin, Floyd, Fulton, Forsyth, Gordon, Greene, Gilmer, Gwinnett, Habersham, Hall, Hart, Haralson, Henry, Jackson, Lumpkin, Morgan, Milton, Madison, Murray, Newton, Oglethorpe, Oconee, Paulding, Pickens, Polk, Rabun, Rockdale, Spalding, Towns, Union, Walker, Walton, Whitfield and White.

The time and place of holding district courts are at Atlanta on second Monday in March and first Monday in October.

The western division of the northern district comprises the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Miller, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup and Webster.

The district courts of this division are held at Columbus on first Mondays in May and December.

The southern district is divided into three divisions, called the eastern division of the southern district, the western division of the southern district, and the northeastern division of the southern district.

The eastern division of the southern district comprises the counties of Appling, Berrien, Bulloch, Bryan, Brooks, Clinch, Camden, Coffee, Charlton, Colquitt, Chatham, Decatur, Echols, Emanuel, Effingham, Glynn, Irwin, Lowndes, Liberty, Montgomery, McIntosh, Pierce, Screven, Tattnall, Thomas, Ware, Wayne and Worth.

The district court is held at Savannah, second Tuesdays in February, May, August and November.

courts are: San Francisco, first Monday in March, second Monday in July and first Monday in November.

The southern district is divided into two divisions called the northern and southern divisions of the southern district.

Counties in the district.— Northern division: Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced and Tulare. Southern division: Los Angeles, Orange, Riverside, San Bernadino, San Diego, San Luis Obispo, Santa Barbara, and Ventura.

Times and places of holding district courts: Northern division: First Monday in May and second Monday in November, at Fresno. Southern division: Second Mondays in January and July, at Los Angeles.

Colorado (eighth circuit) constitutes one judicial district.[8] Suits removed from state courts in Archuleta, Conejos, Costilla, Dolores, La Plata, Mineral, Montezuma, Rio Grande and San Juan counties shall be filed at Del Norte. Suits removed from state courts in Baca, Bent, Chaffee, Custer, Delta, Fremont, Gunnison, Hinsdale, Huerfano, Kiowa, Las Animas, Mesa, Montrose, Otero, Ouray, Prowers, Pueblo and San Miguel counties shall be filed at Pueblo. Suits removed from state courts in counties not specified above shall be filed at Denver. Bankruptcy proceedings from these counties should be filed in the same court as suits removed from a state court.

The time and place of holding district courts are: At Denver, first Tuesdays in May and November; at Pueblo, first Tuesday in April; at Montrose, second Tuesday in September.

Connecticut (second circuit) constitutes one judicial district.

The district court is held at New Haven on the fourth Tuesdays in February, and August; at Hartford, fourth Tuesday in May and the first Tuesday in December.

Delaware (third circuit) constitutes one judicial district.

The district court is held on the second Tuesdays in January, April, June and September, at Wilmington.

The District of Columbia. The district comprises all the District of Columbia.

[8] Act of June 26, 1876, 19 Stat. at L. 61.

The supreme court is held on the first Mondays in January, April and October.

FLORIDA (fifth circuit) is divided into two districts, called the northern district and the southern district.

The northern district embraces the counties of Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levi, Liberty, Santa Rosa, Taylor, Wakulla, Walton and Washington.

The time and place of holding district courts are first Monday in February, at Tallahassee; first Monday in March, at Pensacola.

The counties of the southern district are Alachua, Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, Duval, Hamilton, Lake, Madison, Marion, Nassau, Orange, Osceola, Putnam, St. Johns, Sumter, Suwannee, Volusia, Monroe, Manatee, Lee, De Soto, Hillsboro, Hernando, Polk and Pasco.

The time and place of holding district courts are second Monday in February, at Tampa; first Mondays in May and November, at Key West; first Monday of December, at Jacksonville; third Monday in January, at Ocala.

GEORGIA is divided into two districts, the northern district and the southern district.

The northern district is divided into four divisions, called the eastern division of the northern district, the western division of the northern district, the northern division of the northern district and the northwestern division of the northern district.

The eastern division of the northern district comprises the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Walton and White.

The time and place of holding district courts are at Atlanta on second Monday in March and first Monday in October.

The western division of the northern district comprises the counties of Clay, Early, Harris, Heard, Meriwether, Marion, Miller, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup and Webster.

The district courts of this division are held at Columbus on first Mondays in May and December.

Northern division of the northern district comprises the following counties of Campbell, Carroll, Cherokee, Clayton, Cobb, Coweta, Dawson, Dekalb, Douglas, Fannin, Fayette, Forsyth, Fulton, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns and Union.

The time and place of holding district courts are at Atlanta, first Mondays in October and second Mondays in March.

Northwestern division: Bartow, Catoosa, Chattooga, Dade, Floyd, Gordon, Haraison, Murray, Paulding, Polk, Walker and Whitfield.

The time and place of holding district courts are at Rome, third Mondays in May and November.

The southern district is divided into four divisions, called the eastern division of the southern district, the western division of the southern district, the northeastern division of the southern district and the southwestern division of the southern district.

The eastern division of the southern district comprises the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Liberty, Montgomery, McIntosh, Pierce, Screven, Tattnall and Wayne.

The district court is held at Savannah, second Tuesdays in February, May, August and November.

The western division of the southern district comprises the counties of Baker, Baldwin, Bibb, Butts, Calhoun, Crawford, Dodge, Dooley, Dougherty, Hancock, Houston, Jasper, Jones, Laurens, Lee, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox and Wilkinson.

The district court of this division is held at Macon, first Mondays in May and October.

The northeastern division of the southern district comprises the counties of Burke, Columbia, Glascock, Jefferson, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes and Warren.

The district court of this division is held at Augusta on the first Monday in April and the third Monday in November.

The southwestern division of the southern district comprises the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Colquitt, Decatur, Echols, Irwin, Lowndes, Mitchell, Thomas, Ware and Worth.

The district court of this division is held at Valdosta, second Mondays in June and December.

IDAHO (ninth circuit) constitutes one judicial district. It is divided into three divisions, called the northern, central and southern divisions.

The northern division comprises the counties of Latah, Nez Perces, Idaho, Shoshone and Kootenai. The district court of this division is held at Moscow, second Monday in May and fourth Monday in October.

The central division comprises the counties of Ada, Lincoln, Blaine, Boise, Canyon, Cassia, Elmore, Owyhee and Washington. The district court of this division is held at Boise, second Mondays in March and September.

The southern division comprises the counties of Bear Lake, Bingham, Bannock, Custer, Fremont, Lemhi and Oneida. The district court of this division is held at Pocatello on the second Monday in April and the first Monday in October.

ILLINOIS (seventh circuit) has two districts, called the northern and southern districts.

The northern district is divided into two divisions, the northern and southern divisions of the northern district.

The northern division of the northern district comprises the counties of Boone, Bureau, Carroll, Cook, Dekalb, Du Page, Grundy, Jo Daviess, Kane, Kankakee, Kendall, Lake, La Salle, Lee, McHenry, Ogle, Stephenson, Whiteside, Will and Winnebago. The time and place of holding district courts of this division are on the first Monday in July and the third Monday in December, in Chicago.

The southern division of the northern district comprises the counties of Fulton, Henderson, Henry, Iroquois, Knox, Livingston, Marshall, McDonough, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren and Woodford. The

district courts of this division are held on the third Mondays in April and October, in Peoria.

The southern district of Illinois embraces the counties of Adams, Alexander, Bond, Brown, Calhoun, Cass, Champaign, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, De Witt, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Greene, Hamilton, Hancock, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Logan, Moultrie, Macon, Macoupin, Madison, Marion, Mason, Massac, McLean, Menard, Monroe, Montgomery, Morgan, Perry, Piatt, Pike, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Sangamon, Schuyler, Scott, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White and Williamson.

The time and place of holding district courts of this district are the first Mondays in January and June, at Springfield; first Monday in May, at Danville; first Monday in September, at Quincy, and first Mondays in March and October, at Cairo.

INDIANA (seventh circuit) constitutes one judicial district.

The time and place of holding district courts are the first Tuesdays in May and November, at Indianapolis; first Mondays in January and July, at New Albany; first Mondays in April and October, at Evansville; second Tuesdays in June and December, at Fort Wayne; third Tuesdays in April and October, at Hammond.

INDIAN TERRITORY (eighth circuit) is divided into three districts, called the western, central and southern districts.

The western district comprises the Creek and Seminole nations, and portions of the Cherokee and Choctaw nations adjacent to the eastern and southern boundary of the Creek Nation.

The time and place of holding courts are: At Eufaula, second Monday in April and fourth Monday in November; at Muscogee, second Monday in January and first Monday in October; at Okmulgee, third Monday in April and second Monday in December; at Sapulpa, third Monday in February and first Monday in December; at Wagoner, second Monday in March and second Monday in November; at Wewoka, first Monday in February and fourth Monday in October.

The central district comprises the Choctaw nation and a

small portion of the southeast part of the Chickasaw nation. The time and place of holding district courts are: Antlers, second Monday in April and first Monday in December; Atoka, second Monday in February and first Monday in October; Durant, fourth Monday in October and the first Monday in March; Poteau, third Monday in March and second Monday in November; South McAlester, first Monday in January and first Monday in May.

The southern district comprises all of the Chickasaw nation, except a small portion of southeast part of same, which is attached to central district.

Iowa (eighth circuit) is divided into two districts, called the northern and southern districts.

The northern district of Iowa is divided into four divisions, the eastern division of the northern district, the Cedar Rapids division of the northern district, the central division of the northern district, and the western division of the northern district.

The eastern division of the northern district comprises the counties of Allamakee, Blackhawk, Bremer, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Floyd, Howard, Jackson, Mitchell and Winneshiek. The district courts of the eastern division are held at Dubuque on the fourth Tuesday in April and the first Tuesday in December.

The Cedar Rapids division of the northern district embraces the counties of Benton, Cedar, Clinton, Grundy, Hardin, Iowa, Johnson, Jones, Linn and Tama. The district courts of the Cedar Rapids division are held on the first Tuesday in April and the second Tuesday in September.

The central division of the northern district comprises the counties of Butler, Calhoun, Cerro Gordo, Emmet, Franklin, Hamilton, Hancock, Humboldt, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth and Wright. The district courts of the central division of the northern district are held at Fort Dodge on the second Tuesday in June and the second Tuesday in November.

The western division comprises the counties of Buena Vista, Cherokee, Clay, Dickinson, Ida, Lyon, Monona, O'Brien, Os-

ceola, Plymouth, Sac, Sioux and Woodbury. The district courts of the western division are held at Sioux City on the fourth Tuesday in May and the first Tuesday in October.

The southern district of Iowa is divided into three divisions, called the eastern division of the southern district, the central division of the southern district, and the western division of the southern district.

The counties in the eastern division of the southern district are Davis, Des Moines, Henry, Jefferson, Keokuk, Lee, Louisa, Muscatine, Scott, Van Buren, Wapello and Washington. Courts held at Keokuk. The district court of the eastern division is held at Keokuk on the second Tuesday in April and the third Tuesday in October.

The counties in the central division of the southern district are Boone, Dallas, Greene, Guthrie, Jasper, Madison, Mahaska, Marion, Marshall, Polk, Poweshiek, Story and Warren. The district courts of the central division of the southern district are held at Des Moines on the second Tuesday in May and the third Tuesday in November.

The western division of the southern district comprises the counties of Audubon, Carroll, Cass, Crawford, Harrison, Mills, Montgomery, Pottawattamie and Shelby. District courts held at Council Bluffs on the second Tuesday in March and third Tuesday in September.

KANSAS (eighth circuit) constitutes one judicial district.

It is divided into three divisions, called the first, second and third divisions.

The first division includes the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington and Wyandotte. The district court is held at Topeka on the second Monday in April, at Leavenworth on the second Monday in October, second Monday in May at Salina and Kansas City

on the second Monday of January and first Monday of October.

The second division includes the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Haskell, Hodgeman, Kearny, Kingman, Kiowa, Lane, McPherson, Meade, Morton, Ness, Pawnee, Pratt, Reno, Rice, Rush, Scott, Sedgwick, Seward, Stafford, Stanton, Stevens, Sumner and Wichita. The district courts of the second division are held on the second Monday in March and the second Monday in September, at Wichita.

The third division comprises the counties of Allen, Anderson, Bourbon, Chautauqua, Cherokee, Coffey, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson and Woodson. The district courts for the third division are held on the first Monday in May and the second Monday in November, at Fort Scott.

KENTUCKY (sixth circuit) is divided into two districts, called the eastern district and the western district.

The eastern district comprises the counties of Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe and Woodford. The time and place of holding district courts in this district: Frankfort, second Monday in March and fourth Monday in September; Covington, first Monday in April and third Monday in October; Richmond, fourth Monday in April and second Monday in November; London, second Monday in May and fourth Monday in November; Catlettsburg, fourth Monday in May and second Monday in December.

The western district comprises the counties of Adair, Allen,

Ballard, Barren, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Christian, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hardin, Hart, Henderson, Hickman, Hopkins, Jefferson, Larue, Livingston, Logan, Lyon, McCracken, McLean, Marion, Marshall, Meade, Metcalfe, Monroe, Muhlenberg, Nelson, Ohio, Oldham, Russell, Simpson, Spencer, Taylor, Todd, Trigg, Union, Warren, Washington and Webster. Time and place of holding courts: Louisville, second Monday in March and second Monday in October; Paducah, third Monday in April and third Monday in November; Owensboro, first Monday in May and fourth Monday in November; Bowling Green, third Monday in May and second Monday in December.

LOUISIANA (fifth circuit) is divided into two districts, called the eastern and western districts.

The eastern district is divided into two divisions, the New Orleans division and the Baton Rouge division.

The New Orleans division comprises the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Mary, St. Tammany, Tangipahoa, Terrebonne and Washington. The district court is held at New Orleans the third Mondays in February, May and November.

The Baton Rouge division includes the parishes of Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, St. Helena, West Baton Rouge and West Feliciana. The district court is held at Baton Rouge on the second Mondays in April and November.

The parishes in the western district are Avoyelles, Acadia, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, De Soto, East Carroll, Franklin, Grant, Jackson, Lafayette, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, St. Landry, St. Martin, Tensas, Union, Vermilion, Vernon, Webster, West Carroll and Winn.

Time and place of holding district courts are the first Mondays of January and June, at Opelousas; fourth Mondays of January and June, at Alexandria; third Mondays of February

and October, at Shreveport; first Mondays of April and October at Monroe.

MAINE (first circuit) constitutes one judicial district.

The district court is held on the first Tuesdays in February and December, at Portland; first Tuesday in June, at Bangor; first Tuesday in September, at Bath.

MARYLAND (fourth circuit) constitutes one judicial district.

The district court is held on the first Tuesdays in March, June, September and December, at Baltimore.

MASSACHUSETTS (first circuit) constitutes one judicial district.

The district court is held on the third Tuesday in March, fourth Tuesday in June, second Tuesday in September and first Tuesday in December, at Boston.

MICHIGAN (sixth circuit) is divided into two districts, called the eastern and western districts.

The eastern district is divided into two divisions, called the northern division of the eastern district, and the southern division of the eastern district.

The northern division of the eastern district comprises the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee and Tuscola. The district courts for the northern division are held at Bay City on the first Tuesdays in May and October. Terms of court at Port Huron are held in the discretion of the judge.

The southern division of the eastern district includes the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw and Wayne. The time and place of holding district courts in the southern division of the eastern district are at Detroit on the first Tuesdays in March, June and November.

The northern division of the western districts includes the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft. The district court is held at Marquette on the first Tuesdays in May and September.

The southern division embraces the counties of Allegan,

Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren and Wexford. The district court is held at Grand Rapids on the first Tuesdays in March and October.

MINNESOTA (eighth circuit) constitutes one judicial district, divided into six divisions, called the first, second, third, fourth, fifth and sixth divisions.

The first division comprises the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore and Houston. The district courts are held in the first division on the first Tuesday in June, and the first Tuesday in December, at Winona.

The counties which comprise the second division are Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley and Lac qui Parle. The district court of the second division is held on the third Tuesday in April, and the first Tuesday in November, at Mankato.

The third division is composed of the counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice and Scott. The district court for the third division is held on the fourth Tuesday in June, and the second Tuesday in January, at St. Paul.

The fourth division consists of the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne and Isanti. The district court for the fourth division is held on the first Tuesday in March, and the first Tuesday in September, at Minneapolis.

The fifth division comprises the counties of Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Millelacs, Morrison and Benton. The district court for the fifth division is held on the second Tuesday in May, and the second Tuesday in October, at Duluth.

The sixth division comprises the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Wilkins, Clay, Berker, Wadena, Norman, Polk, Marshall,

Kittson, Beltrami and Hubbard. The district court for the sixth division is held on the fourth Tuesday in March, and the fourth Tuesday in September, at Fergus Falls.

MISSISSIPPI (fifth circuit) has two districts, a northern and a southern district.

The northern district comprises the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Tishomingo, Winston, Benton, Calhoun, Carroll, Coahoma, De Soto, Granada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster, Yalobusha and Prentiss.

The district court of the northern district are held on the first Mondays in June and December, at Oxford, and on the first Mondays in April and October, at Aberdeen.

The counties of the southern district of Mississippi are:

(Jackson division) Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson and Yazoo.

(Vicksburg division) Warren, Issaquena, Sharkey, Washington, Bolivar, Claiborne and Sunflower.

(Biloxi division) Harrison, Hancock, Jackson, Marion, Perry, Greene and Pearl River.

(Meridan division) Kemper, Noxubee, Neshoba, Wayne, Clarke, Jasper, Jones, Leake, Lauderdale and Newton.

The time and place of holding district courts in the southern district of Mississippi are at Jackson, first Mondays in May and November; at Vicksburg, first Mondays in January and July; at Biloxi, third Mondays in February and August; at Meridian, second Mondays in March and September.

MISSOURI (eighth circuit) has two districts, called the eastern and western districts.

The eastern district of Missouri is divided into two divisions, called, respectively, the eastern division of the eastern district, and the northern division of the eastern district.

The eastern division of the eastern district of Missouri comprises the counties of Audrain, Bollinger, Butler, Cape Girardeau, Carter, Crawford, Dent, Dunklin, Franklin, Gas-

conade, Iron, Jefferson, Lincoln, Madison, Mississippi, Montgomery, New Madrid, Oregon, Pemiscot, Perry, Reynolds, Ripley, St. Charles, St. Francois, Ste. Genevieve, St. Louis, Scott, Shannon, Stoddard, Warren, Washington, Wayne, and St. Louis City. The district court is held at St. Louis, on the first Mondays in May and November.

The northern division of the eastern district of Missouri comprises the counties of Marion, Macon, Randolph, Monroe, Lewis, Schuyler, Scotland, Adair, Pike, Ralls, Knox, Shelby and Clark. The district court of the northern division of the eastern district is held at Hannibal, on the fourth Monday in May and the first Monday in December.

The western district of Missouri is divided into five divisions, called, respectively, the western division of the western district, the St. Joseph division of the western district, the central division of the western district, the southern division of the western district and the southwestern division of the western district.

The western division of the western district contains the counties of Barton, Bates, Caldwell, Carroll, Cass, Chariton, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Linn, Livingston, Mercer, Putnam, Ray, St. Clair, Saline and Sullivan.

The St. Joseph division of the western district embraces the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Harrison, Holt, Nodaway, Platte and Worth.

The central division of the western district comprises the counties of Benton, Boone, Calloway, Camden, Cole, Cooper, Hickory, Howard, Maries, Miller, Moniteau, Morgan, Osage, Pettis and Phelps.

The southern division of the western district comprises the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Ozark, Polk, Pulaski, Taney, Texas, Webster and Wright.

The southwestern division of the western district comprises the counties of Barry, Barton, Jasper, Lawrence, McDonald, Newton, Stone and Vernon.

The time and place of holding district courts in the western district of Missouri are at Kansas City, fourth Monday in April and first Monday in November; at St. Joseph, first Monday in March and third Monday in September; at Springfield, first Mondays in April and October; at Jefferson City, third Mondays in March and October; Joplin, second Mondays in January and June.

MONTANA (ninth circuit) constitutes one judicial district.

It is divided into two divisions, the southern division and the other counties of the district not included in the southern division.

The southern division includes the counties of Beaverhead, Madison and Silverbow.

The other counties in the district are Broadwater, Cascade, Choteau, Carbon, Custer, Dawson, Deerlodge, Flathead, Fergus, Granite, Gallatin, Jefferson, Lewis and Clarke, Meagher, Missoula, Park, Ravalli, Sweetgrass, Teton, Yellowstone and Valley.

The time and place of holding courts are the first Mondays in April and November, at Helena, and the first Tuesdays in February and September, at Butte.

NEBRASKA (eighth circuit) constitutes one judicial district.

The time and place of holding courts are at Omaha City on the first Monday in May and the second Monday in November; Lincoln, third Monday in January and first Monday in October; Hastings, third Monday in April; Norfolk, fourth Monday in April.

NEVADA (ninth circuit) constitutes one judicial district.

The district court is held at Carson City on the first Mondays in February, May and October.

NEW HAMPSHIRE (first circuit) comprises the entire state.

The time and place of holding court are at Portsmouth on the third Tuesdays in March and September; Concord on the third Tuesdays in June and December; Littleton on the last Tuesday in August.

NEW JERSEY (third circuit) constitutes one judicial district.

The district court is held on the third Tuesdays in January, April, June and September, at Trenton.

New Mexico (eighth circuit) is divided into five judicial districts, called the first, second, third, fourth and fifth districts.

The counties in the first district are Santa Fe, Taos, Rio Arriba and San Juan. The United States court for the first district is held at Santa Fe first Monday in January, and last Monday in May.

The second district comprises the counties of Bernalillo, McKinley and Valencia. The United States court for the second district is held at Albuquerque third Mondays in March and October.

The third district includes the counties of Donna Ana, Grant, Luna, Otero and Sierra. The United States court for the third district is held at Las Cruces first Mondays in February and September.

The fourth district comprises the counties of San Miguel, Mora, Colfax, Union and Guadaloupe. The United States court for the fourth district is held at Las Vegas first Mondays in May and November.

The fifth district comprises the counties of Socorro, Lincoln, Chaves and Eddy. The United States court for the fifth district is held at Socorro third Monday in May and fourth Monday in November.

New York (second circuit) is divided into four districts, called the northern, the eastern, the western and the southern districts.

The northern district of New York comprises the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren and Washington, with the waters thereof.

District courts for the northern district are held on the second Tuesday in February, at Albany; first Tuesday in December, at Utica; second Tuesday in June, at Binghamton; first Tuesday in October, at Auburn; first Tuesday in April, at Syracuse; and, in the discretion of the judge of the court, one

term annually at such time and place within the counties of Saratoga, Onondaga, St. Lawrence, Clinton, Jefferson, Oswego and Franklin as he may from time to time appoint.

The eastern district of New York includes the counties of Kings, Queens, Richmond, Nassau and Suffolk, with the waters thereof.

The time and place of holding district courts for the eastern district of New York are on the first Wednesday in every month, at Brooklyn.

The southern district of New York comprises the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester.

The district court for the southern district of New York is held on the first Tuesday in each month, at New York city.

The western district of New York comprises the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming and Yates, with the waters thereof.

The time and place of holding district court for the western district of New York are on the second Tuesday in January, at Elmira; second Tuesdays in March and November, at Buffalo; second Tuesday in July, at Jamestown; second Tuesday in October, at Lockport.

NORTH CAROLINA (fourth circuit) has two districts, called the eastern and western districts.

The eastern district of North Carolina includes the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Chatham, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Person, Perquimans, Pitt, Richmond, Robeson, Sampson, Tyrrell, Vance, Wake, Warren, Washington, Wayne and Wilson.

The time and place of holding courts are Raleigh, fourth Monday in May and first Monday in December; Wilmington, first Monday after the fourth Monday in April and October;

Newbern, fourth Mondays in April and October; Elizabeth City, third Mondays in April and October.

The western district comprises the counties of Alamance, Alexander, Alleghany, Anson, Ashe, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Clay, Cleveland, Davie, Davidson, Forsyth, Gaston, Graham, Guilford, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Watauga, Wilkes, Yadkin and Yancey.

The time and place of holding district courts are on the first Mondays in April and October, at Greensboro; third Mondays in April and October, at Statesville; first Mondays in May and November, at Asheville; first Mondays in June and December, at Charlotte; and second Mondays in July and November, at Wilkesboro.

North Dakota (eighth circuit) constitutes one judicial district.

The time and place of holding district courts are on the first Tuesday in July, at Devil's Lake; first Tuesday in March, at Bismarck; third Tuesday in May, at Fargo; second Tuesday in November, at Grand Forks.

Ohio (sixth circuit) is divided into two districts, the northern district and the southern district.

The northern district is divided into two divisions, called the eastern division of the northern district, and the western division of the northern district.

The eastern division of the northern district comprises the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull and Wayne. The time and place of holding district courts are on the first Tuesdays in February, April and October, at Cleveland.

The western division of the northern district includes the

counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood and Wyandot. The district court for the western division of the northern district is held at Toledo on the first Tuesdays in June and December.

The southern district is divided into two divisions, called the eastern division of the southern district, and the western division of the southern district.

The eastern division of the southern district includes the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton and Washington. The district court for the eastern division of the southern district is held on the first Tuesdays in June and December, at Columbus.

The western division of the southern district includes the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby and Warren. The time and place of holding district courts for the western division of the southern district are on the first Tuesdays in February, April and October, at Cincinnati.

Oklahoma (eighth circuit). The counties of this territory are assigned to districts as follows:

First district — Lincoln, Logan and Payne.

Second district — Canadian, Cleveland, Custer, Kingfisher and Washita.

Third district — Oklahoma and Pottawatomie.

Fourth district — Kay, Noble, Osage Nation and Pawnee.

Fifth district — Blaine, Garfield, Grant and Roger Mills.

Sixth district — Beaver, Day, Dewey, Woods and Woodward.

Seventh district — Caddo, Comanche, Greer and Kiowa.

The United States courts are held in each county. The time of holding them in this territory has been frequently altered.

Oregon (ninth circuit) constitues one judicial district.

The district court is held at Portland on the first Mondays in March, July and November.

PENNSYLVANIA (third district) is divided into two districts, the eastern and the western districts.

The eastern district comprises the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia and Schuylkill.

The district court is held on the second Mondays in March and June, third Monday in September, and second Monday in December, at Philadelphia.

The middle district comprises the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming and York.

The times and places of holding district courts: Scranton, fourth Monday in February and third Monday in October; Harrisburg, first Monday in May and first Monday in December; Williamsport, second Monday in January and second Monday in June.

The western district comprises the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington and Westmoreland.

The time and place of holding district courts are at Pittsburg, first Monday in May and third Monday in October; at Erie, third Monday in July and second Monday in January.

RHODE ISLAND (first circuit) constitutes one judicial district.

The district court is held at Providence on the first Tuesdays in February and August; at Newport the second Tuesday in May and the third Tuesday in October.

SOUTH CAROLINA (fourth circuit) constitutes one judicial district.[9]

[9] There has been much confusion with reference to the meaning of R. S. Sec. 546, whether the State of South Carolina was divided into

The district court is held on the first Tuesdays in June and December, at Charleston; third Tuesdays in April and October, at Greenville; fourth Tuesday in November, at Columbia; first Tuesday in March, at Florence.

SOUTH DAKOTA (eighth circuit) constitutes one judicial district, divided into four divisions, called the northern, central, southern and western divisions.

The northern division (court at Aberdeen) includes the counties of Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink, Brown, McPherson, Edmunds, Campbell, Walworth, and Sisseton and Wahpeton reservations.

The central division (court at Pierre) comprises the counties of Buffalo, Faulk, Jerauld, Hand, Hughes, Hyde, Potter, Stanley, Sully; also Cheyenne and part of Standing Rock Indian reservations.

The southern division (court at Sioux Falls) includes the counties of Aurora, Beadle, Bonhomme, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, Lyman, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, Yankton; also Crow Creek, Lower Brule and Yankton Indian reservations.

The western division (court at Deadwood) comprises the counties of Butte, Custer, Fall River, Lawrence, Meade, Pennington, and the Rosebud and Pine Ridge Indian reservations.

The time and place of holding district courts in South Dakota are at Sioux Falls, first Tuesday in April and third Tuesday in October; at Aberdeen, first Tuesday in May and second Tuesday in November; at Deadwood, third Tuesday in May and first Tuesday in September; at Pierre, second Tuesday in June and first Tuesday in October.

TENNESSEE (sixth circuit) is divided into three districts, the eastern, middle and western districts. The eastern district of Tennessee is divided into three divisions called respectively

two districts or two divisions; but it is now settled that the state constitutes one district divided into two divisions. See 26 Stat. at L. 71; Barrett v. United States, 169 U. S. 218; Lucker v. Phœnix Co., 66 Fed. Rep. 161; Young v. Insurance Co., 29 Fed. Rep. 273.

the northern division of the eastern district, the southern division of the eastern district and the northeastern division of the eastern district. The northern division of the eastern district of Tennessee comprises the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Scott, Sevier and Union.

The southern division of the eastern district of Tennessee comprises the counties of Bledsoe, Bradley, Cumberland, Fentress, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, Sequatchie.

The northeastern division of the eastern district of Tennessee comprises the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi and Washington.

The time and place of holding district courts in the eastern district are second Mondays in March and September, at Knoxville; first Mondays in April and October, at Chattanooga; second Mondays in May and November, at Greenville.

The middle district comprises the counties of Bedford, Cannon, Cheatham, Clay, Coffee, Davidson, Dekalb, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Jackson, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Montgomery, Moore, Overton, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Van Buren, Warren, Wayne, White, Williamson and Wilson.

The time and place of holding district courts are at Nashville on the third Mondays in April and October.

The western district of Tennessee is divided into two divisions called respectively the eastern division of the western district and the western division of the western district. The eastern division of the western district comprises the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardin, Hardeman, Henderson, Henry, Lake, Madison, McNairy, Obion, Weakley and Perry.

The western division of the western district comprises the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby and Tipton.

The time and place of holding district courts in the western

district are at Jackson on the fourth Mondays in April and October; at Memphis on the fourth Mondays in May and September.

TEXAS (fifth circuit) is divided into four districts, the northern, eastern, western and southern districts.

The counties in the northern district are: Returnable to Waco — Brazos, Robertson, Leon, Limestone, Freestone, McLennan, Falls, Bell, Coryell, Foard, Hamilton, Bosque, Somervell and Hill.

Returnable to Dallas — Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro and Rockwall.

Returnable to Fort Worth — Archer, Armstrong, Bailey, Baylor, Briscoe, Carson, Castro, Childress, Clay, Cochran, Collingsworth, Comanche, Cottle, Dallam, Dawson, Deaf Smith, Donley, Erath, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hood, Hutchinson, Jack, Lamb, Lipscomb, Moore, Motley, Ochiltree, Oldham, Palo Pinto, Parker, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Tarrant, Wheeler, Wichita, Wilbarger, Wise and Young.

Returnable to Abilene — Andrews, Borden, Callahan, Crosby, Dickens, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, King, Knox, Lubbock, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton and Yoakum.

Returnable to San Angelo — Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runnells, Schleicher, Sterling, Sutton, Tom Green and Upton.

The time and place of holding courts for the northern district are at Dallas, second Monday of January and the first Monday of May; at Fort Worth, second Monday of March and the first Monday of November; at Abilene, second Monday of April and the first Monday of October; at San Angelo, fourth Monday of April and the third Monday in October.

The counties in the eastern district are: Returnable to Paris — Delta, Fannin, Grayson, Lamar and Red River.

Returnable to Texarkana — Bowie, Franklin and Titus.

Returnable to Beaumont — Hardin, Jasper, Jefferson, Lib-

erty, Newton, Orange, Sabine, San Augustine and Tyler.

Returnable to Tyler — Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Shelby, Smith, Trinity, Van Zandt and Wood.

Returnable to Jefferson — Camp, Cass, Harrison, Hopkins, Marion, Morris and Upshur.

Returnable to Sherman — Collin, Cooke, Denton, Grayson and Montague.

The time and place of holding court for the eastern district are Tyler, fourth Mondays in January and April; Jefferson, first Monday in October and first Monday in February; Paris, fourth Monday of October and second Monday of March; Beaumont, third Monday in November and first Monday in April.

Returnable to Sherman — First Monday in January and third Monday in May.

The counties in the western district are: Returnable to Austin — Bastrop, Blanco, Burleson, Burnett, Caldwell, Fayette, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, McCulloch, Mason, San Saba, Travis, Washington and Williamson.

Returnable to Waco — Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson and Somervell.

Returnable to San Antonio — Atascosa, Bandera, Bee, Bexar, Comal, Dewitt, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, Live Oak, Maverick, Medina, Uvalde, Valverde, Wilson and Zavalla.

Returnable to El Paso — Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Pecos, Presidio, Reeves, Ward and Winkler.

The time and place for holding district courts are at Austin, fourth Monday in January and second Monday in June; at Waco, second Monday in November and fourth Monday in February; at San Antonio, third Monday in December and first Monday in May; at El Paso, first Monday in October and first Monday in April.

Counties in the southern district are: Returnable to Galves-

ton — Austin, Brazoria, Chambers, Fort Bend, Galveston, Matagorda and Wharton.

Returnable to Houston — Brazos, Calhoun, Colorado, Goliad, Grimes, Harris, Jackson, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Victoria, Walker and Waller.

Returnable to Laredo — Aransas, Duval, Lasalle, McMullen, Neuces, Refugio, San Patricio, Webb and Zapata.

Returnable to Brownsville — Cameron, Hidalgo and Starr.

Times and places of holding district courts are at Galveston, second Monday in January and first Monday in June; at Houston, fourth Mondays in February and September; at Laredo, third Monday in April and second Monday in November; at Brownsville, second Monday in May and first Monday in December.

UTAH (eighth circuit) constitutes one judicial district.

The time and place of holding courts are on the second Mondays in April and November, at Salt Lake; second Mondays in March and September, at Ogden.

VERMONT (second circuit) constitutes one judicial district.

The time and place of holding district courts are the fourth Tuesday in February, at Burlington; the third Tuesday in May, at Windsor; the first Tuesday in October, at Rutland.

One of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier.

VIRGINIA (fourth circuit) is divided into two districts, the eastern and western districts.

The counties in the eastern district are Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland and York.

The time and place of holding district courts for the eastern district are the first Mondays in April and October,

at Richmond; the first Mondays in May and November, at Norfolk; the first Mondays in January and July, in Alexandria.

Counties in the western district are Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetout, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise and Wythe.

The time and place of holding district courts for the western district are at Danville, Tuesdays after the second Mondays in April and November; Lynchburg, Tuesdays after the second Mondays in March and September; Abingdon, Tuesdays after the first Mondays in May and October; Harrisonburg, Tuesdays after the first Mondays in June and December; Charlottesville, second Monday in January and first Monday in July; Roanoke, second Monday in February and third Monday in June.

WASHINGTON (ninth circuit) constitutes one judicial district, divided into four divisions, called the northern, southern, eastern and western divisions.

The northern division comprises the counties of King, Kitsap, Island, Whatcom, Skagit, Jefferson, Clallam, San Juan and Snohomish. The time and place of holding district courts for the northern division are at Seattle, first Tuesdays in June and December.

The southern division includes the counties of Wallawalla, Columbia, Garfield, Asotin, Whitman, Franklin, Yakima and Klickitat. The district courts for the southern division are held at Wallawalla, first Tuesdays in May and November.

The eastern division consists of the counties of Spokane, Chelan, Stevens, Douglas, Okanogan, Kittitas, Lincoln and Adams. The district courts for the eastern division are held at Spokane, first Tuesdays in April and September.

The western division embraces the counties of Pierce, Thurston, Mason, Chehalis, Lewis, Pacific, Wahkiakum, Cowlitz,

Clarke and Skamania. The district courts for the western division are held at Tacoma, first Tuesdays in February and July.

West Virginia (fourth circuit) is comprised of two distrists, the northern and southern district.

The northern district is comprised of the following counties: Barbour, Berkeley, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Wetzel, Wirt and Wood.

Times and places of holding courts: Wheeling, first Tuesday in April and third Tuesday in September; Clarksburg, third Tuesday in April and first Tuesday in October; Martinsburg, third Tuesday in October.

The southern district is comprised of the following counties: Boone, Braxton, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers, Wayne, Webster and Wyoming.

Time and place of holding court for the southern district: At Addison, first Monday in September; at Huntington, first Tuesday in April and first Tuesday after the third Monday in September; at Bluefield, first Tuesday in May and third Tuesday in October; at Charleston, first Tuesday in June and third Tuesday in November.

District court is held at Wheeling, April 1 and September 20; Clarksburg, April 15 and October 1; Charleston, May 1 and November 10; Martinsburg, October 15.

Wisconsin (seventh circuit) is divided into two districts, the eastern and western districts.

The counties in the eastern district are Brown, Calumet, Dodge, Door, Fond du Lac, Florence, Forest, Green Lake, Kenosha, Kewaunee, Langlade (except townships 31, 32, 33 and 34 of ranges 9 and 10 east), Marquette, Manitowoc, Milwaukee, Marinette, Oconto, Oneida (towns 35, 36, 37, 38 and 39 of range 11 east), Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Vilas (towns 40, 41 and 42 of range 11 east),

Walworth, Washington, Waukesha, Waupaca, Waushara and Winnebago.

The time and place of holding district courts are on the first Mondays of January and October, at Milwaukee; second Tuesday of June at Oshkosh.

The western district comprises the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, and that part of Langlade lying and being in townships 31, 32, 33 and 34, north of ranges 9 and 10, east of the fourth principal meridian; also Marathon, Monroe, Oneida (except towns 35, 36, 37, 38 and 39 of range 11 east), Pepin, Pierce, Polk, Portage, Richland, Rock, St. Croix, Sauk, Taylor, Trempealeau, Vernon, Vilas (except towns 40, 41 and 42 of range 11 east), Washburn and Wood.

The time and place of holding district courts of the western district are on the first Tuesday in December, at Madison; first Tuesday in June, at Eau Claire; third Tuesday in September, at La Crosse; and third Tuesday in June, at Superior. "The clerk residing at Madison shall attend all terms of said courts at Eau Claire as clerk thereof."

Wyoming (eighth circuit) constitutes one judicial district, which includes Yellowstone National Park.

The time and place of holding district courts are at Cheyenne, second Mondays in May and November; at Evanston, first Monday in July, and at Sheridan or in National Park at such dates as the courts may order.

Appellate Courts — Territorial Jurisdiction.

The Supreme Court.— The territorial jurisdiction of the Supreme Court of the United States includes all of the states and territories.

One term is held annually on the second Monday in October and such adjourned or special terms as it may find necessary for the dispatch of business.

Circuit Courts of Appeals.— The territorial jurisdiction and time of holding court of the several circuit courts of appeals is as follows:

The first circuit includes the states of Maine, New Hampshire, Massachusetts and Rhode Island.

One term of the circuit court of appeals is held annually at Boston, Mass., on the first Tuesday of October.

The second circuit includes Vermont, Connecticut and New York.

One term of the circuit court of appeals for the second circuit is held annually at New York, N. Y., on the third Tuesday of October and such adjourned sessions as the court may from time to time designate.

The third circuit includes the states of New Jersey, Pennsylvania and Delaware.

The circuit court of appeals for the third circuit holds two terms in a year at Philadelphia, Pa. The March term commences on the first Tuesday in March and the September term on the third Tuesday of September in each year.

The fourth circuit includes the states of North Carolina, South Carolina, Maryland, Virginia and West Virginia.

The circuit court of appeals for the fourth circuit holds three terms annually at Richmond, Va., beginning on the first Tuesday in February, May and November respectively.

The fifth circuit includes the states of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.

The circuit court of appeals for the fifth circuit holds a term of court at Montgomery, Ala., on the first Monday in September; at Atlanta, Ga., on the first Monday in October; at Fort Worth, Tex., on the first Monday in November, and at New Orleans, La., on the third Monday in November.

The sixth circuit includes the states of Ohio, Michigan, Kentucky and Tennessee.

The circuit court of appeals for the sixth circuit holds one term annually at Cincinnati, Ohio, beginning on the first Tuesday after the first Monday in October and adjourned sessions on the first Tuesday after the first Monday in each month except August and September.

The seventh circuit includes the states of Indiana, Illinois and Wisconsin.

The circuit court of appeals for the seventh circuit holds one term annually at Chicago, Ill., beginning on the first Tuesday in October.

The eighth circuit includes the states of Minnesota, Iowa, Missouri, Arkansas, Nebraska, Colorado, Kansas, Wyoming, North Dakota, South Dakota, Utah, and the territories of New Mexico, Oklahoma and Indian Territory.

The circuit court of appeals for the eighth circuit holds one term annually at St. Paul, Minn., beginning on the first Monday in May, one term annually at Denver, Colo., beginning the first Monday in September, and one term annually at St. Louis, Mo., beginning the first Monday in December.

The ninth circuit includes the states of California, Oregon, Nevada, Washington, Idaho and Montana, also includes the territories of Alaska, Arizona and Hawaii.

The circuit court of appeals for the ninth circuit holds the October term at San Francisco, beginning on the first Monday in October, a term at Seattle, Wash., beginning on the second Monday in September, and a term in Portland, Ore., beginning on the third Monday in September.

CHAPTER IV.

THE JURISDICTION OF COURTS OF BANKRUPTCY.

§16. The statutory jurisdiction.

The jurisdiction of a court of bankruptcy is purely statutory. Congress has conferred power upon the courts of bankruptcy in the present act as follows:

"SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

"(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

"(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

"(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

"(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

"(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;

"(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

"(9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

"(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

"(11) determine all claims of bankrupts to their exemptions;

"(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

"(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

"(14) extradite bankrupts from their respective districts to other districts;

"(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;

"(16) punish persons for contempts committed before referees;

"(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

"(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

"(19) transfer cases to other courts of bankruptcy.

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

§17. **The general extent of bankruptcy powers.**

A court of bankruptcy, being created by congress, depends solely for its jurisdiction and powers upon the laws of the United States.[1] It has no powers except those which are expressly granted by congress, and such implied powers as may be necessary to give full force and effect to the jurisdiction conferred upon it.

In construing this bankrupt act, which gives full and complete jurisdiction over a subject to courts constituted for the purpose, the strict rule of construction, which is applied where a special statute gives to a court power to do a particular thing and prescribes the mode in which the power shall be executed, has no application.[2]

[1] *In re* Williams, 120 Fed. Rep. 38. Consult *In re* Morris No. 9825, Fed. Cas., s. c. Crabbe, 70; Campbell's Case, No. 2349, Fed. Cas., 1 N. B. R. 165; Clark v. Binninger, 38 Howard's Prac. 341.

In re Morris, *supra*, Judge Hopkinson, in an exhaustive opinion, reached the conclusion that neither a Chancellor in England nor a United States judge, had any powers in bankruptcy matters, other than those arising expressly or impliedly from the bankrupt statute.

[2] In Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. Rep. 691, Judge Hawley, speaking of the present act, said: "The national bankruptcy act establishes a uniform system, and regulates, in all their details, the relations, rights, and duties of debtor and creditor. It should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote justice."

See also *in re* Cal. Pac. R. Co., No. 2315, Fed. Cas., 3 Saw. 240; *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513; *In re* Locke, No. 8439, Fed. Cas., s. c. 1 Lowell, 293; *In re* Silverman, No. 12855, Fed. Cas., s. c. 1 Saw. 410.

The language of the act of 1898, conferring the jurisdiction of the bankruptcy courts, is very broad and general. It is that these courts "are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms, as they are now or may be hereafter held."[3] The section proceeds to enumerate certain specific powers, and concludes as follows: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It was evidently the intention of Congress to establish a complete system of bankruptcy proceedings, and to confer on the courts of bankruptcy, constituted by the act, special jurisdiction over the whole subject and extending to all matters, acts and things to be done under and in virtue of bankruptcy.

The object and policy of the bankrupt law is that proceedings under it shall be summary in order to settle the bankrupt's affairs as speedily and with as little delay as may be consistent with justice. But summary proceedings do not imply that no notice is required to be served on the persons to be affected by the order of the court and a reasonable time within which to make a defense.[4] The proceedings in bankruptcy generally are in the nature of proceedings in equity.[5]

Proceedings in bankruptcy are instituted by the filing of the petition,[6] which is a *caveat* to all the world, and in effect an attachment and injunction,[7] and on adjudication title to the bankrupt's property becomes vested in the trustee with actual or constructive possession and is in the custody of the bankruptcy court.[7] The proceedings end in the distribution of the

[3] B. A. 1898, Sec. 2 and Sec. 16, *ante*.

[4] Smith v. Belford (C. C. A., 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291; Boyd v. Glucklich (C. C. A., 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[5] *In re* Union Trust Co., 122 Fed. Rep. 937; *In re* Rochford (C. C. A., 8th Cir.), 124 Fed. Rep. 182.

[6] *In re* Kindt, 98 Fed. Rep. 867; 3 Am. B. R. 546.

[7] Mueller v. Nugent, 184 U. S. 1; Bank v. Sherman, 101 U. S. 403.

assets among the creditors and the discharge or refusal to discharge the bankrupt.

The jurisdiction of a court of bankruptcy includes the power to make or refuse an adjudication in bankruptcy,[8] and to administer the estate of the debtor and to grant or refuse to grant him a discharge. By estate is meant the property in the possession of the debtor at the time proceedings in bankruptcy are commenced to which the trustee may fairly make a pretension of claim.[9] In the exercise of its summary jurisdiction a court of bankruptcy may order the bankrupt or his agent to pay over to the trustee such property as he has in his possession and punish him for contempt of court if he disobeys,[10] or compel restitution by persons who have forcibly or unlawfully seized and taken out of the custody of the court property which had lawfully come into its possession as a part of the bankrupt's property,[11] or determine claims against the bankrupt's property in the possession of the court,[12] or determine validity and the relative priority of conflicting claims to a fund arising from the sale of property,[13] or determine whether particular property in question is a part of the bankrupt's estate and subject to distribution to his creditors,[14] or to order paid to the trustee money in the hands of a sheriff acquired by levy and sale within four months prior to the filing of the petition in bankruptcy,[15] but not when the money has been paid over to

[8] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[9] *In re* New England Piano Co., 122 Fed. Rep. 937, 9 Am. B. R. 767; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178.

[10] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Rosser (C. C. A., 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612. An assignee for creditors is an agent of the debtor. Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; *In re* Stokes, 106 Fed. Rep. 312.

[11] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178.

[12] White v. Shloerb, 178 U. S. 542, 4 Am. B. R. 178; Keegan v. King, 96 Fed. Rep. 768; *In re* Whitener (C. C. A., 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623, affirmed 121 Fed. Rep. 333.

[13] Chauncey v. Van Dyke (C. C. A., 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 414; *In re* McCullum, 113 Fed. Rep. 393, 7 Am. B. R. 596; *In re* Rochford (C. C. A., 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608.

[14] *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623.

[15] Clarke v. Larremore, 188 U. S.

the judgment creditor,[16] or to order paid to the trustee property in the hands of a bailee or agent who does not claim title to such property,[17] or to enjoin the prosecution of suits founded upon provable debts or to prevent the transfer or disposition of the debtor's property or any interference with the administration of the debtor's estate,[18] or to order an assessment upon the stockholders of a bankrupt corporation for unpaid subscriptions.[19]

A court of bankruptcy has no power to compel a third person claiming property in his possession adversely to the trustee to turn it over to him by summary proceedings.[20] An assignee for the benefit of creditors does not hold his title for value but is simply an agent for the distribution of the proceeds of the debtor's property among his creditors.[21]

A court of bankruptcy may appoint receivers or marshals to take charge of the bankrupt's estate,[22] or to appoint trustees when the creditors fail to elect, or to punish for failure to obey lawful orders and punish for contempts committed before referees.

In administering an estate it is the duty of a court of bankruptcy to determine the proportionate share of each creditor,

486, 9 Am. B. R. 476, affirming *In re* Kenney (C. C. A., 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355.

[16] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004.

See observation of Mr. Justice Brewer in Clarke v. Larremore, 188 U. S. 486.

But see *In re* Breslauer, 10 Am. B. R. 33.

[17] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Moore, 104 Fed. Rep. 896, 5 Am. B. R. 151, *In re* Stokes, 106 Fed. Rep. 312.

[18] Sec. 22, *post.*

[19] *In re* Miller Electric Maintenance Co., 111 Fed. Rep. 515, 6 Am. B. R. 701.

[20] See Sec. 20, *post.* Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421.

[21] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 313.

As to who is an adverse claimant, see Sec. 20, *post.*

[22] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Booneville Nat. Bank v. Blakey (C. C. A., 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; *In re* Florcken, 107 Fed. Rep. 241, 5 Am. B. R. 802.

declare dividends, order payment and close the estate,[23] and in proper cases to reopen it for further proceedings.[24]

These powers and the others mentioned in Sec. 2 of the act are powers in bankruptcy as distinguished from law or equity. This distinction is important for the reason that controversies arise in connection with the administration of nearly every estate, which can be determined only in a suit at law or equity and not in the bankruptcy proceeding.[25]

The summary jurisdiction of a court of bankruptcy may be exercised only with reference to those persons who are parties to the proceedings, and such as may be brought in and made parties under Sec. 2, clause 6, of the act. Such are the bankrupt, the petitioning creditors and such other claimants as may be properly brought in or who voluntarily appear and become parties.[26] It has been held that petitioning creditors, by naming an assignee in a state proceeding as a party to the petition

[23] *In re* Carr, 116 Fed. Rep. 555, 8 Am. B. R. 635.

[24] *In re* Shaffer, 104 Fed. Rep. 982, 4 Am. B. R. 728; *In re* Newton, 107 Fed. Rep. 439, 6 Am. B. R. 52.

[25] See Sec. 20, *post*.

[26] In Fisher v. Cushman (C. C. A., 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654, the court said: "So far as Ida C. Fisher is concerned, there can be no question of jurisdiction, inasmuch as the proceedings have taken place in the case in which she was adjudged bankrupt, and the court therefore clearly had the power to proceed summarily for the purpose of merely compelling her to give her signature on the transfer of the license. So far as Rollin B. Fisher is concerned it is maintained that he was entitled to appropriate the license, or an interest in it, to his personal use, and that therefore the court could not, in the case of Ida C. Fisher in bankruptcy, proceed summarily against him with reference thereto. This objection is met, however, by the fact that Rollin B. Fisher is himself in bankruptcy, and his assignee submitted himself to the proceedings in the district court, which disposes of all substantial questions so far as Rollin B. Fisher is concerned."

In White v. Schloerb, 178 U. S. 542; 4 Am. B. R. 178, the supreme court said: "Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: 'The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.'"

for an adjudication and praying a subpœna for him, cannot thereby bring him into the case for the purpose of future inquiries and determinations to be made in the progress of the case.[27] It seems, however, that an assignee, not holding title adversely to the trustee, may be compelled by order of the bankruptcy court to deliver the property of the bankrupt in his possession to the trustee in bankruptcy.[28] Persons who claim property in their possession adversely to the trustee and who are not parties and who have not voluntarily appeared for the purpose of becoming parties cannot be compelled to come into court under a rule to show cause or other summary process.[28*]

When an application is made to the court to make a summary order directing a respondent to surrender the possession of certain property that is alleged by a trustee to belong to the bankrupt's estate, the court may examine the ground set up by the respondent for his refusal to deliver possession, and to determine whether a real, and not merely a pretended, controversy exists upon this subject.[29]

Should it appear that the claim is fictitious or colorable the court of bankruptcy may retain jurisdiction on the theory that the property is then constructively in the possession of the court of bankruptcy.[30]

The district courts have jurisdiction of suits on trustees' bonds.[31]

The district courts as courts of bankruptcy are invested with "such jurisdiction at law and in equity as will enable them to

[27] *Ex parte* Comingor (C. C. A., 6th Cir.), 107 Fed. Rep. 898, s. c. 5 Am. B. R. 537; Louisville Trust Co. v. Comingor, 184 U. S. 18.

[28] *In re* Thompson, 122 Fed. Rep. 174; *In re* Knight, 125 Fed. Rep. 35; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312, 3 N. B. N. 443; *In re* Smith, 92 Fed. Rep. 135, 2 Am. B. R. 9.

[28*] Bardes v. Hawarden Bank, 178 U. S. 524; Marshall v. Knox, 16 Wall. 551; *Ex parte* Comingor (C. C. A., 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; Louisville Trust Co. v. Comingor, 184 U. S. 18; *In re* Ward, 104 Fed. Rep. 985, s. c. 5 Am. B. R. 215; Jaquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525.

[29] *In re* Baird, 8 Am. 649; Mueller v. Nugent, 184 U. S. 1, 15, 5 Am. B. R. 176.

[30] *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Michie, 116 Fed. Rep. 749, 8 Am. B. R. 734.

[31] U. S. v. Union Surety & Guaranty Co., 9 Am. B. R. 114.

exercise original jurisdiction in bankruptcy proceedings" in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law.[31*]

§ 18. Bankruptcy jurisdiction exclusive.

The original jurisdiction in bankruptcy, conferred on these courts, is exclusive of the courts of the several states,[32] and also of the courts of the United States, not created courts of bankruptcy. The circuit courts have no bankruptcy jurisdiction under the act of 1898.[33]

The exclusive jurisdiction, however, is confined to matters in bankruptcy, and does not extend to matters at law or in equity which may grow out of bankruptcy proceedings.[34] This principle is recognized in section 23 of the act of 1898, which provides for instituting such suits in the circuit courts of the United States and in the state courts. The former acts did not expressly confer or recognize any jurisdiction in the state courts, but the federal and state judges held that R. S. Sec. 711 did not divest the state courts of any jurisdiction at law or in equity.[35]

[31*] Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50. See also R. S., Sec. 566.

[32] R. S. Sec. 711; *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35; Akins v. Stradley, 51 Ia. 414; Broach v. Powell, 79 Ga. 79; Southern v. Fisher, 6 S. C. 345.

[33] B. A. 1898, Sec. 23, where jurisdiction at law and in equity, as distinguished from proceedings in bankruptcy, is conferred upon the circuit courts, and in no place in the act is any bankruptcy jurisdiction conferred upon the circuit courts. As to when bankruptcy proceedings may be had in a circuit court, owing to the district judge being disqualified to act, see Sec. 24, *post*.

[34] Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; Small v. Muller (N. Y. Sup. Ct. App. Div.), 8 Am. B. R. 448; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

[35] Eyster v. Gaff, 91 U. S. 521;

When jurisdiction in bankruptcy attaches, which it does as soon as the petition is filed,[36] it extends over the bankrupt and his estate, and all parties and questions connected therewith. The filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction.[37]

The trustee is vested with the title of the bankrupt's property as of the date when he is adjudged a bankrupt, and it is then in the legal custody of the court. Property thus surrendered to a trustee cannot be affected by any other court, or a person acting under process from any other court attempting to interfere with or withdraw the property from the possession of the trustee.[38] All claims against the bankrupt's property and all controversies concerning the same, including title to the property, which was in his possession at the time of filing the petition, should be presented and adjudicated in the court of bankruptcy.[39] Where the bankruptcy court in the exercise of its customary jurisdiction obtains the lawful custody of property to which liens attach, it has jurisdiction to determine the relative priorities of conflicting claims to the fund realized from the sale of the property.[40]

Burbank v. Bigelow, 92 U. S. 179; Claflin v. Houseman, 93 U. S. 130; Clark v. Ewing, 3 Fed. Rep. 83; Scott v. Kelly, 22 Wall. 57; *In re* Miller, No. 9551, Fed. Cas., s. c. 6 Biss. 30; Cook v. Whipple, 55 N. Y. 150.

[36] B. A. 1898, Sec. 1, clause 10; *In re* Kindt, 98 Fed. Rep. 867, 3 Am. B. R. 546; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178.

[37] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176.

[38] White v. Schloeb, 178 U. S. 545.

A referee or a trustee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshals and receivers are applicable with equal force to the protection of a trustee. Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Shields v. Coleman, 157 U. S. 168; Porter v. Sabin, 149 U. S. 473.

[39] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 2 N. B. N. 721; Keegan v. King, 96 Fed. Rep. 758; *In re* Russell (C. C. A., 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers Calder Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Corbett, 5 Am. B. R. 224; 104 Fed. Rep. 872, *In re* Whitener (C. C. A., 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316; *In re* Emslie (C. C. A., 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992.

[40] Chauncey v. Dyke Bros. (C. C. A., 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444.

All suits against the bankrupt, founded upon a claim from which a discharge would be a release, and pending at the time of the filing of a petition against him, may be stayed until after an adjudication or dismissal of the petition; if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication; or if within that time such person applies for a discharge, then until the question of such discharge is determined.[41] The court may, however, direct the trustee to prosecute or defend a pending suit.[41]

The filing of a petition in bankruptcy does not *propria vigore* abate or suspend a suit pending in a state court at the time.[42] Although the bankrupt court has exclusive jurisdiction of all proceedings in bankruptcy, it does not, upon such proceedings being instituted, draw to it all manner of controversies with the bankrupt.[43] State courts are entitled to notice of some kind before they are required to yield jurisdiction over a pending case.[44] Some cases may proceed to final settlement in the state court; others must be stayed if application is made for that purpose.[45] Where a state court loses its jurisdiction of the *res* by reason of a lien being annulled by the bankruptcy

[41] B. A. 1898, Sec. 11. See Sec. 22, *post.*

[42] Taylor v. Taylor (N. J. Chan.), 45 Atlantic Rep. 440, 4 Am. B. R. 211; Continental Nat. Bank v. Katz (Sup. Ct. Cook Co., Ill.), 1 Am. B. R. 19; Reid, Murdock & Co. v. Cross (Sup. Ct. Cook Co., Ill.), 1 Am. B. R. 34; Heath v. Shaffer, 93 Fed. Rep. 647; 2 Am. B. R. 98; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Horton (C. C. A., 8th Cir.), 102 Fed. Rep. 986, 4 Am. B. R. 486; *In re* Scholtz, 106 Fed. Rep. 834; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

In Pickens v. Dent (C. C. A., 4th Cir.), 106 Fed. Rep. 653, the court said: "The institution of the proceedings in bankruptcy did not devest that [the state] court of its jurisdiction over appellant and his property; and it was clearly not only the right, but the duty, of that court to proceed to final decree in said cause, even if it was advised of the fact that the district court of the United States for the district of West Virginia had adjudicated one of the defendants thereto to be a bankrupt." Affirmed 187 U. S. 177.

[43] Pickens v. Roy, 187 U. S. 177; *In re* Wells, 8 Am. B. R. 75, 114 Fed. Rep. 222; *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815; Lockwood v. Exchange Bank, 190 U. S. 294.

[44] *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35.

[45] See Sec. 22, *post.*

of the defendant the court of bankruptcy may acquire jurisdiction of it.[46]

Where the subject of a suit relates to matter subsequent to the commencement of bankruptcy proceedings, or to property not properly a part of the bankrupt's estate, the suit is not effected by the bankruptcy proceedings. Thus a debt created after the institution of bankruptcy proceedings may be collected out of property subsequently acquired by the bankrupt. Upon the same principle it would seem that a security on a homestead may be enforced in a state court pending the bankruptcy.

§ 19. Limitations to the exercise of jurisdiction.

Although full power and authority is conferred upon courts of bankruptcy, extending to all matters of bankruptcy without limitation, there are two principal restrictions to the exercise of this authority:

First. The power conferred extends only to persons, corporations, partnerships, etc., who are subject to be adjudged bankrupts. These courts have no authority over persons other than those specified in the act to be subject to its provisions.

Second. The courts of bankruptcy are expressly limited to the exercise of bankruptcy jurisdiction within their "respective territorial limits."

The language of this act in this respect is similar to the act of 1867, where the jurisdiction of courts of bankruptcy was limited to "their respective districts." With reference to the meaning of this expression in the act of 1867, Mr. Justice Bradley, in Lathrop *v.* Drake,[47] said: "When the act says that they shall have jurisdiction in their respective districts it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation."

A district court, sitting as a court of bankruptcy, has no greater power or authority outside of its own district than it

[46] *In re* Tune, 8 Am. B. R. 285. [47] 91 U. S. 517.

had before the bankrupt statute was enacted. Thus it has been held that a writ of subpœna or other process cannot be served beyond the limits of the district of the court issuing the writ.[48] An exception to this rule exists in subpœnas for witnesses under a special provision applicable to courts of bankruptcy, being courts of the United States.[49]

There is no objection to a person living without the district entering his appearance voluntarily. In such case the court has complete jurisdiction over him as though he had been legally served with process.[50] So also if a nonresident of the district comes into the case for the purpose of proving a claim he is subject to the jurisdiction of the court, irrespective of his place of residence,[51] and is bound to take notice of and obey the orders of the court to the same extent as any other party to the proceedings. When a voluntary appearance has been entered it cannot be withdrawn without permission of the court.[52] Jurisdiction cannot be conferred by consent or voluntary appearance when otherwise the court is without jurisdiction of the subject-matter.[53]

Clearly the words "in their respective territorial limits" do not confine the jurisdiction of the court of bankruptcy to cases arising within the district of the court.[54] Ancillary suits

[48] *In re* Waukesha Water Co., 8 Am. B. R. 715, 116 Fed. Rep. 1009; Jobbins v. Montague, No. 7329, Fed. Cas., s. c. 5 Ben. 425; Paine v. Caldwell, No. 10674, Fed. Cas., s. c. 1 Hask. 452; *In re* Hirsch, No. 6529, Fed. Cas., s. c. 2 Ben. 493; *In re* Litchfield, 13 Fed. Rep. 868.

[49] R. S. Sec. 876 provides that "subpœnas for witnesses, who are required to attend a court of the United States, in any district, may run into any other district: *Provided*, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." See also B. A. 1898, Sec. 41.

[50] Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 867, 4 Am. B. R. 646; *In re* Smith, 9 Am. B. R. 98; *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355.

[51] *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 482; Clay v. Smith, 3 Pet. 411.

[52] *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355. See also U. S. v. Curry, 6 How. 106; Eldred v. Michigan Ins. Bank, 17 Wall 545.

[53] Jobbins v. Montague, No. 7329, Fed. Cas., s. c. 5 Ben. 425.

[54] Lathrop v. Drake, 91 U. S. 516;

growing out of the original proceedings may be prosecuted in courts of bankruptcy in other districts unless restricted by some other clause of the bankrupt act.[55]

§ 20. Jurisdiction of plenary suits at law and in equity as distinguished from summary proceedings.

Prior to the decision of the supreme court in Bardes *v.* Hawarden Bank,[56] the district courts and the circuit courts of appeals expressed widely different opinions as to the jurisdiction of the courts of bankruptcy to entertain independent suits at law or in equity against third parties to collect debts or recover property belonging to the bankrupt estate. Most of these courts held that they had jurisdiction of such suits.[57]

It is now settled that the bankruptcy act of 1898 conferred no jurisdiction upon the courts of bankruptcy of suits at law or in equity brought by trustees against third parties to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent under the act, except by consent of the defendant.[58] But the courts of bankruptcy are vested with jurisdiction by the proposed defendant's consent to entertain such suits.[59] It is not necessary that the proposed defendant's consent should be in writing or upon the record in express terms. He will be presumed to consent if he appears and pleads to the merits and will not be allowed thereafter to

Burbank v. Bigelow, 92 U. S. 179; Marshall v. Knox, 16 Wall. 551; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552; Mason v. Hartford P. & F. R. Co., 19 Fed. Rep. 53; Shainwald v. Lewis, 5 Fed. Rep. 513.

[55] See Ancillary Proceedings in other Districts, Sec. 21, *post.*

[56] 178 U. S. 524; 4 Am. B. R. 163; 2 N. B. N. 725.

[57] The cases are collated in a note to Bardes v. Hawarden Bank, 4 Am. B. R. 163.

[58] Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 4 Am. B. R. 177; Hicks v. Knost, 178 U. S. 541, 4 Am. B. R. 178; Jacquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525; Wall v. Cox, 181 U. S. 244, 5 Am. B. R. 727; Real Estate Trust Co. v. Thompson, 7 Am. B. R. 520.

[59] Bardes v. Hawarden Bank, 178 U. S. 524; 4 Am. B. R. 163; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Philips v. Turner (C. C. A. 5th Cir.), 114 Fed. Rep. 726, 8 Am. B. R. 171.

object to the jurisdiction of the court [60] or withdraw his consent.[61] A stipulation to pay a fund into the registry of the court to be dealt with by that court, the rights of the parties to be determined upon summary petition, is not a consent to the jurisdiction of the court of a plenary suit.[62] A general appearance to a petition will not prevent the defendant from objecting to the jurisdiction of the court to an amended petition, which for the first time states a case against him.[63] Proving a claim in bankruptcy as a secured debt is not such a consent as to give a court of bankruptcy jurisdiction of a controversy by the claimant to enforce such debt in state court.[64]

Under these decisions, prior to the amendment of February 5, 1903,[65] the trustee was required to resort to the state courts to recover property in the possession of third parties or to collect debts due an estate by persons not parties to the proceedings, "unless by consent of the proposed defendant," and in such cases as could be prosecuted in the circuit courts of the United States under Sec. 23*a* of the bankruptcy act of 1898.[66]

It should be observed that the limitations of Sec. 23*b* apply only to suits instituted by trustees and do not affect proceedings which may be properly instituted by petitioning creditors before the appointment of a trustee.[67] It does not affect proceedings against trustees. Any claim made to property in

[60] *In re* Connolly, 100 Fed. Rep. 620, 3 Am. B. R. 842; *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

[61] *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

[62] Havens & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569.

[63] *In re* Hemby-Hutchinson Pub. Co., 105 Fed. Rep. 909, 5 Am. B. R. 569. In *Ex parte* Comingor, 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed in 184 U. S. 18, the circuit court of appeals for the sixth circuit said:

"It should be observed in this connection that the consent mentioned in Sec. 23*b*, means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. . . . We are, therefore, inclined to think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time he did, which was before the making of the final order, and that the court erred in refusing to entertain it."

[64] Pickens v. Dent, 187 U. S. 177.

[65] 32 Stat. at L. 797.

[66] See Sec. 25, *post*.

[67] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623.

the lawful custody of a court of bankruptcy or an officer thereof must be adjudicated in that court and by no other court.[68] Sec. 2 of the bankrupt act of 1898 confers ample jurisdiction for this purpose.

By the amendment of February 5, 1903, Congress conferred upon the bankruptcy courts jurisdiction of suits for the recovery of property under Sec. 60*b*, Sec. 67*e* and Sec. 70*e*.[69] It has been held that the courts of bankruptcy have jurisdiction of suits at law and in equity by a trustee begun since February 5, 1903, and are not limited to suits brought by trustees appointed in bankruptcy proceedings in which the adjudication took place after the amendment was adopted.[70] The effect of this amendment is unquestionably to confer sufficient jurisdiction at law or in equity upon the courts of bankruptcy for the purpose of recovering property in the possession of third parties claimed as preferential or fraudulent transfers. Congress evidently intended to confer on the courts of bankruptcy full powers at law or in equity in respect to this subject-matter. If a suit in equity is begun, founded upon the recovery of fraudulent transfers, a court of bankruptcy has power to settle all controversies arising out of this subject-matter and for this

[68] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 2 N. B. N. 721; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992.

In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316, the court said:

"The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654, the court said:

"The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

[69] Secs. 23*b*, 60*b*, 67*e* and 70*e*, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[70] Pond v. N. Y. Exch. Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343.

purpose may entertain cross bills and other pleadings usual in a court of equity.

There is also conferred upon the courts of bankruptcy concurrent with the circuit courts of the United States a limited jurisdiction of suits at law to punish certain offenses named in the act.[71]

Plenary Suits Against Adverse Claimants.— It is well settled that summary proceedings on motion and notice or rule to show cause cannot be substituted for plenary suits at law or in equity to recover property in the possession of third persons who claim to own it.[71*] This applies with equal force to controversies arising before and since the amendment of 1903. The reason for this rule is that such parties would be deprived of the usual processes of law in defense of their rights in a summary proceeding. The defendant in such cases may be entitled to a trial by jury, or to put in evidence upon an issue regularly made by pleadings, or to have the decree or judgment reviewed upon appeal or writ of error, or to have the judgment or decree enforced by execution and not by process for contempt for disobeying a summary order of court.[72]

[71] B. A. 1898, Sec. 23*c*. See also Chap. 21.

[71*] Jaquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525; Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421; Marshall v. Knox, 16 Wall. 556; Smith v. Mason, 14 Wall. 419; *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14.

[72] *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed 184 U. S. 18, Judge Severens, speaking for the circuit court of appeals, said:

"The judgment would not be enforced by execution, but by process for contempt. The proceeding when employed for such a purpose is in the nature of a civil remedy for the recovery of money. Quite generally, if not universally, state statutes founded on public policy forbid imprisonment as a remedy to compel the satisfaction of debts or other obligations not founded on wilful wrong, and this policy may not be countervailed by the consent of parties to a proceeding which results in defeating it. And such statutes are given effect in the courts of the United States by Rev. Stat., Secs. 990, 991."

See also Mallory Mfg. Co. v. Fox, 20 Fed. 409, per Wallace C. J.; Low v. Durfee, 5 Fed. Rep. 256, per Lowell, C. J.; *Ex parte* Hooson, Law Rep. 8 Ch. App. 251.

As to the right to trial by jury, see Jones v. MacKenzie (C. C. A. 8th Cir.), 122 Fed. Rep. 390.

The general rule is that the trustee must bring an independent suit at law or in equity to recover money or property in the possession of a person who claims title to it as against the trustee in bankruptcy.[73] It is not necessary in order to be an adverse claimant that he should claim to be the absolute owner of the property in his possession. It is sufficient if money was deposited with him to indemnify him for a liability and that liability has not been determined and satisfied.[74] But a court of bankruptcy has full power by summary proceedings to determine all controversies relating to the title of property which is in the custody of the court or an officer thereof,[75] or to compel a person to deliver to the trustee property, claimed as part of the bankrupt's estate, in his possession to which he has no claim of title as against the trustee, such as a naked bailee,[76] agent[76] or assignee for the benefit of creditors.[77]

The form of pleading is immaterial where the court has jurisdiction to proceed by way of plenary suit and no seasonable objection is taken to the form of procedure, and where under the form of procedure adopted the rights of the respondent are substantially as in a plenary suit.[78]

[73] Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537.

[74] Jacquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525.

[75] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; Keegan v. King, 96 Fed. Rep. 758; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623 (affirmed C. C. A. 2d Cir.), 121 Fed. Rep. 333.

[76] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

[77] *In re* Stokes, 106 Fed. Rep. 312; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623.

[78] *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; 3 N. B. N. 206; Milner v. Meek, 95 U. S. 252; Stickney v. Wilt, 23 Wall. 150.

In re Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355, this rule was applied but not directly decided.

In re Steuer, *supra,* an amendment was permitted to be made to a petition for an injunction and then sustained to recover a preference by Judge Lowell, who said:

"In order that proceedings to recover property may be validly com-

It has been held that a plenary suit at law or in equity was necessary in the following cases: An action of replevin to recover specific property,[79] or a suit to set aside fraudulent transfer of money or property and to recover the same for the estate,[80] or to restrain a third party from dealing with property claimed to belong to the bankrupt's estate,[81] or to recover fees paid by an assignee to himself and his attorney for services rendered in a state court,[82] or to recover a judgment which was collected by execution and the money paid over to the judgment creditor before the petition in bankruptcy was filed against the judgment debtor,[83] or a proceeding to foreclose a collateral security held by the bankrupt to secure a debt of a third person,[84] or a bill by creditors to reach and subject to their claims exempt property of a bankrupt,[85] or a suit to recover money deposited with a surety to indemnify him for his liability upon a bail bond where that liability has not been determined and satisfied.[86]

A claimant to property which has been seized by a marshal under a warrant issued pursuant to Sec. 2, clause 3, as forming a part of the bankrupt's estate, is entitled to have the contro-

menced by petition in bankruptcy, the petition must contain a complete statement of the cause of action, and a sufficient prayer for relief. Upon such a petition process must be issued, and the parties must be given full opportunity to present evidence and arguments in their own behalf. In other words, though the formal requisites of a bill in equity may be wanting, yet the substantial requisites of equitable justice must be complied with as fully in a petition in bankruptcy as in a bill in equity."

[79] Mitchell v. McClure, 178 U. S. 539, 4 Am. B. R. 177; Cooke v. Scovil, 53 Atl. Rep. 692.

[80] Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; Hicks v. Knost, 178 U. S. 541, 4 Am. B. R. 178; *In re* Michie, 8 Am. B. R. 734, 116 Fed. Rep. 749.

[81] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215.

[82] Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; *In re* Klein & Co., 8 Am. B. R. 559; *In re* Carver & Co., 113 Fed. Rep. 138, 7 Am. B. R. 539.

[83] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004.

Consult observation of Mr. Justice Brewer in Clark v. Larremore, 188 U. S., at p. 490.

[84] McKey v. Smith, 105 Fed. Rep. 899.

[85] Woodruff v. Cheeves (C. C. A. 5th Cir.), 105 Fed. Rep. 601, 5 Am. B. R. 296.

[86] Jacquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525.

versy determined by a plenary action which may be either in a court of bankruptcy or elsewhere.[87]

It has been held, on the other hand, that the following are not adverse claimants: An assignee for the benefit of creditors,[88] a person who has mere possession of the property without claim of title,[89] or a mortgagee who enters into possession under a default clause in the mortgage before the expiration of the time named in that clause.[90]

§ 21. Ancillary proceedings in other districts.

As has been stated, each court of bankruptcy is restricted in the exercise of its authority within its own territorial limits.[91] It will, however, be necessary to institute proceedings ancillary to and in aid of the proceedings in bankruptcy in courts without the district in which the principal proceedings are had.[92] That the courts of bankruptcy for such other districts have jurisdiction to entertain auxiliary proceedings to perfect and accomplish the objects of the act can hardly

[87] *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14.

[88] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312.

[89] *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

[90] *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427.

[91] Sec. 19, *ante*.

[92] *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 352; Judge Shiras said:

"The property is not within the territorial jurisdiction of this court. The adjudication in bankruptcy has not yet been had, and this court has not yet been clothed with the full jurisdiction over the property of the alleged bankrupt that will accrue after the adjudication has taken place. Of course, no trustee has yet been appointed. Under these circumstances it is difficult to see how this court can exercise jurisdiction or control over the property in Illinois, or can confer any authority on its receiver to bring suit in Illinois against third parties to obtain possession of the property. The proper course to pursue is for the petitioning creditors to take proceedings in the proper court, state or federal, in Illinois, in their own name, setting up the proceedings now pending in bankruptcy in this court as the basis of their action, and asking that court to protect the rights of creditors in the property situated in Illinois, either by the appointment of a receiver, by injunction, or any other appropriate remedy. If the adjudication in bankruptcy is had, then the trustee who will be appointed can then appear in that case on behalf of creditors, and take control of the proceedings."

be considered an open question in view of the decisions of the courts under prior acts and the reasoning upon which these decisions are based.[93] But the extent of ancillary jurisdiction of the bankruptcy courts under the law of 1898 will depend upon the judicial construction of the act. Ancillary jurisdiction has been exercised[94] and denied.[95]

The courts of other districts, so far as an ancillary jurisdiction exists, are auxiliary, not in any sense implying power to carry out and enforce the judgment and orders of one another, except upon due process in the particular district.[96] In such cases it is necessary to acquire jurisdiction of persons and property by the same means employed in other cases.[96]

§ 22. Power to stay proceedings in other courts.

The same reason does not exist for refusing to interfere by injunction to stay proceedings in a federal court that exists when the case is pending in a state court. The courts of bankruptcy have enjoined proceedings in federal courts when such proceedings interfered with the exercise of bankruptcy jurisdiction.[97]

All courts of the United States are forbidden "to stay proceedings in any court of a state, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy.[98] The bankruptcy act of 1898 expressly

[93] Lathrop v. Drake, 91 U. S. 516; Burbank v. Bigelow, 92 U. S. 179; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552; Moore v. Jones, No. 9768 Fed. Cas., s. c. 23 Vt. 739; *Ex parte* Martin, No. 9149 Fed. Cas., s. c. 5 Law Rep. 158; Goodall v. Tuttle, No. 5533 Fed. Cas., s. c. 3 Biss. 219; *In re* Tifft, No. 14034 Fed. Cas., s. c. 19 N. B. R. 201; Shainwald v. Lewis, 5 Fed. Rep. 513; Mason v. Hartford P. & F. R. Co., 19 Fed. Rep. 53.

[94] *In re* Peiser, 115 Fed. Rep. 199.

[95] *In re* Williams, 120 Fed. Rep 38; *In re* Williams, 123 Fed. Rep. 321; Ross-Meeham Foundry Co. v. Southern Car and Foundry Co., 124 Fed. Rep. 403.

[96] Shainwald v. Lewis, 5 Fed. Rep. 513.

[97] *In re* People's Mail Steamship Co., No. 10970 Fed. Cas., s. c. 3 Ben. 226, the court of bankruptcy enjoined proceedings in admiralty upon a libel *in rem*. But see The Ironsides, No. 7069 Fed. Cas., s. c. 4 Biss. 518.

[98] R. S. Sec. 720; Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340; Peck v. Jenness, 7 How. 625.

confers power upon courts of bankruptcy to issue injunctions to stay proceedings within this exception.[99]

The court has power to stay any suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of the petition against him.[100] It should be observed that this power is limited to suits founded upon a claim from which a discharge would be a release.[101] The word "suit" is broad enough in its scope to include all forms of procedure at law or in equity, or in admiralty, where the personal liability of the debtor is sought to be fixed or determined by final judgment. The stay may be had at any stage in the suit while it is pending in the state court, even after execution [102] and before the sheriff has paid the money to the execution creditor.[103]

Under the act of 1867 power to grant injunctions was expressly conferred for the purpose of preventing any transfer or disposition of the debtor's property or any interference there-

[99] B. A. 1898, Sec. 11*a* and Sec. 2, clause 15; Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476, affirming *In re* Kenney, 105 Fed. Rep. 897, 5 Am. B. R. 355; Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; Blake, Moffat & Towne v. Francis Valentine Co., 89 Fed. Rep. 691; *In re* Gutwillig, 90 Fed. Rep. 475, on rehearing, p. 481, s. c. (C. C. A. 2d Cir.), 92 Fed. Rep. 337, 1 Am. B. R. 388; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. Am. B. R. 261, s. c. 174 U. S. 590.

[100] B. A. 1898, Sec. 11*a*; *In re* Kenney, 95 Fed. Rep. 427, 2 Am. B. R. 494, s. c. Clarke v. Larremore, 188 U. S. 486; 9 Am. B. R. 476; *In re* Goldberg, 117 Fed. Rep. 692; 9 Am. B. R. 156; *In re* Butts, 120 Fed. Rep. 966; *In re* Ball, 118 Fed. Rep. 672; Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Lesser (C. C. A. 2d Cir.), 99 Fed. Rep. 913, 3 Am. B. R. 758.

In re Hilton, 4 Am. B. R. 774, a suit on an unliquidated claim, which might be proved in bankruptcy, but was voluntarily withheld for fifteen months, was stayed.

[101] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868; *In re* Butts, 120 Fed. Rep. 966; *In re* Cole, 106 Fed. Rep. 837; Continental National Bank v. Katz (Supr Ct. Cook Co., Ill.), 1 Am. B. R. 19.

[102] *In re* Kletchka, 92 Fed. Rep. 901, 1 Am. B. R. 479; *In re* De Lany & Co., 124 Fed. Rep. 280.

[103] *In re* Kenney, 95 Fed. Rep. 427, s. c. *sub nom* Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476.

But see *In re* Shoemaker, 112 Fed. Rep. 648, 7 Am. B. R. 437.

with.[104] This power was frequently exercised.[105] The same power has been exercised under the provisions of the present act.[106]

The court of bankruptcy has also exercised jurisdiction to enjoin suits against the bankrupt instituted after the commencement of the bankruptcy proceedings.[107]

An application to stay suits may be made to the state court in which the suit is pending,[108] or to a court of bankruptcy. The provisions of the bankruptcy act relating to staying suits is binding upon the state courts and is applied and enforced by them quite as much as by the bankruptcy courts.[109]

The application to the state court is usually made by petition or motion supported by a certified copy of the petition in bankruptcy. Where the adjudication has been made before the application in state court a certified copy of the order should also be filed in the state court. A copy of this petition or motion and exhibits should be served on the plaintiff and brought to the notice of the state court.[110] If a proper case is made the

[104] Act of March 2, 1867; 14 Stat. at L. 536; R. S. Sec. 5024.

[105] Chapman v. Brewer, 114 U. S. 158; *In re* Mallory, No. 8991 Fed. Cas., s. c. 1 Saw. 88, 6 N. B. N. 22; Markson v. Heaney, No. 9098 Fed. Cas., s. c. 1 Dill. 497, 4 N. B. N. 510; Irving v. Hughes, No. 7076 Fed. Cas., s. c. 2 N. B. N. 61; Jones v. Leach, No. 7475 Fed. Cas., s. c. 1 N. B. N. 595; *In re* Wallace, No. 17094 Fed. Cas., s. c. Deady 433, 2 N. B. N. 134.

[106] *In re* Gutman, 114 Fed. Rep. 1009, 8 Am. B. R. 252; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261, s. c. 174 U. S. 590; *In re* Gutwillig (C. C. A. 2d Cir.), 92 Fed. Rep. 337, 1 Am. B. R. 388, affirming 90 Fed. Rep. 475; *In re* Knight, 125 Fed. Rep. 35; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126.

[107] *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537; *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R. 604.

See also White v. Schloerb, 178 U. S. 542.

[108] As was done in Continental Nat. Bk. v. Katz (Supr. Ct. Cook County, Ill.), 1 Am. B. R. 19; Reid v. Cross (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 34; Vietor v. Lewis (N. Y. Supr. Ct. App. Div.), 1 Am. B. R. 667; Reed v. Equitable Trust (Supr. Ct. Ga.), 8 Am. B. R. 242.

[109] *In re* Geister, 97 Fed. Rep. 322, 3 Am. B. R. 228; Carter v. People's Nat. Bank, 35 S. E. Rep. 61, 4 Am. B. R. 211 (note); Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242; Delavergue v. Farrand, 1 Mich. (N. P.) 90; Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[110] *In re* Geister, 97 Fed. Rep. 322, 3 Am. B. R. 228, the court said:

state court will order proceedings stayed in accordance with Sec. 11*a* of the bankruptcy act, that is, until after an adjudication or the dismissal of the petition. If the debtor has been adjudged a bankrupt, the stay may be until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined. If the discharge has been granted it should be pleaded in the state court in bar of the suit instead of making an application to stay the suit.

The application to stay suits in a state court may be made in the court of bankruptcy administering the estate. The application for an injunction should be filed in the clerk's office and not in that of the referee.[111] The application is regularly made by the bankrupt, the petitioning creditors or the trustee, if one has been appointed. It is made by petition or motion supported by affidavits. The affidavit may be sworn to by the attorney of the creditors, when they live at a distance and his authority to make the application will be presumed.[112] The petition should state the suit, the court in which it is pending, the cause of action, and show that it is founded upon a debt provable in bankruptcy and that the suit is one that may be properly stayed.[113] The petition should also state the names of the persons to be enjoined. If such persons are not already before the court they must be brought in by subpœna.[114] The

"The bankrupt who is the defendant in the state court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in Sec. 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the state court to grant the stay prayed for."

[111] *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[112] *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156.

[113] *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Klein, 97 Fed. Rep. 31, 3 Am. B. R. 174; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Emslie (C. C. A. 2d. Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126; Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746.

[114] See Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623.

Sec. 2, clause 6, of the act authorizes the court of bankruptcy "to bring and substitute additional persons or parties in proceedings in bankruptcy when necessary in the complete determination of the matter in controversy."

authority of a court of bankruptcy to enjoin proceedings in a state court should be exercised through persons subject to the jurisdiction of the bankruptcy court and the writ of injunction directed to them and not to the state court.[115]

The proceedings upon such an application may be *ex parte* and stay may be granted before the subpœna is served upon the bankrupt. The injunction and the subpœna to new parties may be served at the same time.[116]

The application for a stay of proceedings must be heard and decided by the judge and not by the referee.[117] The judge may refer such an application or any specific issue arising thereon to the referee to ascertain and report the facts,[117] but the judge must make the order granting or refusing the injunction.

The court of bankruptcy has exclusive power to determine whether the suit pending in the state court is one founded upon a provable claim and whether it should be stayed or not.[118] Whether the court will exercise this extraordinary power rests in the sound discretion of the judge.[119] This discretion can be reviewed by a circuit court of appeals on petition for re-

[115] *Ex parte Christy*, 3 How. 292; Samson v. Burton, No. 12285 Fed. Cas., s. c. 5 Ben. 343.

[116] In Stengel v. The Leidigh Carriage Co., in the district court for the southern district of Ohio (not reported), the Leidigh Carriage Co. of Dayton, on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount of something like $50,000. Attachments were issued and levies made under these judgments prior to the assignment, and some or all of the property had been sold, but the funds arising therefrom had not been distributed. Upon an application for an injunction Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from taking any further proceedings in the state court. The injunction and subpœna were served at the same time.

[117] Gen. Ord. 12, par. 3.

[118] Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596.

[119] *In re* Knight, 125 Fed. Rep. 35, 39, Judge Evans said:

"Doubtless the court, while it may, under Sec. 11 of the statute, stay proceedings in actions in a state court in certain cases, can decline to exercise its jurisdiction and power in that respect. But this depends entirely upon its own discretion — a discretion which cannot be controlled otherwise than by appellate proceedings in a higher court.

view,[120] but will not be interfered with by the appellate court unless it appears that it has been abused.

A stay will be granted only when some benefit to the bankrupt's estate will be derived thereby. Thus a suit to foreclose a mortgage or other lien may be stayed when the property is likely to be sold for more than the amount of the lien debt,[121] but not when it is insufficient to pay it.[122]

The courts of bankruptcy have granted injunctions to stay proceedings in the state courts in the following cases: attachment suits,[123] an action upon an unliquidated claim which might be liquidated and proved in bankruptcy,[124] a suit to enforce a mechanic's lien,[125] or a suit to foreclose a mortgage,[126] a sheriff from paying money collected upon execution to the judgment creditor,[127] a trust company from paying proceeds

This discretion has been exercised by this court in several instances — among them, in the case of Holloway, 93 Fed. Rep. 639, and in the case of Porter, 109 Fed. Rep. 111. Doing this did not depend upon any want of power in such cases, but because it was discreet not to exercise the power, inasmuch as no benefit could come to the general creditors by staying a suit in the state court, the entire avails of which must go to the plaintiff in the action there pending."

[120] As was done in Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868.

[121] *In re* Ball, 118 Fed. Rep. 672; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770; *In re* San Gabriel Sanatorium Co. (C. C. A. 9th Cir.), 102 Fed. Rep. 310, 4 Am. B. R. 197; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Nathan, 92 Fed. Rep. 590.

[122] Heath v. Shaffer, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[123] Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156.

[124] *In re* Hilton, 4 Am. B. R. 774.

[125] *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126.

[126] *In re* Ball, 118 Fed. Rep. 672; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770; *In re* San Gabriel Sanatorium Co. (C. C. A. 9th Cir.), 102 Fed. Rep. 310, 4 Am. B. R. 197; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Nathan, 92 Fed. Rep. 590.

But see Heath v. Shaffer, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[127] *In re* Kenney, 95 Fed. Rep. 427, s. c. Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476.

of a sale deposited with it to abide a final judgment in a state court,[128] an action by a plaintiff against his bankrupt vendee,[129] to prevent arrest and imprisonment upon an execution issued from a state court,[130] an action of ejectment by a landlord,[131] a bank from endorsing a promissory note given by a debtor of the bankrupt,[132] to prevent a transfer of property mortgaged by the mortgagee,[133] a proceeding in the state court which would defeat the provisions of a bankrupt act or interfere with the administration of the estate of the debtor,[134] and proceedings under a general assignment for the benefit of creditors.[135]

The courts of bankruptcy have refused to stay suits in the following cases: a suit founded upon a claim from which a discharge would not be a release,[136] as a suit to enforce alimony,[137] or an action founded in fraud,[138] or controversies relating to exempt property,[139] or an execution on judgment in a suit upon a bail bond,[140] a creditors' bill or other suit to enforce a valid lien or attachment begun more than four months prior

[128] *In re* Riker, 5 Am. B. R. 720.

[129] *In re* Butts, 120 Fed. Rep. 966.

[130] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80.

[131] *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537.

[132] *In re* Jackson, 94 Fed. Rep. 797, 2 Am. B. R. 501.

[133] *In re* Nathan, 92 Fed. Rep. 590.

[134] *In re* Hornstein, 122 Fed. Rep. 266; *In re* Knight, 125 Fed. Rep. 35; *In re* Gutman, 114 Fed. Rep. 1009, 8 Am. B. R. 252; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658.

See also White v. Schloerb, 178 U. S. 542.

[135] *In re* Krinsky, 112 Fed. Rep. 972, 7 Am. B. R. 535; *In re* Knight, 125 Fed. Rep. 35; *In re* Gutwillig, 90 Fed. Rep. 481 (C. C. A. 2d Cir.), 92 Fed. Rep. 337, 1 Am. B. R. 388; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261, s. c. 174 U. S. 590.

Consult Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[136] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868; Continental Nat. Bank v. Katz (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 19; *In re* Cole, 106 Fed. Rep. 837; *In re* Shepard, 97 Fed. Rep. 187.

[137] *In re* Shepard, 97 Fed. Rep. 187.

See also Audubon v. Shufeldt, 181 U. S. 575; Dunbar v. Dunbar, 190 U. S. 340.

[138] *In re* Cole, 106 Fed. Rep. 837.

[139] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868.

See also Lockwood v. Exch. Bk., 190 U. S. 294.

[140] *In re* Franklin, 106 Fed. Rep. 666; Jacquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525.

to the commencement of bankruptcy proceedings,[141] a replevin action where the property is in the possession of the state court,[142] or generally where the property in controversy is lawfully in the possession of the state court having jurisdiction to administer the same,[143] an action against a marshal individually for trespass,[144] an action to foreclose a lien and for personal judgment,[145] an action to enjoin third parties from disposing of property which the court of bankruptcy cannot order paid to a trustee,[146] to enjoin creditors from prosecuting their claims against a corporation to judgment for the purpose of fixing the statutory liability of its officers and stockholders.[147] But the execution of such judgment against the bankrupt corporation will be enjoined.[147]

The language of the injunction should be in accordance with the statute. If the application is made before an adjudication the stay should be until after the adjudication or dismissal of the petition.[148] If the debtor has been adjudged a bankrupt the suit may be stayed until twelve months after the date of such adjudication, and if within that time such person applies for a discharge, then until the question of such discharge is determined.[149] No injunction should be granted to stay a suit after the discharge is granted.[150] If an injunction had been

[141] Metcalf v. Barker, 187 U. S. 165, reversing *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815, *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542; *In re* Snell, 125 Fed. Rep. 154; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79.

[142] *In re* Wells, 114 Fed. Rep. 222, 8 Am. B. R. 75.

[143] Pickens v. Roy, 187 U. S. 177, 9 Am. B. R. 47; Frazier v. Southern Loan & Trust Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707. See also Sec. 23, *post*.

[144] McLean v. Mayo, 7 Am. B. R. 115.

[145] *In re* Greater American Exposition, 102 Fed. Rep. 986, 4 Am. B. R. 486; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

[146] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215; *In re* Browne, 104 Fed. Rep. 762, 5 Am. B. R. 220.

But see *In re* Smith, 8 Am. B. R. 55.

[147] *In re* Remington Auto. & Motor Co., 119 Fed. Rep. 441; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468.

[148] B. A. 1898, Sec. 11*a*.

[149] B. A. 1898, Sec. 11*a*.

[150] B. A. 1898, Sec. 11*a*.

granted prior to the discharge it should be dissolved when the discharge is granted.[151]

When an injunction is issued it should be served upon the parties personally, but it is not necessary where the parties have actual notice of its issuance.[152]

Staying a suit in a state court is not a dismissal. It does not defeat the cause of action, provided no discharge is granted. It merely suspends proceedings in the state court so long as the injunction is in force. Future action in the state court depends upon the action of the court of bankruptcy. If a discharge is refused the injunction is dissolved. If the discharge is granted the bankrupt may plead it in the suit.[153]

When the suit is pending in another district from that in which the original case is pending, it would seem that the court of bankruptcy for such district might issue the injunction in the exercise of ancillary jurisdiction.[154]

If no steps are taken to stay proceedings in a state court, or a stay is refused, such proceedings, after the adjudication in bankruptcy are valid and binding.[155] The fact that the plaintiff in the state court proves his claim in bankruptcy does not operate to deprive the state courts of jurisdiction, nor amount to a consent to the exercise of exclusive jurisdiction by the court of bankruptcy.[156] If a case is not stayed the trustee may apply to the court of bankruptcy for leave to prosecute and defend such pending suits.[157]

Any party in interest may move to dissolve the injunction.[158]

[151] *In re* Flanders, 121 Fed. Rep. 936; *In re* Rosenthal, 108 Fed. Rep. 368, 5 Am. B. R. 799; *In re* Herzberg, 25 Fed. Rep. 690.

[152] *In re* Krinsky, 112 Fed. Rep. 972, 7 Am. B. R. 535.

[153] *In re* Wesson, 88 Fed. Rep. 855; *In re* Rosenberg, No. 12054 Fed. Cas., s. c. 3 Ben. 14; *In re* Thomas, No. 13890 Fed. Cas., s. c. 3 N. B. N. 38; Banque-Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Ruiz v. Eicherman, 5 Fed. Rep. 790.

[154] Sherman v. Bingham, No. 12762 Fed. Cas., s. c. 3 Cliff. 552; Lathrop v. Drake, 91 U. S. 516. See Ancillary Jurisdiction, Sec. 21. *Contra, In re* Richardson, No. 11774 Fed. Cas., s. c. 2 Ben. 517; *In re* Williams, 120 Fed. Rep. 38.

[155] Boynton v. Ball, 121 U. S. 466-7; Pickens v. Roy, 187 U. S. 177; Metcalf v. Barker, 187 U. S. 165; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

[156] Pickens v. Roy, 187 U. S. 177.

[157] B. A. 1898, Sec. 11*b* and *c*.

[158] *In re* Rosenthal, 108 Fed. Rep. 368, 5 Am. B. R. 799.

If the stay of proceedings was improperly granted the court of bankruptcy may set aside the order upon motion seasonably filed for that purpose.[159] A restraining order is binding and conclusive upon all parties until it is set aside.[160]

§ 23. Power to obtain possession of property — In custodia legis.

Where property, claimed to belong to the estate of the bankrupt, is voluntarily surrendered to the trustee in bankruptcy there can be no controversy.

Where the property is in the possession of the bankrupt or his agent, at the time the petition in bankruptcy was filed, the court of bankruptcy in which the case is pending may summarily order him to deliver to the trustee such property and commit him for contempt if he fails to do so.[161]

Where property, claimed to belong to the bankrupt, is in the possession of a third party at the time of filing the petition in bankruptcy, who claims title to it as against the trustee, the court of bankruptcy cannot summarily order such property delivered to the trustee. A plenary suit at law or in equity must be brought to recover it either in a court of bankruptcy or a state court. This subject has been considered elsewhere.[162]

Where property is in the actual and lawful possession of a state court or an officer thereof and such court has jurisdiction to administer such property, its possession will not ordinarily be disturbed by process issued by a court of bankruptcy.[163] Thus where the possession of a state court is acquired by a judgment creditor's suit begun more than four months prior to bankruptcy,[164] or where a receiver has taken possession of

[159] *In re* Snell, 125 Fed. Rep. 154.

[160] Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596.

[161] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Rosser, (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612, *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151; *In re* Stokes, 106 Fed. Rep. 312.

[162] Sec. 20, *ante*.

[163] Pickens v. Roy, 187 U. S. 177, 9 Am. B. R. 47; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Frazier v. Southern L. & T. Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707; *In re* Price, 92 Fed. Rep. 987, 1 Am. B. R. 606.

[164] Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177, 9 Am. B. R. 47; Frazier v. Southern L. & T. Co.

property under an order of a state court,[165] or where property is in the possession of administrators and executors,[166] or sheriffs and marshals,[167] a court of bankruptcy will not ordinarily disturb such possession. The general rule of comity in this respect is recognized and applied by the courts of bankruptcy and the state courts so far as their jurisdiction is concurrent.[168]

But where the possession of the state court would have the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may sieze such property for the purpose of administering it in accordance with that law.[169] The reason for this is that the bankruptcy law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts.[170] In this respect the state courts have not concurrent jurisdiction with the courts of bankruptcy and the general rule of comity has no application. The bankruptcy law is paramount and should not be defeated by proceedings in a state court. A court of bankruptcy will not interfere with property in the possession of a state court, ex-

(C. C. A. 4th Cir.), 99 Fed. Rep. 707.

[165] *In re* Price, 92 Fed. Rep. 987, 1 Am. B. R. 606.

[166] Byers v. McAuley, 149 U. S. 608; Wickham v. Hull, 60 Fed. Rep. 326; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489; Moses v. Pond (N. Y. Sup. Ct.), 4 Am. B. R 655.

[167] Covell v. Heyman, 111 U. S. 176; Krippendorf v. Hyde, 110 U. S. 276; Senior v. Pierce, 31 Fed. Rep. 625; Gumble v. Pitkin, 124 U. S. 131; Freeman v. Howe, 24 How. 450.

[168] See Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Frazier v. Southern Loan and Trust Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707; Peck v. Jenness, 7 How. 612.

Speaking of the general rule of comity in this respect, in Compton v. Jessup, 68 Fed. Rep. 263, 278-9, s. c. 15 C. C. A. 397, 412-3, Judge Taft said:

"Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down by the supreme court of the United States in a long line of cases."

[169] *In re* Hornstein, 122 Fed. Rep. 266; *In re* Knight, 125 Fed. Rep. 35; *In re* Watts & Sachs, 190 U. S. 1.

[170] *In re* Watts & Sachs, 190 U. S. 1.

cept where that possession was acquired in a proceeding declared null and void by the Bankrupt Act. Thus an assignee for the benefit of creditors in a state court, where the assignment is charged as an act of bankruptcy upon which an adjudication was made, may be compelled to deliver property in his possession as such assignee, to the trustee in bankruptcy,[171] or a sheriff of a state court may be compelled to pay to the trustee money collected upon an execution on a judgment void under Sec. 67*f*, which he has not paid to the judgment creditor,[172] but not when the money has been paid over to the judgment creditor.[173] Where property is in the possession of a receiver of a state court, the appointment of which receiver constitutes an act of bankruptcy upon which an adjudication is made, the receiver may be compelled to deliver assets of the debtor in his possession to a receiver or trustee in bankruptcy subsequently appointed.[174]

The court of bankruptcy may take possession of property in the possession of a garnishee, because a garnishee is not the officer of a court,[175] or in the possession of an officer of a state

[171] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; *In re* Thompson, 122 Fed. Rep. 174; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312; *In re* Knight, 125 Fed. Rep. 35.

[172] *In re* Kenney, 95 Fed. Rep. 427, s. c. Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476.

[173] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004.

See observation of Mr. Justice Brewer in Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476.

[174] *In re* Knight, 125 Fed. Rep. 35.

In re Watts & Sachs, 190 U. S. 1, the supreme court says at p. 28: "The (state) court should have directed the surrender of the property to him (the receiver in bankruptcy) at once, or at least after the report of its own receiver after returning from Indianapolis." And again at p. 35: "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's' estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

[175] Chase v. Cannon, 47 Fed. Rep. 674.

But see Mack v. Winslow, 59 Fed. Rep. 316; 8 C. C. A. 134.

court who seized the property without legal process or warrant.[176]

Where the property is in the actual custody of a state court the better practice is to apply to the state court to turn over the property to the trustee or receiver in bankruptcy, even in cases where the court of bankruptcy may order such surrender.[177] The court of bankruptcy may stay proceedings to permit an application for this purpose to the state court. The appli-

[176] *In re* Tyler, 104 Fed. Rep. 778, 5 Am. B. R. 152.

See also Jervey v. The Carolina, 66 Fed. Rep. 1013.

As to the effect of collusive proceedings to get property out of the custody of a court, see Daniel v. Lazarus, 65 Fed. Rep. 718; Gumble v. Pitkin, 124 U. S. 131.

[177] *In re* Watts & Sachs, 190 U. S. 1; Wilson v. Parr (Sup. Ct. Ga.), 8 Am. B. R. 230.

In re Knight, 125 Fed. Rep. 35, Judge Evans said: "It seems so clear, from the bankruptcy law, as construed by the highest courts, that the rights of the receiver, acquired under the circumstances shown by the testimony, are subordinate to those of the trustee and to those of the bankruptcy court, that it is not doubted that the Fulton circuit court will acquiesce in that view, and, upon proper application made to it, will order the receiver to turn over to the trustee the property in his hands. To the end that an application for that purpose may be made, further proceedings upon the rule will for the present be held in abeyance. It would not only be unseemly, but altogether disagreeable to this court, to pursue any course which would be wanting in the utmost respect and courtesy to the state tribunal, and orders will be made directing the trustee to apply to that court for leave to enter a special appearance in the case there pending, styled "First National Bank of Fulton v. Henry Knight and others," for the purpose of filing a copy of this opinion, the orders made in pursuance thereof, a copy of the adjudication in bankruptcy, and an accompanying application for an order of that court directing its receiver to turn over to the trustee in bankruptcy the property of the bankrupt held by the receiver. For the purpose of giving ample opportunity for doing this, the rule will be respited until the 12th day of October, 1903, at which time the trustee will report what has been done in the premises."

(The state court took the same view of the law, and on October 1st ordered its receiver to turn over to the trustee in bankruptcy all the property in his hands.)

In Carpenter Bros. v. O'Connor, 16 O. C. C. 526, an application was made to the state court for an order directing a receiver appointed by that court after an adjudication in a court of bankruptcy, to deliver property of the bankrupt in his possession to a trustee, subsequently appointed by the creditors in the proceeding in bankruptcy, on the ground that the trustee's title vested as of the date of adjudication and prior to the property coming into the possession of the receiver. The application was granted.

cation to the state court is regularly made by petition or motion supported by affidavits. A certified copy of the petition in bankruptcy and order of adjudication, if one has been made, should be exhibited to the state court. In practice the state courts have regularly passed an order to turn over the property to the bankruptcy court to be administered without the necessity of issuing process from the bankruptcy court.

In order to place property in the custody of a state court there must be a seizure under process of the court or some act equivalent thereto to obtain actual possession. Filing a judgment creditor's bill and service of process is an equitable attachment,[178] but the mere beginning of an action does not ordinarily bring the assets of the debtor into the custody of a state court. This has been held true of a suit to foreclose a mortgage.[179]

Where the property has come into the judicial custody of a court of bankruptcy, or an officer thereof, as referee, trustee or receiver, the state court has no power upon its process to take such property out of the judicial custody of the court of bankruptcy.[180] This includes the property of third parties claiming a title adverse to the bankrupt or trustee, where the officer of the court of bankruptcy has acquired peaceable possession of the property.[181]

The filing of a petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction.[182] The effect of filing such a petition is to place the property of the

[178] Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36.

[179] Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[180] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 2 N. B. N. 721, Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell, (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388, *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992, *In re Neely*, 108 Fed. Rep. 371, 5 Am. B. R. 836; *In re* Kellogg, 121 Fed. Rep. 333.

[181] *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169; Haven & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244; Antigo Screen Door Co., 123 Fed. Rep. 249.

[182] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176.

bankrupt constructively in the custody of the court of bankruptcy. Especially if the petition is subsequently sustained by the court.[183] Where the petition is dismissed it may be doubted if the mere filing of a petition will be held such custody as to render void dealings with such property pending an adjudication.

A claimant of such property in the custody of the bankruptcy court must apply to that court to have it restored, and his right to intervene in the bankruptcy proceedings is well established.[184] If property in the lawful possession of the court of bankruptcy is seized under process from the state court, the court of bankruptcy may by summary proceedings compel the return of such property.[185] If a suit is begun in a state court affecting property in the custody of a court of bankruptcy, it may stay such proceedings.[186]

§ 24. When a circuit court may have jurisdiction of bankruptcy proceedings.

The bankrupt statute confers no general power, either original or supervisory, upon the circuit courts to entertain bankruptcy proceedings.

Where there is no jury in attendance upon the district court a case may be certified for trial to the circuit court sitting at the same place, or, by consent of parties, when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. This has special reference

[183] *In re* Weinger Bergman & Co., 126 Fed. Rep. 875. Consult White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; *In re* Brooks, 91 Fed. Rep. 508, 1 Am. B. R. 531; Wayne Knitting Mills Co., v. Nugent, 104 Fed. Rep. 530, 4 Am. B. R. 747, s. c. 184 U. S. 1.

[184] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R 198, 3 N. B. N. 316; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169.

[185] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; 2 N. B. N. 721, *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224.

[186] Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388, *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992; *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R 604

See also Sec. 22, *ante*.

to a trial by jury with respect to the question of the bankrupt's insolvency and any act of bankruptcy alleged to have been committed by him, upon an involuntary petition.[187]

A limited jurisdiction of controversies at law and in equity is conferred upon the circuit courts by section 23. Such cases are incidental to, but are not strictly, proceedings in bankruptcy.[188]

The bankruptcy proceedings, strictly so called, may be certified to the circuit court for the district in case the district judge is disqualified.[189]

The authority for such proceedings is found in the Revised Statutes.

Sec. 601. "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein."

[187] B. A. 1898, Sec. 19.

[188] Sec. 25, *post*.

[189] In Farrund, Williams & Clark v. Milburn & Co. (eastern district of Michigan, 1899, not reported), the district judge was disqualified by reason of being related to one of the parties. The case was certified to the circuit court and the circuit judge, Taft, ordered a warrant to seize the goods of the alleged bankrupt pursuant to Sec. 69, and to hold the same until the petition should be dismissed or an adjudication be made and a trustee duly appointed and qualified. The case thereafter proceeded in the circuit court.

But see comment of the circuit court of appeals for the fifth circuit on this practice. *In re* Seebold, 105 Fed. Rep. 910, 5 Am. B. R. 358.

See also Spencer v. Lapsley, 20 How. 264.

Sec. 637. "When any cause, civil or criminal, of whatever nature, is removed into a circuit court, as provided by law, from a district court wherein the same is cognizable, on account of the disability of the judge of such district court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party to such cause as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner, as the said district court might have, or as said circuit [court] might have if the same had been originally and lawfully commenced therein, and shall proceed to hear and determine the same accordingly."[190]

§ 25. Jurisdiction of the circuit courts at law and in equity.

The bankrupt statute confers no jurisdiction in bankruptcy, either original, supervisory or appellate, upon the circuit courts of the United States. But they "have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." [191]

A controversy, in order that it may be cognizable, under this clause, in the circuit courts of the United States, *first*, must be a controversy at law or in equity, as distinguished from proceedings in bankruptcy; *second*, the parties must be a trustee in bankruptcy and adverse claimants; *third*, the controversy must be concerning property acquired or claimed by the trustee; and, *fourth*, it must be such a proceeding as

[190] Consult also R. S. Secs. 587 to 590; Spencer v. Lapsley, 20 How. 264; *Ex parte* United States, No. 14411, Fed. Cas., s. c. 1 Gall. 338; The Richmond, 9 Fed. Rep. 863; Wallace v. Loomis, 97 U. S. 146, 156.

[191] B. A. 1898, Sec. 23*a*; Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328; McFarlan Carriage Co. v. Solanas (C. C. A. 5th Cir.), 106 Fed. Rep. 145; Spencer v. Duplan Silk Co., 191 U. S. —.

could have been instituted by the bankrupt had no proceedings in bankruptcy intervened. All four of these conditions must concur to give jurisdiction.

Controversies at Law and in Equity.— This clause can not be construed as vesting in the circuit courts jurisdiction of controversies at law or in equity of which they have not already jurisdiction. It is rather a regulation of jurisdiction. What are controversies at law or in equity are to be determined by the general rules of jurisprudence. No fixed rule can be stated defining precisely what are suits at law or in equity as distinguished from bankruptcy proceedings. The question has been frequently considered by the supreme court, and each particular case was held either to be the one or the other, without attempting to lay down a general rule of distinction.[192]

The district and circuit courts were given concurrent jurisdiction of suits at law and in equity, as distinguished from bankruptcy proceedings, under the act of 1867.[193] Actions at law and suits in equity were frequently before the court in matters relating to bankruptcy. Thus the parties sought the aid of the court in actions of replevin,[194] in assumpsit,[195] in trover [196] and by a bill in equity.[197] These cases are useful to illustrate the distinction between suits at law or in equity and proceedings in bankruptcy.

[192] Consult Morgan v. Thornhill, 11 Wall. 65, 75; Smith v. Mason, 14 Wall. 419, 430; Marshall v. Knox, 16 Wall. 551; Burbank v. Bigelow, 92 U. S. 179; McFarlan Carriage Co. v. Solanas (C. C. A. 5th Cir.), 106 Fed. Rep. 145.

[193] R. S. Sec. 4979.

[194] Haughey v. Albin, No. 6222 Fed. Cas., s. c. 2 Bond 244.

[195] Street v. Dawson, No. 13533 Fed. Cas., s. c. 4 N. B. R. 207; Van Dyke v. Tinker, No. 16849 Fed. Cas., s. c. 11 N. B. R. 308.

[196] Carr v. Gale, No. 2434 Fed. Cas., s. c. 2 Ware 330, and No. 2435 Fed. Cas., s. c. 3 Woodb. & M. 38; Mitchell v. McKibben, No. 9666 Fed. Cas., s. c. 8 N. B. R. 548; Brooke v. McCraken, No. 1932 Fed. Cas., s. c. 10 N. B. R. 461; Babbitt v. Walbrun, No. 695 Fed. Cas., s. c. 6 N. B. R. 359; Wadsworth v. Tyler, No. 17032 Fed Cas., s. c. 2 N. B. R. 316; Cragen v. Carmichael, No. 3319 Fed. Cas., s. c. 2 Dill. 519.

[197] *In re* Bowie, No. 1728 Fed. Cas., s. c. 1 N. B. R. 628; March v. Heaton, No. 9061 Fed. Cas., s. c. 1 Low. 278; Bradshaw v. Klein, No. 1790 Fed. Cas., s. c. 2 Biss. 20; Shaffer v. Fritchery, No. 12697 Fed. Cas., s. c. 4 N. B. R. 548; Taylor v. Rasch, No. 13801 Fed. Cas., s. c. 5 N. B. R. 399; Wilt v. Stickney, No. 17854 Fed. Cas., s. c. 15 N. B. R.

PARTIES AND ADVERSE CLAIMS.— It is essential that one party shall be the trustee and the other party an adverse claimant, or claimants, and that the controversy be concerning the property acquired or claimed by the trustee.[197*] This provision is very similar to that used in the act of 1867, which was "any person claiming an adverse interest . . . touching any property or rights of the bankrupt transferable or vested in such assignee."[198] This provision was frequently construed by the courts.[199]

If the trustee is dead and no one has been appointed in his stead, a creditor may file a bill to detain property of a bankrupt to be administered by a trustee subsequently appointed.[200]

Who are necessary parties to such actions at law or suits in equity is determined by the general rules governing such proceedings in the circuit courts.

THE STATUS OF THE BANKRUPT DETERMINES JURISDICTION.—The circuit courts have jurisdiction only in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such a controversy had been between the bankrupt and the adverse claimants. This clause is a limitation upon the exercise of the jurisdiction of the circuit courts.

The judiciary act of 1887, as amended August 13, 1888,[201]

23; Warren v. Nat. Bank, No. 17202 Fed. Cas., s. c. 10 Blatch. 493; Bank v. Cooper, 20 Wall. 171; Garrison v. Markley, No. 5256 Fed. Cas., s. c. 7 N. B. R. 246; Sutherland v. Lake Superior Canal Co., No. 13643 Fed. Cas., s. c. 9 N. B. R. 298; Beecher v. Bininger, No. 1222 Fed. Cas., s. c. 7 Blatch. 170; Kellogg v. Russell, No. 7666 Fed. Cas., s. c. 11 Blatch. 519.

[197*] As to who are adverse claimants under this act, see Sec. 20, *ante*.

[198] R. S. Sec. 4979.

[199] Consult Morgan v. Thornhill, 11 Wall. 65, 75; Smith v. Mason, 14 Wall. 419, 430; Marshall v. Knox, 16 Wall. 551; Burbank v. Bigelow, 92 U. S. 179; Bachman v. Packard, No. 709 Fed. Cas., s. c. 2 Saw. 264; Carr v. Gale, No. 2434 Fed. Cas., s. c. 2 Ware 330, and No. 2435 Fed. Cas., s. c. 2 Woodb. & M. 38; Mitchell v. McKibben, No. 9666 Fed. Cas., s. c. 8 N. B. R. 548; Street v. Dawson, No. 13533 Fed. Cas., s. c. 4 N. B. R. 207; Haughey v. Albin, No. 6222 Fed. Cas., s. c. 2 Bond 244; Brooke v. McCraken, No. 1932 Fed. Cas., s. c. 10 N. B. R. 461; Spaulding v. McGovern, No. 13217 Fed. Cas., s. c. 10 N. B. R. 188.

[200] Clark v. Clark, 17 How. 315.

[201] 25 Stat. at L. 433.

conferred jurisdiction upon the circuit courts in "cases arising under the constitution and laws of the United States." It is well settled that where the plaintiff holds an office like that of a receiver appointed by the court, or a receiver of a national bank, that the suit involves a federal question, and may be prosecuted in the circuit courts without regard to the citizenship of the parties. This rule was applied under the act of 1867 with reference to assignees.[202] A trustee, being an officer of the court under the present act, would have undoubtedly been entitled to have prosecuted suits in the circuit courts on this ground, were it not for the restriction contained in section *23a*. As it is, however, in order that the circuit courts may take cognizance of the controversy, there must exist a diversity of citizenship, as between the bankrupt and the adverse claimants, and the amount involved must exceed two thousand dollars. The citizenship of the trustee is immaterial. The averments of the first pleading must show that all these jurisdictional requisites exist.

When a suit is begun in a state court in which these jurisdictional requisites exist, it may be removed to a circuit court and there tried as if originally begun there.[203]

[202] Burbank v. Bigelow, 92 U. S. 179; Claflin v. Houseman, 93 U. S. 130; Woolridge v. McKenna, 8 Fed. Rep. 650; Payson v. Dietz, No. 10861 Fed. Cas., s. c. 2 Dill. 504; Atkinson v. Purdy, No. 616 Fed. Cas., s. c. Crabbe 551; Wehl v. Wald, No. 17356 Fed. Cas., s. c. 17 Blatch. 342; Connor v. Scott, No. 3119 Fed. Cas., s. c. 4 Dill. 242.

[203] Spencer v. Duplan Silk Co., 191 U. S. 526; s. c. (C. C. A. 3d Cir.), 115 Fed. Rep. 689, 8 Am. B. R. 367, reversing 112 Fed. Rep. 638, 7 Am. B. R. 563.

CHAPTER V.

REFEREES.

§ 26. The appointment, removal and districts of referees.

The office of referee is created by statute.[1] Referees are officers of the courts of bankruptcy. They are appointed within the territorial limits of each court of bankruptcy by the judge of that court.[2]

The number of referees rests in the discretion of the judge.[3] There should be a sufficient number to expeditiously transact the bankruptcy business within each district. The term of office is two years.[4] They are, however, at all times subject to removal by the judge, because their services are not needed, or for other cause.[4] Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act or may appoint another referee, or another referee holding an appointment under the same court may, by the order of the judge, temporarily fill the vacancy.[5]

The court is also authorized to designate and from time to time change the districts of referees, so that each county where the services of a referee are needed may constitute at least one district.[6]

§ 27. Qualifications of referees.

No person is eligible to be a referee unless he is competent to perform the duties of that office.

Under the act of 1867 no person was eligible for appointment as register unless he was an attorney at law.[7] Although no such restriction is contained in the present statute, judges of some of the districts have publicly announced that no person would be appointed a referee unless he is an attorney. It may be doubted if a person may be considered competent

[1] B. A. 1898, Sec. 33.
[2] B. A. 1898, Sec. 34.
[3] B. A. 1898, Sec. 37; Bray v. Cobb, 1 Am. B. R. 153; 91 Fed. Rep. 102.
[4] B. A. 1898, Sec. 34.
[5] B. A. 1898, Sec. 43. See Bray v. Cobb, 91 Fed. Rep. 102.
[6] B. A. 1898, Sec. 34.
[7] R. S. Sec. 4904.

to perform the duties unless he has pursued studies in law and been admitted to practice in a court of record.

No person is eligible for the appointment if he holds any "office of profit or emolument under the laws of the United States or of any state, other than commissioners of deeds, justices of the peace, masters in chancery or notaries public."[1] By profit or emolument is meant "the profit arising from office or employment; that which is received as a compensation for services or which is annexed to the position of office as salary, fees and perquisites."[2] Such are the office of postmaster,[3] U. S. surveyor general,[4] inspector of customs,[5] county recorder or county commissioner,[6] or a member of a state legislature.[7]

No person is eligible for appointment who is related by consanguinity or affinity within the third degree, as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed.[8] Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other."[9]

No person is eligible to appointment unless he resides in or has his office in the territorial district for which he is to be appointed.[10]

[1] B. A. 1898, Sec. 35.

[2] Century Dictionary, subject, Emolument; Standard Dictionary, subject, Emolument; Webster's Dictionary, subject, Emolument; Apple vs. Crawford Co., 105 Pa. St. 300.

[3] McGregor v. Balch, 14 Vt. 428.

[4] People v. Whitman, 10 Cal. 38.

[5] Crawford v. Dunbar, 52 Cal. 36.

[6] Dailey vs. State, 8 Blackf. (Ind.) 329.

[7] State v. Valle, 41 Io. 29.

[8] B. A. 1898, Sec. 35.

[9] 2 Black. Com. 206; Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Addams, 45 Penn. St. 432.

[10] B. A. 1898, Sec. 35.

§ 28. The oath and bond of a referee.

The referee must take the same oath of office as that prescribed for the judges of the United States courts.[11]

Before entering upon the duties of his office every referee must enter into a bond to the United States in such sum as shall be fixed by the court, not to exceed $5,000, conditioned for the faithful performance of his official duty.[12] The court fixes the time within which the bond is to be given and approves the sureties. If a referee fails to give bond within such time he is deemed to have declined the appointment and there is a vacancy in his office.[13] There shall be at least two sureties upon each bond, each of whom must qualify in a sum equal at least to the amount of the bond.[14] Corporations organized for the purpose of becoming sureties on bonds, or authorized by law to do so, may be accepted as sureties.[15] The court shall require evidence as to the actual value of the property of sureties, and all sureties must be approved by the court.[16] Such bonds are filed of record in the office of the clerk.[17] They may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.[17] Such suits must be brought within two years after the alleged breach of the bond.[18]

§ 29. General powers of referees.

The territorial jurisdiction of a referee is generally limited by the county or district for which he is appointed,[19] except when he is specially designated by the judge to temporarily fill a vacancy in another county or district within the jurisdiction of the court.[20]

Referees are appointed for the purpose of assisting the judge of the court of bankruptcy in the performance of his duties. The referee has the same power generally as the judge has

[11] B. A. 1898, Sec. 36, Form No. 33; R. S. Sec. 712.

[12] B. A. 1898, Sec. 50*a*.

[13] B. A. 1898, Sec. 50*k*.

[14] B. A. 1898, Sec. 50 *c*, , .

[15] B. A. 1898, Sec. 50*g*.

[16] B. A. 1898, Sec. 50 *a*, *d*.

[17] B. A. 1898, Sec. 50*h*.

[18] B. A. 1898, Sec. 50*l*.

[19] B. A. 1898, Sec. 38 and Sec. 34, clause 2.

[20] B. A. 1898, Sec. 43; Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. Rep. 102.

in the performance of his judicial duties under the bankrupt act, subject to a few exceptions to be noted presently.[21] After a case has been referred to a referee all the proceedings thereafter, except such as are required by the statute or general orders to be had before the judge, are had before the referee.[22] The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee, and at such times and places the referees may perform the duties which they are empowered by the act to perform.[22]

The referee has power to act only by virtue of a reference by the clerk or the judge of a court of bankruptcy.

The clerk is required to refer a petition in case the judge is absent from the district or the division of the district.[23] A voluntary petition should be referred immediately, an involuntary petition on the next day after the last day on which pleadings may be filed.[24] Such references are general in their nature.

The judge, after an adjudication, may refer the case generally to a referee or specially with only limited authority to act in the premises or to consider and report upon specified issues.[24] The power of the referee in such cases depends upon the order of reference. The judge may refer the case to any referee within the territorial jurisdiction of the court if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district;[25] or for the convenience of parties or for cause he may transfer a case from one referee to another.[26]

The statute provides that the word "court" when used in the statute may include the referee and that the word "judge"

[21] B. A. 1898, Sec. 38; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Tudor, 96 Fed. Rep. 942, 2 Am. B. R. 808.

[22] Gen. Ords. 12 and 20 and B. A. 1898, Sec. 38, clause 4.

[23] B. A. 1898, Sec. 18, *f* and *g*; Official Form No. 15, Form No. 32, *post*.

[24] B. A. 1898, Sec. 22.

[25] B. A. 1898, Sec. 22.

[26] B. A. 1898, Sec. 22*b*.

excludes the referee.[27] Consequently the referee has no power to perform these duties which are imposed by the act on the judge alone; *first,* to issue a warrant to the marshal against the bankrupt to compel his immediate examination or detention upon satisfactory proof that the bankrupt is about to leave the district;[28] *second,* to confirm or set aside compositions and order distribution of the consideration;[29] *third,* to extend the time for filing a petition for his discharge by the bankrupt, to hear applications for a discharge, to refuse or grant the same, and to revoke discharges once granted;[30] *fourth,* to determine the issues presented whenever the facts alleged in a petition for involuntary bankruptcy are controverted by either the bankrupt or his creditors;[31] *fifth,* to punish or commit persons who have disobeyed the orders or process of courts of bankruptcy or misbehaved during a hearing, even though the contempt be with reference to the process or orders of, or in the presence of the referee who can only certify the facts to the judge for his action;[32] *sixth,* to refer causes after adjudication either generally or specifically to a referee, and transfer causes from one referee to another;[33] and, *seventh,* to order notices to creditors to be given otherwise than by the referee.[34] The referee should not collect the estate of the bankrupt nor issue subpœnas; these should be done by the trustee and clerk respectively.[35]

There are also certain powers ordinarily to be exercised by the judge, but which are to be exercised by the referee only when the judge is absent from the division of the district in which the proceedings are pending and they are referred or certified by the clerk to the referee. These are: *first,* to make adjudications on voluntary and on uncontested involuntary

[27] B. A. 1898, Sec. 1, cl. 7 and 16.

[28] B. A. 1898, Sec. 9, cl. *b,* and Sec. 38, cl. 4.

[29] B. A. 1898, Sec. 12*d* and Sec. 13*a;* Gen. Ord. 12, cl. 3.

[30] B. A. 1898, Secs. 14 and 15, and Sec. 38, cl. 4; Gen. Ord. 12, cl. 3.

[31] B. A. 1898, Sec. 18*d.*

[32] B. A. 1898, Sec. 41*b,* and see *post,* "Proceedings in Contempt." Chap. XXII.; Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

[33] B. A. 1898, Sec. 22.

[34] B. A. 1898, Sec. 58*c.*

[35] *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

petitions;[36] and, *second*, to take possession of the bankrupt's property pending the adjudication and release it.[37] This last power may be exercised by the referee also on certification of the judge's illness or inability to act,[37] but adjudications can only be made in cases of the judge's absence.

The statute also confers on the referee jurisdiction to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on "courts" of bankruptcy and as shall be prescribed by rules or orders. Accordingly by the General Orders of the supreme court have further limited the powers of the referees by providing that applications for an injunction to stay proceedings of a court or officer of the United States, or of a state shall be heard and decided by the "judge,"[38] and that where the bankrupt has not made a deposit for the fees of the clerk, referee, and trustee, the judge may order these fees paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[39]

In all orders made by a referee it must be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.[40]

The action of referees is subject always to review by the judge of the court of bankruptcy.[41] It would therefore appear that in any proceeding before a referee a party is at liberty to take the opinion of the judge upon any point or matter arising in the course of such proceeding.[42]

The referee is required to preside at the first meeting of

[36] B. A. 1898, Sec. 18*e*, *f* and *g*, and Sec. 38, cl. 1, and "Power to make an adjudication"; Sec. 30, *post*.

[37] B. A. 1898, Secs. 69 and 38, cl. 3; and "Power to take possession, etc.": Sec. 32, *post*.

[38] Gen. Ord. 12, cl. 3.

[39] Gen. Ord. 35, par. 4; *In re* Plympton, 103 Fed. Rep. 775.

[40] Gen. Ord. 23.

[41] Gen. Ord. 27. B. A. 1898, Sec. 38 and Sec. 2, clause 10.

[42] See Sec. 32*a*.

the creditors in the absence of the judge,[43] but he should not interfere with or influence the choice of trustee.[44] He can, however, pass on the right of a person who claims to be a creditor, to vote.[45] Where a trustee is elected by creditors the referee can not remove him and appoint another, but should report his disapproval to the judge, who alone can remove the trustee elected.[46] It is his duty to prepare a list of debts proved at this meeting,[47] and to notify the trustee of his appointment and the penal sum of his bond.[48] In the absence of an appointment of a trustee by the creditors he may appoint the trustee;[49] but should only do so where the creditors have had full opportunity to elect one and have failed.[50] The referee regularly approves the bond of the trustee.[51] The referee may furnish on application a certified copy of any proceeding before him to be used as evidence in a state or federal court. Certified copies of proceedings before a referee, or of papers, when issued by the referee, are admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.[52]

[43] B. A. 1898, Sec. 55*b*.

[44] *In re* Smith, No. 12971 Fed. Cas., 2 Ben. 113.

[45] *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel, 109 Fed. Rep. 861 at 865.

[46] Gen. Ord. 13; *In re* Hare, 119 Fed. Rep. 246; *In re* Mackellar, 116 Fed. Rep. 547; but see *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811.

[47] Official Form No. 19, see Form No. 38, *post*.

[48] Gen. Ord. 16; Official Form No. 24, see Form No. 43, *post*.

[49] B. A. 1898, Sec. 44; Official Form No. 23, see Form No. 42, *post; In re* Mackellar, 116 Fed. Rep. 547; *In re* Nice & Schreiber, 123 Fed. Rep. 987; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 158; *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162; *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50; *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631.

Where there are no assets the referee may in his discretion order that no trustee be appointed. *In re* Smith, 93 Fed. Rep. 791.

[50] *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Nice & Schreiber, 123 Fed. Rep. 987; *In re* Mackellar, 116 Fed. Rep. 547.

[51] Official Form No. 26, see Form No. 45, *post*.

[52] B. A. 1898, Sec. 21*d*.

Referees can not act in cases in which they are directly or indirectly interested,[53] practice as attorneys and counselors at law in bankruptcy proceedings, or purchase, directly or indirectly, any property of an estate in bankruptcy.[54]

§ 30. Power to make an adjudication.

Every referee within his own territorial limits has power to consider all petitions referred to him by the clerk and make the adjudications or dismiss the petitions.[55] This includes petitions in involuntary as well as in voluntary bankruptcy. It is the duty of the clerk to refer a petition, in either voluntary or involuntary bankruptcy, to the referee whenever the judge is absent from the district or the division of the district.[56] It is regularly the duty of the judge to consider the petition and make the adjudication thereon.[57] A referee has power to consider the petition and make the adjudication only when the petition has been specially referred to him for that purpose. The action of the referee in such cases is subject to review by the judge.[58]

When there is a reference by the clerk of a petition it may be considered in the nature of a default. The consideration necessary is probably the same as that required in taking a decree *pro confesso*. The matter of the petition ought to be opened and explained to the referee so that he may see that a proper case of bankruptcy is made. It is not necessary that he should hear evidence in addition to the affidavit attached to the petition. If such a proper case is made by the petition it is the duty of the referee to adjudge the person a bankrupt. The case then proceeds as though the adjudication had been made by the judge.

[53] The fact that a referee owes a debt to the bankrupt does not disqualify him. Bray v. Cobb, 91 Fed. Rep. 102, 1 Am. B. R. 153.

[54] B. A. 1898, Sec. 39*b*; Cobb v. Bray, 91 Fed. Rep. 102.

[55] B. A. 1898, Sec. 38, clause 1; Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post*.

[56] B. A. 1898, Sec. 18, clauses *f* and *g*.

[57] B. A. 1898, Sec. 2, clause 1; Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post*.

[58] B. A. 1898, Sec. 38*a*; Gen. Ord. 27.

§ 31. Power to administer oaths and examine witnesses.

Referees are also authorized to exercise the powers vested in courts of bankruptcy for the administration of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.[59] The subpœna should be issued by the clerk, not by the referee.[60]

The referee is given power to administer the oaths required by the bankrupt act in all cases except upon hearings in court.[61]

Under these provisions the referee is empowered to take evidence with reference to questions pending before him, and to summon witnesses for the purpose of examining them. The subpœna must be duly issued by the clerk of the court of bankruptcy.[62] Subpœnas for witnesses may run into another district, provided no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fees for one day's attendance shall be first paid or tendered to him.[63]

Generally any witness competent to testify in a court of bankruptcy may be compelled by subpœna to appear and bring with him documents and papers mentioned in the subpœna. It, however, may be doubted if the referee has power to compel a trustee to appear as a witness or to produce documents.[64] The court in proper cases may call the trustee to an account, but whether the referee has a supervisory power of this character may be questioned.

The referee is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate, at a compensation not to exceed ten cents per folio for reporting and transcribing proceedings before him.[65] He may, when

[59] B. A. 1898, Sec. 38, clause 2.

[60] *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[61] B. A. 1898, Sec. 20, clause 1.

[62] Gen. Ord. 3; R. S. Secs. 911 and 912; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[63] B. A. 1898, Sec. 41; R. S. Sec. 876; *In re* Woodward, No. 18000 Fed. Cas., s. c. 12 B. R. 297.

[64] *In re* Hicks, 2 Fed. Rep. 851; but see B. A. 1898, Sec. 49.

[65] B. A. 1898, Sec. 38, clause 5; *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830; as to taxing such fees as costs see *In re* Todd, 6 Am. B. R. 88, 109 Fed. Rep. 265.

necessary, employ a clerk, whose hire will be paid as part of the costs of administration.[66]

The examination of witnesses before the referee[67] may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee must be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee must note upon the deposition any question objected to, with his decision thereon, and the court has power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

The referee has no power to punish for contempt committed in proceedings before him.[68] Where a person, in proceedings before a referee, disobeys or resists any lawful order or process or writ, misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent documents, or refuses to appear after having been properly summoned, or upon hearing refuses to take an oath as a witness, or, having taken the oath, refuses to be examined according to law,[69] proceedings must be taken in the court of bankruptcy for commitment. In such cases the referee certifies the facts to the judge. The judge, in a summary manner, hears the evidence as to the acts complained of and makes such orders, and decrees such punishment as he would had the contempt been committed in proceedings before the court.[70]

[66] *In re* Pierce, 111 Fed. Rep. 516, 5 Am. B. R. 747; *In re* Teho, 101 Fed. Rep. 419, 4 Am. B. R. 235, *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 881.

[67] Gen. Ord. 22; B. A. 1898, Sec. 39, clause 9. See also Examinations, Sec. 208, *post.*

[68] Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

[69] B. A. 1898, Sec. 41.

[70] B. A. 1898, Sec. 41 and Sec. 2, clauses 13 and 16. See also Contempt, Chap. XXII, *post.*

§ 32. Power to take possession and release the bankrupt's property.

It is properly within the province of the judge to take possession and release the property of the bankrupt. Yet the referee is clothed with this power, provided the clerk issues a certificate showing the absence of the judge from the judicial district or the division of the district, or his sickness or inability to act.[71] This language evidently means that the referee has the same power to act in cases properly referred to him as the judge has when no reference is made. The referee has no authority to take possession of or release the property under any other circumstances.

The referee may appoint a receiver or the marshal, upon application of parties in interest, in case it shall be necessary for the preservation of the estate, to take charge of the property of the bankrupt at any time after the filing of the petition and until it is dismissed or the trustee is qualified.[72] If necessary for the best interest of the estates, the referee may authorize the business of the bankrupt to be conducted for a limited period by a receiver, the marshal or the trustee.[73]

In case it becomes necessary to take possession of the property after the petition is filed and before an adjudication, a warrant may issue to the marshal to seize and hold the property subject to further orders.[74] In such cases an indemnity bond, in such an amount as the referee shall fix, with such sureties as he shall approve, is required. Such property may be released upon the bankrupt giving a bond in such sum and with such sureties as the referee may approve. In case the petition is dismissed the referee has power to release the

[71] B. A. 1898, Sec. 38, clause 3. See also B. A. 1898, Sec. 69.

[72] B. A. 1898, Sec. 2, clause 3, and Sec. 38, clause 4.

In re Maher, at Cincinnati, Referee Waite appointed a receiver of a stable of horses on the application of a voluntary bankrupt, who was unable to obtain hay and grain to feed them. The receiver was in possession until a trustee was appointed.

Where the property is of a perishable nature, see *in re* Vila, No. 16941 Fed. Cas., s. c. 5 Law Rep. 17; Gen. Ord. 18.

[73] B. A. 1898, Sec. 2, clause 5, and Sec. 38, clause 4.

[74] B. A. 1898, Sec. 38, clause 3, and Sec. 69.

property. After the adjudication the referee may direct a receiver appointed by him or a marshal to take possession of the property before the trustee is appointed. In such case no bond is required.

It should be observed, however, that the referee has power to act only in the absence of the judge, or his sickness, or disability to act. If any person refuses to obey a proper order of the referee the court may enforce it by an order of attachment for contempt.[75] The referee may also have the property insured by the direction of the judge.[76]

As soon as a trustee is appointed and qualified he is vested by law with the title to the bankrupt's property as of the date of the adjudication, except property exempt by law,[77] and is entitled to the possession of the property. The bankrupt regularly surrenders possession of his property to the trustee. If the bankrupt does not turn over his property to his trustee the referee has power to order him to do so.[78]

§ 32a. Review of referees' rulings by judge.

Any ruling or order of a referee may be reviewed by the judge of the court of bankruptcy.[79] When a bankrupt, creditor, trustee or other person desires a review by the judge of any order made by the referee, he must file with the referee his petition therefor, setting out the errors complained of; and the referee shall certify to the judge the questions presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[80] It is a specific order or ruling which may be reviewed. A general review of the proceedings before the referee is not contemplated.[81]

A bankrupt, creditor, trustee or other person may apply for a review of the ruling or order of the referee. The application

[75] *In re* Speyer, 42 How. Prac. 397; *In re* Kempner, No. 7689 Fed. Cas., s. c. 6 B. R. 521.

[76] *In re* Carow, 41 How. Prac. 112.

[77] B. A. 1898, Sec. 70.

[78] *In re* Tudor, 96 Fed. Rep. 942, 2 Am. B. R. 808.

[79] B. A. 1898, Sec. 2, cl. 10; Gen. Ord. 27.

[80] Gen. Ord. 27.

[81] *In re* Kelly Dry Goods Co., 102 Fed Rep. 747, 4 Am. B. R. 528.

should be made by a person interested or whose rights are affected by the ruling or order complained of.

The application should be in the form of a petition filed with the referee.[82] The petition should be filed after the order or ruling sought to be reviewed has been made by the referee [83] and not before.[84] No time is specified in the statute or general orders within which this petition must be filed, but the courts have held that it must be within a reasonable time.[85]

The petition should clearly set forth the error complained of and pray that the order or ruling of the referee may be reviewed.[86]

The petition should be signed by the petitioner or his attorney. It need not be verified by an affidavit for the reason that it does not allege facts. The facts are brought up by the certificate or record of the evidence.

When such a petition has been filed with the referee he must forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[87] The summary of the evidence mentioned in General Order 27 may be all the evidence taken stenographically or the substance thereof as agreed upon by the parties.[88] The summary and not the complete evidence should be certified whenever the rules of justice will permit.[89] Where this is done the district court may require original evidence or parts thereof certified to it.[90] If exhibits are attached

[82] Gen. Ord. 27; *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *In re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re* Hawley, 116 Fed. Rep. 428, 8 Am. B. R. 632.

[83] *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566, *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704.

[84] *In re* Smith, 93 Fed. Rep. 791.

[85] *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Chambers, Calder & Co., 6 Am. B. R. 709; *In re* Reliance Storage and Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

[86] For forms of petition, see Forms Nos. 130 to 134, *post*.

[87] Gen. Ord. 27. For form of certificate, see Forms Nos. 135 to 139, *post*. *In re* Kurtz, 11 Am. B. R. 129.

[88] B. A. 1898, Sec. 39*a*, cl. 5 and 9.

[89] Cunningham v. German Nat. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192.

[90] Cunningham v. German Nat. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192.

to the certificate they should be referred to in the certificate and marked in some manner to identify them.

It has been held that exceptions may be taken to the proceedings and contained in the certificate and exhibits attached to it.[91] Where a referee makes a ruling upon the admissibility of evidence in the course of an examination the certificate should show the ruling and the question should be answered in any case and the examination continued, and the question decided by the court after the deposition is completed.[92]

The certificate should be prepared and signed by the referee and by him transmitted to the clerk of the court.

When the certificate is filed in the clerk's office it becomes the duty of the judge to consider and confirm, modify or overrule, or return with instructions for further proceedings such records and findings.[93] If the question be improperly certified the court may refuse to give an opinion.[94]

The case is regularly set for hearing upon the petition and exhibits without answer or pleading on the part of the respondent. The judge will usually hear arguments of counsel. If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him.[95] or refer the matter to the referee for further proofs.

[91] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541; *In re* Carver, 113 Fed. Rep. 138; 7 Am. B. R. 539; Carolina Cooperage Co., 96 Fed. Rep. 604.

In re Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237, Judge Lowell said: "Counsel for the joint creditors raised certain formal objections, based upon the state of the record. It is sufficient to say that this court has not hitherto required, and does not intend to require hereafter, any particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out, that is enough. No formal exceptions to the referee's findings or rulings need be filed. If this practice shall seem lax to some, the answer is that it has hitherto been found convenient in this district, both for the judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there."

[92] *In re* Lipset, Levittan & Co., 119 Fed. Rep. 379, 9 Am. B. R. 32; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[93] R. S. Sec. 2, cl. 10.

[94] *In re* Smith, 93 Fed. Rep. 791.

[95] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641.

Ordinarily the review by the judge of an order made by the referee will be confined to the errors pointed out in the petition for review, but the judge may notice an error not assigned.[96]

The judge reviews both law and fact. No fixed rule can be laid down with reference to the weight to be given by the judge to the finding of fact by the referee in making his ruling or order.[97]

If the order of the referee is modified or reversed the judge will usually direct the proper order to be entered with reference to the further proceedings. A certified copy of this order should be furnished the referee for his direction and guidance.[98]

[96] *In re* Gottardi, 7 Am. B. R. 723.

[97] *In re* Grant Bros., 118 Fed. Rep. 73, 9 Am. B. R. 93; *In re* Carver, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re* Covington, 110 Fed. Rep. 143, 6 Am. B. R. 373; *In re* Mayer, 98 Fed. Rep. 839, 3 Am. B. R. 533, *In re* McCormick, 97 Fed. Rep. 566, 3 Am. B. R. 340; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770.

In re Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237, Judge Lowell, speaking on this subject, said: "Again, no precise quantitative weight is in this district, assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are, in an important respect, better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor saving formula will determine the weight of the finding, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' 'or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross,' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous, after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate."

[98] For forms of orders, see Forms Nos. 143 to 145, *post*.

§ 33. The administrative duties of referees.

In addition to his judicial duties, the statute enumerates certain administrative duties of the referee.

It provides[99] that referees shall

First, declare dividends and prepare and deliver to trustees dividend sheets, showing the dividends declared and to whom payable;

Second, examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended.

Third, furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest. This does not include furnishing copies of proceedings pending before them.[100]

Fourth, give notices to creditors as provided by the statute;[101]

Fifth, make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

Sixth, prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse or neglect to do so;[102]

Seventh, safely keep, perfect and transmit to the clerks the

[99] B. A. 1898, Sec. 39*a*.

[100] *In re* Lewin, 103 Fed. Rep. 850, 4 Am. B. R. 632.

[101] B. A. 1898, Sec. 58*a*, provides that "creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings."

[102] See Gen. Ord. 9.

records herein required to be kept by them, when the cases are concluded;

Eighth, transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

Ninth, upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance;[103] and

Tenth, whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

All notices are given by the referee, unless otherwise ordered by the judge.[104] In sending notices the referee is entitled to use an official penalty envelope, and need not pay postage.[105]

A penalty envelope for conducting the official business by a referee may be in the following form:

JOHN DOE, **Referee in Bankruptcy,** **CINCINNATI, O.**	**DEPARTMENT OF JUSTICE.** **OFFICIAL BUSINESS.** **Penalty for Private Use, $300.**

[103] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830; *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[104] B. A. 1898, Sec. 58*c*.

[105] Post Office Department, First Assistant Postmaster General, Di-

§ 34. Records of referees.

A record of proceedings in each case before a referee is required to be kept as nearly as may be in the same manner as records are now kept in equity cases in the circuit courts of the United States.[106]

The referee is required to endorse on each paper filed with him the date and the hour of filing and a brief statement of its character.[107] He must, upon application of any party in interest, preserve the evidence taken or the substance thereof, as agreed between the parties before him, when a stenographer is not in attendance.[108] If a stenographer is in attendance a transcript of his notes is used.[109] These papers, together with such orders as the referees from time to time makes, such notices as he is required to give and a record of the proceedings in each case required to be kept in a separate book or books, constitute the record of the case.[110]

The record is frequently kept on one or more sheets of paper, upon which are stated the proceedings in the same form as proceedings are usually stated in an appearance docket. These separate sheets form the first pages of the record. The various sheets constituting the record should be firmly and neatly bound together, when the case is concluded, by the referee, should be certified by him and transmitted to the clerk of the court of bankruptcy, and there remain as a part of the record of the court.[111]

Whenever a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee

vision of Correspondence, Washington, August 6, 1898.

Postmaster, Cincinnati, O., Sir:—

Your letter of August 1, addressed to the Assistant Attorney General for the Post Office Department, has been referred to this office for reply. Answering your inquiry you are advised that a referee in bankruptcy, appointed by the Court in Bankruptcy, is entitled to make use of the official penalty envelope, for conducting the official business, for which he is appointed.

Very respectfully,

Geo. M. Allen, Acting First Assistant Postmaster-General.

[106] B. A. 1898, Sec. 42*a*.

[107] Gen. Ord. 2.

[108] B. A. 1898, Sec. 39, clause 9; Gen. Ord. 22.

[109] B. A. 1898, Sec. 38, clause 5; Gen. Ord. 22.

[110] B. A. 1898, Sec. 42*b*.

[111] B. A. 1898, Sec. 42*c*.

he applies to the referee by petition that the question may be certified to the judge for review.[112] He is required thereupon to make up a record embodying the evidence or substance thereof, as agreed upon between the parties, together with his findings, certify to the same and transmit the record to the judge.[113]

He is also required to transmit to the clerk such papers as may be on file before him whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or if it be impracticable to transmit the original papers, transmit certified copies thereof by mail.[114] These last two are partial or interlocutory records, and do not affect the making of the final record above referred to at the proper time.

§ 35. Offenses of referees.

Referees are forbidden by the statute to act in cases in which they are directly or indirectly interested;[115] to practice as attorneys and examiners at law in any bankruptcy proceedings; or to purchase, directly or indirectly, any property of an estate in bankruptcy.

The statute provides[116] that

"A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

"*first,* acted as a referee in a case in which he is directly or indirectly interested; or

"*second,* purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

"*third,* refused, while a referee or trustee, to permit a

[112] Gen. Ord. 27. See *ante,* Sec. 32*a*.

[113] B. A. 1898, Sec. 39, clause 5; Gen. Ord. 27.

[114] B. A. 1898, Sec. 39, clause 8.

[115] Cobb v. Bray, 91 Fed. Rep. 102, 1 Am. B. R. 153; B. A. 1898, Sec. 39*b*.

[116] B. A. 1898, Sec. 29*c*.

A circuit court or a court of bankruptcy has jurisdiction to punish for any of these offenses. B. A. 1898, Sec. 23*c* and Sec. 2, clause 4.

reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do."

§ 36. Compensation and expenses of referees.

The compensation is fixed by the statute [117] as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration, and from estates which have been administered before them one percentum commissions on all moneys disbursed to creditors by the trustee, or one-half of one percentum on the amount to be paid to creditors upon the confirmation of a composition.

Sec. 72, added by the amendment of 1903, provides "That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." [118]

The bankruptcy act as originally passed allowed referees ten dollars instead of fifteen dollars, and no fee for filing claims. Commissions were allowed on "sums to be paid out as dividends." This was held not to include commissions on moneys paid secured creditors, because they were not dividends.[119] This rule applies to all proceedings begun prior to

[117] B. A. 1898, Sec. 40, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[118] 32 Stat. at L. 797; Dressel v. North State Lumber Co., 119 Fed. Rep. 531.

But see *In re* Goldville Mining Co., 123 Fed. Rep. 579; 10 Am. B. R. 552.

[119] *In re* Utt (C. C. A., 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383, *In re* Smith, 108 Fed. Rep. 39; 5 Am. B. R. 559; *In re* Lumber Co., 116 Fed. Rep. 731, *In re* Ft. Wayne Elec. Corp., 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re* Gardner, 103 Fed. Rep. 922, 4 Am. B. R. 420; *In re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132. But see *In re* Barber, 97 Fed. Rep. 547, 3 Am. B. R. 306.

February 5, 1903.[120] Under the provision of the amendment referees are clearly entitled to commissions on moneys paid secured creditors as well as on dividends to unsecured creditors.

"Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

"In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

The compensation of referees prescribed by the act is in full compensation for all services performed by them under the act or under the general orders, but does not include expenses necessarily incurred by them in the performance of their duties under the act and allowed by special order of the judge.[121] Thus a referee will not be allowed any extra compensation for hearing specifications in opposition to a discharge,[122] nor for preparing the dividend sheet, nor for hearing the evidence during the examination,[123] nor for hearing numerous claims for specific liens,[124] nor for services in giving notice of application for discharge.[125] No allowance will be made for notices sent to creditors other than those required by Sec. 58 of the act, nor for the employment of a stenographer in adjustment correspondence or other business of the estate.[126] Clerk hire will be allowed where the services of a clerk are necessary.[127]

[120] Act of Feb. 5, 1903, Sec. 19; 32 Stat. at L. 797.

[121] Gen. Ord. 35, par. 2.

[122] *In re* Troth, 104 Fed. Rep. 291, 4 Am. B. R. 780; Bragasa v. St. Louis Cycle (C. C. A., 5th Cir.), 107 Fed. Rep. 77, 5 Am. B. R. 700; *contra,* Fellows v. Frendenthal (C. C. A., 7th Cir.), 102 Fed. Rep. 731, 4 Am. B. R. 490; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510.

[123] *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132.

[124] *In re* Mammouth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132.

[125] *In re* Dixon, 114 Fed. Rep. 675, 8 Am. B. R. 145.

[126] *In re* Mammouth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651.

[127] Gen. Ord. 35; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Todd, 109 Fed. Rep. 265; 6 Am. B. R. 88.

It has been held that where a trustee and adverse claimant to property try the right to it before the referee the referee is doing work in addition to his duty, and a reasonable fee as well as a stenographer's fee should be taxed against the unsuccessful claimant,[128] but it is doubtful if this would be allowed since the passage of Sec. 72 of the act.[129] The referee's claim for commissions must be presented to and passed upon by the court.[130] Every referee is required to keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him, and to make return of the same under oath to the judge, with proper vouchers, when vouchers can be procured, on the first Tuesday in each month.[131]

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.[133] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[132]

In any case in which the fees of the referee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.[133]

[128] *In re* Todd, 109 Fed. Rep. 265; 8 Am. B. R. 88.

[129] 32 Stat. at L. 797.

[130] *In re* Mammouth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651.

[131] Gen. Ord. 26.

[132] Gen. Ord. 10; Sec. 62, B. A.

[133] Gen. Ord. 35, par. 4.

CHAPTER VI.

CLERKS, MARSHALS AND ATTORNEYS.

§ 37. Duties of the clerk.

The word clerk, as used in the bankrupt act, means the clerk of a court of bankruptcy, unless such a meaning is inconsistent with the context.[1]

The clerk is required to keep a docket,[2] in which the cases shall be entered and numbered in the order in which they are commenced. It must contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case, except those duly entered on the referee's certified record aforesaid. The docket must be arranged in a manner convenient for reference, and shall at all times be open to public inspection. The clerk is also required to endorse on each paper filed with him the date and hour of filing and a brief statement of its character.[3] He issues all process, summons and subpœnas under the seal of the court.[4]

The clerks are also required to prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed;[5] and they are entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts;[6] pro-

[1] B. A. 1898, Sec. 1, clause 5.
[2] Gen. Ord. 1.
[3] Gen. Ord. 2.
[4] Gen. Ord. 3.
[5] Sec. 71, added by the amendment of 1903 to the Bankruptcy Act, 32 Stat. at L. 797.
[6] R. S. Sec. 828.

vided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

It is the duty of a clerk to refer a case to a referee if the judge is absent from the district or division of the district in which the petition is filed. In voluntary cases the reference is made immediately upon the filing of the petition.[7] In involuntary cases the reference is made on the next day after the last day on which pleadings may be filed, provided none have been filed by the bankrupt or any of his creditors.[8] For the purpose of enabling the referee to exercise the powers of the judge for the taking possession of and releasing the property of the bankrupt the clerk may issue a certificate showing the absence of the judge from the judicial district or division of the district, or his sickness or inability to act.[8*]

The clerks are required to respectively [9]

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) collect the fees of the clerk, referee and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) and within ten days after each case has been closed pay

[7] B. A. 1898, Sec. 18*g*. Official Form No. 15, Form No. 32, *post*.

[8] B. A. 1898, Sec. 18*f*. Official Form No. 15, Form No. 32, *post*.

[8*] B. A. 1898, Sec. 38, clause 3.

That a deputy clerk cannot refer a case, see Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. Rep. 102.

[9] B. A. 1898, Sec. 51.

to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

The clerk is entitled to one copy of the petition[10] and to one copy of the schedule.[11]

§ 38. Compensation and expenses of clerks.

The clerk receives as full compensation for his service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.[12]

Such fee is in full compensation for all services performed by him in regard to filing petitions or other papers required by the act to be filed with him, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but does not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.[13] In any case in which the fees of the clerk are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[14]

The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.[15] Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk may require, from the bankrupt or other person in

[10] B. A. 1898, Sec. 59*c*.
[11] B. A. 1898, Sec. 7, clause 8.
[12] B. A. 1898, Sec. 52.
[13] Gen. Ord. 35, par. 1.
[14] Gen. Ord. 35, par. 4.
[15] B. A. 1898, Sec. 62.

whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[16]

§ 39. Marshals.

The word "officer," as used in the act, includes a marshal, and the imposing of duty upon or the forbidding of an act by any officer includes his successor and any person authorized by law to perform the duties of such officer.[17]

It is the duty of the marshal to serve such writs and process as may be directed to him. It is his duty to serve the bankrupt in involuntary proceedings with the writ of subpœna and a copy of the petition filed against him.[18] The judge may authorize him to seize and hold the property of the bankrupt subject to further orders,[19] or to conduct the business of the bankrupt for a limited period.[20] Notices are usually served by the referee, and not by the marshal.[21]

§ 40. Compensation and expenses of marshals.

Marshals respectively receive from the estate where an adjudication in bankruptcy is made, except as by the act otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.[22] A marshal has been allowed a fee of $2 for serving a petition and affidavits and a fee of $2 for an order to show cause, both of which were

[16] Gen. Ord. 10.

[17] B. A. 1898, Sec. 1, clause 18.

[18] B. A. 1898, Sec. 18*a*; Eq. Rule 13.

[19] B. A. 1898, Sec. 69*a*, and Sec. 2, clause 3.

[20] B. A. 1898, Sec. 2, clause 5; *In re* Adams Sartorial Co., 101 Fed. Rep. 215.

[21] B. A. 1898, Sec. 58*c*.

[22] B. A. 1898, Sec. 52*b*; R. S. Sec. 829, provides for fees of marshals. The act of May 28, 1896, Sec. 6, 29 Stat. at L. 179, provides that all fees and emoluments of U. S. marshals shall be charged as heretofore.

served upon the same person.[23] In one case he was allowed $20 for seventeen days' services;[24] in another case $3 a day for services of a deputy marshal,[25] and in another case $2.50 a day for services of a deputy marshal and $1 a day for the services of a watchman.[26] In each case he was allowed his actual expenses in addition to this compensation. Actual expenses, however, do not include the cost of board and lodging.[27] The marshal must make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.[28]

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the marshal may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.[29] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[29]

§ 41. Duty of the attorney-general to report annually.

The attorney-general is required annually to lay before congress statistical tables showing for the whole country, and by states the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property in the estates; the dividends paid and the expenses of administering

[23] *In re* Damon, 104 Fed. Rep. 775; 5 Am. B. R. 133, Judge Hazel said: "Those charges, having always been made in accordance with custom and practice of United States courts, must, therefore, be regarded as reasonable. The charge for the one is fixed by statute, and the other by custom and tacit concurrence."

[24] *In re* Adams Sartorial Art Co., 101 Fed. Rep. 215; 4 Am. B. R. 107.

[25] *In re* Woodard, 95 Fed. Rep. 955.

[26] *In re* Scott, 99 Fed. Rep. 404, 4 Am. B. R. 625.

[27] *In re* Scott, 99 Fed. Rep. 404, 4 Am. B. R. 625.

[28] Gen. Ord. 19; *In re* Scott, 99 Fed. Rep. 404, 4 Am. B. R. 625.

[29] Gen. Ord. 10.

such estates; and such other like information as he may deem important.[30]

Officers, including clerks, marshals, receivers, referees and trustees,[31] are required to furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.[32]

§ 41a. Attorneys.

A court of bankruptcy has jurisdiction of a voluntary petition, signed and sworn to by the bankrupt, although the attorney for the bankrupt is not authorized to practice "in the circuit or district court."[33] An attorney for the bankrupt may act as notary to take the affidavit of the bankrupt to a petition and schedule prior to instituting proceedings in bankruptcy.[34] A petition in involuntary bankruptcy should be verified by the petitioner and specification in opposition to the discharge by objecting creditors. An attorney may verify either pleading if he is cognizant of the facts and can make positive oath to them.[35]

It has been held that an attorney may take the oath of his client to prove a debt,[36] but this is not good practice. The bankrupt's attorney should not represent creditors proving claims against the estate,[37] and it is not good practice for the same attorney to represent the trustee and the bankrupt.[38] The trustee may employ an attorney if necessary but it has been held that the court will not make directions in advance with

[30] B. A. 1898, Sec. 53.

[31] B. A. 1898, Sec. 1, clause 18.

[32] B. A. 1898, Sec. 54.

[33] *In re* Kindt, 3 Am. B. R. 546, 98 Fed. Rep. 403.

[34] *In re* Kindt, 2 Am. B. R. 306; 98 Fed. Rep. 867.

[35] *In re* Herzikopf, 118 Fed. Rep. 101; *In re* Hunt, 108 Fed. Rep. 282; *In re* Chequassat Lumber Co., 112 Fed. Rep. 56, 7 Am. B. R. 87; *In re* Glass, 119 Fed. Rep. 391. But see *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63.

[36] *In re* Kimball, 2 N. B. N. 46, 100 Fed. Rep. 777. But see *In re* Brumelkamp, 1 N. B. N. 360, 95 Fed. Rep. 814.

[37] *In re* Kimball, 1 N. B. N. 46, 100 Fed. Rep. 777; *In re* Wooten, 118 Fed. Rep. 670, 9 Am. B. R. 247.

[38] Keyes v. McKirrow, 180 Mass. 261, 9 Am. B. R. 322.

reference to such employment.[39] An attorney for creditors should not be appointed attorney for the trustee, where there are matters in controversy between different classes of creditors.[40] When an attorney accepts the office of trustee he cannot also be attorney for creditors.[41] The creditors may elect an attorney for the trustee.[42]

An attorney, agent or proxy should be required to produce and file with the referee written authority from the creditor to represent him and vote at the creditors' meeting.[43] But an attorney at law admitted to practice in the district or circuit court may appear in bankruptcy proceedings generally in behalf of his client without written power of attorney as in other cases.[44] Notices of hearing before a referee may be given by mail to the attorneys interested.[45]

If an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held in contempt for error in judgment.[46]

Fees of Attorneys.— The bankrupt act provides that the costs of administration, to which priority is given, shall include one reasonable attorney's fee, for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed in the act, and to the bankrupt in voluntary cases, as the court may allow.[47] This allowance may be made by the referee,[48] and may be made *ex parte* without giving notice to cred-

[39] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575.

[40] *In re* Rusch, 103 Fed. Rep. 607.

[41] *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730.

[42] *In re* Little Lumber Co., 101 Fed. Rep. 558.

[43] *In re* Blankfein & Deitz, 2 N. B. N. 49; *In re* Sugenheimer, 91 Fed. Rep. 744; *In re* Eagles & Crisp, 2 N. B. N. 462, 99 Fed. Rep. 695; *In re* Richards, 103 Fed. Rep. 849. But see *In re* Gasser (C. C. A., 8th Cir.), 104 Fed. Rep. 537, 5 Am. B. R. 32.

[44] *In re* Gasser (C. C. A., 8th Cir.), 104 Fed. Rep. 537, 5 Am. B. R. 32.

[45] *In re* Lewin, 103 Fed. Rep. 850.

[46] *In re* Watts & Sachs, 190 U. S. 1.

[47] B. A. 1898, Sec. 64*b*, cl. 3.

[48] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146.

itors.[49] Where a partnership is adjudged a bankrupt, but one attorney fee can be allowed, though each of the partners appeared throughout the proceedings by different attorneys.[50]

Before a fee will be allowed to an attorney for a voluntary bankrupt he must show that he actually rendered some services.[51] Where the referee is not satisfied with the evidence of services rendered, he may suspend the claim for a time but must make an allowance within a reasonable time on such evidence as he may have.[52]

It has been held that the attorney for a voluntary bankrupt is entitled to a fee only for services which are beneficial to the estate, and that no fee should be granted for services rendered in preparing the schedules or other services for the benefit of the bankrupt.[53] This doctrine is dissented from by Judge Brown.[54] Claims for such fees may be proved against the estate under general order ten.[55] A fee for such services and for all other services in assisting the bankrupt in performing the duties required of him by the act has been allowed the attorney of an involuntary bankrupt.[56] Where a voluntary bankrupt before filing his petition paid his attorney a fee for services in preparing the schedules and petition he cannot recover this and the filing fee from the estate under general order ten.[57] A fee has been refused where the bankrupt's attorney received from the bankrupt's brother a larger fee than would ordinarily be allowed by the court out of the estate.[58] An attorney for the bankrupt is not entitled to a fee as a matter of right. Its allowance is within the sound

[49] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641.

[50] *In re* Eschwege & Cohn, 8 Am. B. R. 282.

[51] *In re* Terrill, 103 Fed. Rep. 781, 4 Am. B. R. 625.

[52] *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146.

[53] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535, *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

[54] *In re* Kross, 96 Fed. Rep. 816, 3 Am. B. R. 188.

[55] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535.

[56] *In re* Michel, 95 Fed. Rep. 803, *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238; *In re* Goldville Mfg. Co., 123 Fed. Rep. 579.

[57] *In re* Matthews, 97 Fed. Rep. 772, 3 Am. B. R. 265.

[58] *In re* O'Connell, 98 Fed. Rep. 83, 3 Am. B. R. 422.

discretion of the court,[59] as is also its amount,[60] and this discretion may be reviewed on appeal.[61] The fee allowed should be, not what is reasonable for the work done, but what is reasonable for the work necessary.[62] To justify an allowance of a fee, the services must have been rendered in good faith and reasonably necessary for the purposes of the act.[63] Where the bankrupt tries to defeat and delay the proceedings no fee should be allowed to his attorney,[64] nor should any fee be allowed for defending him for contempt.[65] It has been held that a fee should not be allowed for assisting a bankrupt in getting his discharge.[66]

An attorney who represents the creditors in voluntary proceedings is not entitled to fees out of the estate.[67] An attorney for the creditors in involuntary proceedings is entitled to a reasonable fee as a matter of right.[68] An attorney for the petitioning creditors is not entitled to a fee for attending creditors' meetings, nor for doing the work which the bankrupt act requires the referee to do.[69] Where a creditor employs an attorney the attorney has a lien on the amount secured for the creditor which the bankruptcy court will enforce.[70]

A fee is also allowed to the attorney of the trustee in both involuntary and voluntary cases when his services are reason-

[59] *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58; *In re* Morris, 125 Fed. Rep. 841.

[60] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535; *In re* Burrus, 97 Fed. Rep. 926, 3 Am. B. R. 296; *In re* Curtis (C. C. A., 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238.

[61] *In re* Roche (C. C. A., 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; *In re* Curtis (C. C. A., 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R 17.

[62] *In re* Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

[63] Rosenthal v. Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[64] *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692.

[65] *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238. But see language in Rosenthal v. Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[66] *In re* Brundin, 112 Fed. Rep. 306, 7 Am. B. R. 296. But see Rosenthal v. Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[67] *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

[68] *In re* Curtis (C. C. A., 7th Cir.), 100 Fed. Rep. 785, 4 Am. B. R. 17, Smith v. Cooper, 120 Fed. Rep. 230.

[69] *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 219.

[70] *In re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319.

ably necessary.[71] The trustee must himself decide whether such services are reasonably necessary as the court will not instruct him as to whether or not he should employ an attorney.[72] A fee will not be allowed where there was no reasonable expectation that the work of an attorney would gain anything for the estate.[73] A trustee who was an attorney at law has been allowed compensation for his professional services such as he would have been obliged to pay had he employed other counsel.[74] The attorney for a trustee is not entitled to a fee for professional services for attending examinations where his services were rendered in behalf of creditors who were his real clients,[75] or in general when the attorney for the trustee is also attorney for the creditors.[76] An attorney must disclose his dealings with his client to enable the court to fix the amount of his compensation.[77] An attorney for an assignee under a general assignment for creditors in a state court, where the property of the debtor is later administered in bankruptcy, is entitled to a reasonable fee for services rendered such assignee before and after the petition in bankruptcy is filed, which are beneficial to the estate,[78] but he is not entitled to a fee for resisting bankruptcy proceedings.[79] Fees for services rendered the assignee which are beneficial to the estate should be given priority under Sec. 64*b*.[80] A fee for services rendered the

[71] *In re* Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682; *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847. But see *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

[72] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575.

[73] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830.

[74] *In re* Mitchell, 1 Am. B. R. 687; to the same effect *In re* Welge, 1 Fed. Rep. 216; *contra*, *In re* Muldaur, No. 9905 Fed. Cas., s. c. 8 Ben. 65.

[75] *In re* Rozinsky, 101 Fed. Rep. 229.

[76] *In re* Carolina Cooperage Co., 96 Fed. Rep. 950.

[77] *In re* Carr, 9 Am. B. R. 58.

[78] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[79] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[80] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1. See also *In re* Chase (C. C. A., 1st Cir.), 124 Fed. Rep. 753; Summers v. Abbott (C. C. A., 8th Cir.), 122 Fed. Rep. 36.

debtor in preparing the deed of assignment may be proved as an unsecured claim.[81]

The amount of fees allowed attorneys in various cases are collated below.[82]

A court of bankruptcy will not ordinarily tax as costs attorneys' fees upon the dismissal of a petition in involuntary bankruptcy.[83] When, however, an application to seize and hold the property of the bankrupt pending the hearing has been granted and the petition afterwards dismissed, the court may allow attorneys' fees as costs of the proceeding.[84] A docket fee of twenty dollars may be taxed as costs in a proper case.[85] A court of bankruptcy has refused to dismiss a voluntary petition until the attorney for the trustee had been paid.[86] The

[81] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[82] Under different circumstances the following amounts have been allowed as reasonable fees: To attorney for a voluntary bankrupt, fifty dollars, *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535; fifty dollars, *In re* Kross, 96 Fed. Rep. 816, 3 Am. B. R. 188; two hundred dollars, *In re* Burrus, 97 Fed. Rep. 926, 3 Am. B. R. 296; fifty dollars, *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

To attorney for involuntary bankrupt: twenty-five dollars, *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; fifty dollars, and twenty-five dollars per diem, *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238; ninety dollars, *In re* Anderson, 103 Fed. Rep. 854, 4 Am. B. R. 640; one hundred and twenty-five dollars, *In re* Carr, 117 Fed. Rep. 572, — Am. B. R. —; one hundred dollars, *In re* Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

To the attorney for creditors: one hundred dollars (for preparing the petition, schedules, etc. This is governed in some districts by rule of court). *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 219; seventy-five dollars, *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692; two thousand dollars, *In re* Curtis (C. C. A., 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; seventy-five dollars, *In re* Silverman, 97 Fed. Rep. 325, 3 Am. B. R. 227; *In re* Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682; one hundred and fifty dollars, *In re* Carr, 117 Fed. Rep. 572, — Am. B. R. —; one thousand dollars, Smith v Cooper, 120 Fed. Rep. 230.

To attorney for trustee: one hundred and twenty-five dollars, *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; twenty dollars, *In re* Mitchell, 1 Am. B. R. 687; twenty-five dollars, *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847.

[83] *In re* Ghiglione, 93 Fed. Rep. 186.

[84] *In re* Abraham (C. C. A., 5th Cir.), 93 Fed. Rep. 767 (785).

[85] *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[86] *In re* Salaberry, 107 Fed. Rep. 95

court will not enforce a provision in a mortgage for the payment "of an attorney's fee of ten per cent of the amount of the debt." [87]

[87] *In re* Roche (C. C. A., 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369.

CHAPTER VII.

WHO MAY BE BANKRUPTS.

§ 42. Voluntary bankrupts.

Any person who owes debts, except a corporation, is entitled to the benefits of the act as a voluntary bankrupt.[1]

The language of this provision is very general and comprehensive. A person is defined by the act itself to include partnerships and women.[2] It would therefore appear that any natural person or association of persons not incorporated, irrespective of trade, business or profession, may become voluntary bankrupts. The only condition is that such persons shall owe debts which a discharge in bankruptcy would release. A person whose only liability is a judgment on which an appeal is pending [3] or a judgment for willful and malicious injury [4] cannot become a voluntary bankrupt. A creditor cannot resist voluntary bankruptcy on the ground that the petitioner is solvent.[5] No limit is fixed as to the amount of the indebtedness.[6] The right of an alien, an infant, a lunatic and a married woman to become voluntary bankrupts is considered in another place.[7]

§ 43. Involuntary bankrupts.

The act, as amended Feb. 5, 1903, provides [8] that "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated

[1] B. A. 1898, Sec. 4*a*.

[2] B. A. 1898, Sec. 1, clause 19.

[3] *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

[4] *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

[5] *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[6] Under the act of 1867, R. S. Sec. 5014, a person was required to owe debts, provable in bankruptcy, exceeding the sum of $300.

[7] See Secs. 44 to 47, *post*.

[8] B. A. 1898, Sec. 4*b*, 32 Stat. at L. 797.

company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

It will be observed that the provision with respect to persons against whom a petition may be filed is more limited in its scope than in the case of a person voluntarily seeking the benefits of the act. It is limited, *first,* to natural persons, not wage-earners or persons engaged chiefly in farming or the tillage of the soil;[9] *second,* to unincorporated companies;[10] *third,* to corporations engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, and, *fourth,* to private bankers. A trustee in bankruptcy, like any other person, may be adjudged a bankrupt.[11] In any case there must be an indebtedness of $1,000 or over in order to support a petition in involuntary bankruptcy.[12]

The statute expressly excludes, *first,* wage-earners, and defines a wage-earner to mean "an individual who works for wages, salary or hire at a rate of compensation not exceeding $1,500 per year."[13] A bookkeeper and secretary of a corporation whose salary is less than $1,500 per year is within this clause.[14] *Second,* persons engaged chiefly in farming and the tillage of the soil.[15] For a person's principal occupation to be

[9] An involuntary petition against a natural person is defective which does not aver that the defendant is not a wage earner or a person engaged chiefly in farming or the tillage of the soil. *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re* Taylor (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515. Such defect may be cured by amendment. Beach v. Macon Grocery Co. (C. C. A., 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762; and it is waived by answering on the merits, Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[10] See also B. A. 1898, Sec. 5.

[11] See Merrick's Estate, 5 Watts & S. (Penn.) 9.

[12] B. A. 1898, Sec. 4*b*.

[13] B. A. 1898, Sec. 1, clause 27.

[14] *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 244.

[15] *In re* Thompson, 102 Fed. Rep. 287, 4 Am. B. R. 340.

In re Luckhardt, 101 Fed. Rep.

farming it must be that which is of principal concern to him, which he deems of paramount importance to his welfare and on which he chiefly relies for his livelihood.[16] The owner of a farm who has leased it to another for a year is not a person engaged chiefly in farming and can be made an involuntary bankrupt.[17] *Third,* national banks, which are wound up when insolvent by special statute not included in the bankruptcy act;[18] *fourth,* banks incorporated under state or territorial laws, whose affairs, if involved, may be settled under the laws of the state or territory creating them.[19] A corporation cannot be a private banker within the meaning of the bankrupt act.[20] The bankrupt statute does not authorize or justify an adjudication in bankruptcy against the individual estate of a deceased person.[21] The act deals with living persons. A deceased person cannot be adjudged a bankrupt.

The right to force an alien, an infant, a lunatic and a married woman into involuntary bankruptcy is considered in another place.[22]

§ 44. Aliens.

The act does not limit the persons who may be adjudged bankrupts to citizens or even to residents of the United States. Hence an alien may become either a voluntary or an involuntary bankrupt.[23]

807, a merchant who had committed an act of bankruptcy and thereafter abandoned his business and engaged in farming was adjudged an involuntary bankrupt.

[16] *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577. See also *In re* Drake, 114 Fed. Rep. 229, 8 Am. B. R. 137, affirmed in Wulbern v. Drake (C. C. A., 4th Cir.), 120 Fed. Rep. 493, 9 Am. B. R. 695.

[17] *In re* Matson, 123 Fed. Rep. 743.

[18] R. S. Secs. 5220 to 5243; see *In re* Manufacturer's National Bank, No. 9051, Fed. Cas., s. c. 5 Biss. 499.

[19] Davis v. Stevens, 104 Fed. 235. The rule seems to have been otherwise under the act of 1867. See Thornhill v. Bank of Louisville, No. 13990, Fed. Cas., s. c. 3 N. B. R. 435.

[20] *In re* Surety Guarantee & Trust Co. (C. C. A., 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129.

[21] Adams v. Terrell, 4 Fed. Rep. 802; *In re* Stevens, No. 13393, Fed. Cas., s. c. 1 Low. 397; *In re* Daggett, No. 3536, Fed. Cas., s. c. 8 N. B. R. 433. In these cases the question arose with reference to reaching the assets of a deceased person.

[22] See Secs. 44 to 47, *post.*

[23] *In re* Goodfellow, No. 5536, Fed Cas., s. c. 1 Low. 510; *In re*

A foreigner must either have had a principal place of business or residence within the United States for six months, or the greater portion thereof, or have property within the jurisdiction of the court of bankruptcy.[24] "The governing principle," said Judge Brett,[25] "is that all legislation is *prima facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being themselves within the allegiance of the legislating power." Hence it may be doubted if a foreigner would be adjudged a bankrupt unless he had assets or owed debts contracted in the United States.[26] Such would be an idle proceeding.

§ 45. Infants.

An infant is not generally liable for debt contracted by him during his infancy.[27] The word infant, or minor, is not found in the bankrupt act. In order to support a bankruptcy petition

Boynton, 10 Fed. Rep. 277.

In Judd v. Lawrence, 1 Cush. (Mass.) 531, it was held that a foreigner residing within the commonwealth could take the benefit of the state insolvent law.

In Cutter v. Folsom, 17 N. H. 139, under the bankrupt act of August 19, 1841, 5 Stat. at L. 440, it was held that one residing within the jurisdiction of the circuit court, who was a member of a foreign firm, was entitled to the provisions of the act.

[24] B. A. 1898, Sec. 2, clause 1.

[25] *Ex parte* Blain, 12 Chan. Div. 528.

[26] Consult *ex parte* Blain, 12 Chan. Div. 522.

[27] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232, in discussing the rights of an infant to be adjudged a bankrupt, Judge Blatchford said: "The general contracts of an infant having no force, if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority." . . . .

"But there are other difficulties attendant on an involuntary case. The debt of a petitioning creditor must be a debt provable at the time the petition is filed." He then proceeds to show that such a debt is not provable under the different sections of the act of 1867, which reasons are applicable with equal force to the act of 1898.

See also Belton v. Hodges, 9 Bing. 365, where it was held that a commission of bankrupt against an infant was void, not merely voidable.

there must be capacity in the infant to owe the debt.[28] But whether a debt for necessities would support a bankruptcy petition seems to be an open question in England.[29] After an infant has reached his majority he may become liable for a debt created during infancy. If he does become so liable he is subject to be adjudged a bankrupt.

§ 46. Lunatics.

Whether a lunatic can be adjudged either a voluntary or involuntary bankrupt is doubtful under the authorities.

In England the words of the statute are "a debtor," [30] which may be considered equivalent to "any person who owes debts" or "owing debts." [31] Under the English statutes it is an open question, and has been since the time of Lord Eldon.[32] It has been held that a person, who is so unsound in mind as to be wholly incapable of managing his affairs, cannot, in that condition, commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian.[33] It has also been held that an insane person cannot become a voluntary bankrupt because he is not a "qualified" person within the meaning of Sec. 59*a*.[34] But if he commits an act of bankruptcy while sane he has been adjudged an involuntary bankrupt against the consent of his guardian.[35] The fact that

[28] *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Dunnigan, 95 Fed. Rep. 428; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607; *In re* Eidemiller, 105 Fed. Rep. 595.

See *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232; *In re* Book, No. 1637, Fed. Cas., s. c. 3 McLean 317, where an infant was allowed to claim the benefit of the bankrupt law of 1841; *In re* Cotton, No. 3269, Fed. Cas., s. c. 6 Law. Rep. 546, the petitioner who applied for an injunction was a minor, and this was one of the objections to his seeking the benefit of the act. The court passed the question without deciding it.

[29] *In re* Soltykoff, 1 Q. B. (1891) 415.

[30] 46 and 47 Vic. chap. 52, Sec. 4.

[31] B. A. 1898, Sec. 4 *a* and *b*.

[32] *In re* Farham, 2 Chan. Div. (1895) 805.

[33] *In re* Funk, 101 Fed. Rep. 244, 4 Am. B. R. 96; *In re* Marvin, No. 9178, Fed. Cas., s. c. 1 Dill. 178; *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96.

[34] *In re* Eisenberg, 117 Fed. Rep. 786, 8 Am. B. R. 551.

[35] *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96; *Ex parte* Stamp, 1 De Gex, 345; Anon. 13 Ves. 590.

a person has been adjudged a lunatic does not imply that he will always remain so.[36] A guardian *ad litem* may be appointed pending the determination of his sanity at the time the act of bankruptcy complained of was committed.[37]

Where a bankrupt becomes insane after the commencement of proceedings in bankruptcy they are not abated thereby, but may be conducted and concluded in the same manner, so far as possible, as though he had not become insane.[38]

§ 47. Married women.

Under the former bankrupt acts there was some doubt, as to the power of the courts of bankruptcy to adjudge a married woman a bankrupt.[39] The laws of the several states have extended a married woman's rights with reference to property within the last quarter of the century.

In order to come within the provisions of the bankrupt act a person must owe a debt. The true rule with reference to married women is that where a woman may owe a debt she may be adjudged a voluntary or involuntary bankrupt.[40] Her capacity to owe is determined by the laws of the state of her domicile, as interpreted by the highest court in the state.[40] She may be able to contract and owe debts and accordingly be adjudged a bankrupt in one state and not in another state.

§ 48. Corporations.

As the bankrupt statute does not restrict the classes of unincorporated companies or partnerships, it may become important to determine what is a corporation. Corporations are defined by the act to mean "all bodies having any of the powers and

[36] Saunders v. Mitchell, 61 Miss. 321.

[37] *In re* Burka, 107 Fed. Rep. 674, 5 Am. B. R. 843.

[38] B. A. 1898, Sec. 8.

[39] The cases are collected and considered in an article on married women as bankrupts, 13 American Law Register, N. S. (March, 1874) 129.

[40] *In re* Collins, No. 3006, Fed. Cas., s. c. 3 Biss. 415; *In re* O'Brien, No. 10397, Fed. Cas., s. c. 1 N. B. R. 176; *In re* Lyons, No. 8649, Fed. Cas., s. c. 2 Saw. 524, and note discussing the subject. *In re* Kinkead, No. 7824, Fed. Cas., s. c. 3 Biss. 405 and note. *In re* Goodman, No. 5540, Fed. Cas., s. c. 5 Biss. 401; *In re* Howland, No. 6791, Fed. Cas., s. c. 2 N. B. R. 357.

privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." [41]

The act, as amended, limits the classes of corporations subject to be adjudicated bankrupts upon a petition by creditors to those "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits." [42] Any corporation not falling within one of these classes is not subject to be adjudged a bankrupt. The classes specified are evidently intended to cover what are generally known as private business corporations. The petition must state that the corporation is engaged in one of these pursuits or the court acquires no jurisdiction to adjudge it a bankrupt.[43] A corporation which has not in fact engaged in one of these pursuits cannot be adjudged an involuntary bankrupt although its charter authorizes it to engage in them.[44]

Manufacturing Companies.— As generally understood and defined by the lexicographers, a manufacturing company is one engaged in making goods or wares of any kind; producing articles for use from raw or prepared materials by giving to these materials new qualities, properties or combinations, whether by hand labor or by machinery.[45] This is probably the meaning of the word as used in the bankrupt act.

[41] B. A. 1898, Sec. 1, clause 6.

This subject is also considered by Judge Lurton in the case of Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. Rep. 585, s. c. 30 C. C. A. 293, where the question was whether the circuit court had jurisdiction of a limited partnership association as a citizen of Pennsylvania.

[42] B. A. 1898, Sec. 4*b*, 32 Stat. at L. 797.

[43] *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[44] *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508, affirmed *In re* Morris (C. C. A. 2d Cir.), 102 Fed. Rep. 1004; *In re* Tontine Surety Co., 116 Fed. Rep. 401, 8 Am. B. R. 421.

[45] See *In re* Tecopa Mining & Smelting Co., 110 Fed. Rep. 120, 6 Am. B. R. 250.

In Columbia Iron Works v. Nat. Lead Co., 126 Fed. Rep. —, 11 Am. B. R. —, Judge Severens, speaking for the circuit court of appeals for the 6th circuit, said: "The business in question is the building of articles of commerce, as much as the building of locomotives and railway cars, or the manufacture of their constituent parts. The distinction would seem to run along the

TRADING COMPANIES.— A trading company is one whose business is buying or selling or barter, its object being to buy and sell again personal property for gain. What constitutes a trader under the bankrupt law has been the subject of judicial interpretation, both in this country and in England.[46] Thus the term trader has been held to include a miller,[47] a baker,[48] a butcher,[49] a stair-builder,[50] a furniture dealer,[51] a grocer,[52] a merchant tailor,[53] a theatrical manager [54] but not a theatrical corporation,[54*] an inn, hotel or boarding-house keeper,[55] or a livery-stable keeper,[55*] or a druggist or a physician who dispenses and is paid for medicines administered to

line of those articles which are more or less fixed in place, and not ordinarily the subjects of bargain and sale as articles of commerce, as contradistinguished from those which are movable and ordinarily regarded as subjects of sale and manual transfer, articles of trade in the common course of mercantile business. The associated words seem to import that Congress intended to include all those corporations which were engaged in the manufacture or sale of articles of commerce."

[46] *In re* Eeles, No. 4302, Fed. Cas., s. c. 5 Law Rep. 273; Wakeman v. Hoyt, No. 17051, Fed. Cas., s. c. 5 Law Rep. 309, and cases cited in notes below.

[47] Daniels v. Palmer, 35 Minn. 347.

A ship-building company has been held to be a corporation engaged principally in manufacturing. Columbia Iron Works v. National Lead Co. (C. C. A., 6th Cir.), 126 Fed. Rep. —; 11 Am. B. R. —.

[48] *In re* Cocks, No. 2933, Fed. Cas., s. c. 3 Ben. 260.

[49] *In re* Bassett, 8 Fed. Rep. 266; Dally v. Smith, 4 Burr 2148; Sylvester v. Edgecomb, 76 Me. 499.

[50] *In re* Garrison, No. 5254, Fed. Cas., s. c. 5 Ben. 430.

[51] *In re* Newman, No. 10175, Fed. Cas., s. c. 3 Ben. 20.

[52] *In re* Good, 78 Cal. 399.

[53] Archenbrown, No. 505, Fed. Cas., s. c. 12 N. B. R. 17.

[54] *In re* Duff, 4 Fed. Rep. 519.

[54*] *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219.

[55] *In re* Ryan, No. 12183, Fed. Cas., s. c. 2 Saw. 411. King v. Simmons, 1 H. L. Cas., 754; Gibson v. King, 10 M. & W. 667, 12 L. J. Ex. 9; *Ex parte* Daniell, 7 Jur. 334; *In re Jones,* 3 Chan. Div. 457; s. c. 25 W. R. 186; *In re* Sherwood, No. 12773, Fed. Cas., s. c. 9 Ben. 66.

But see *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; Saunderson v. Rowles, 4 Burr, 2064; *Ex parte* Bowers, 2 Deac. 99; *Ex parte* National Deposit Bank, 26 W. R. 624.

In re San Gabriel Sanitorium Co., 95 Fed. Rep. 271, 2 Am. B. R. 408, a corporation which owned and maintained a private hospital for profit and not as a charity, has been adjudged an involuntary bankrupt. See note 55*.

[55*] Groves v. Kilgore, 72 Me. 489;

his own patients,[56] a smuggler or illegal trader,[57] or an electric light company whose principal business was furnishing electricity for power and light.[58]

On the other hand, the term trader has been held not to include a stock broker,[59] or railroad contractor,[60] or a mining company,[61] or a superintendent of a common carrier,[62] or a carrier,[63] or a teamster who buys and sells hay and straw for the purpose of keeping his teams,[64] or a fisherman who occasionally buys fish to make up for market a cargo otherwise deficient,[65] or a person who from time to time buys paintings,

In re Odell, No. 10426, Fed. Cas., s. c. 9 Ben. 209; Wright v. Bird, 1 Price 20; Martin v. Nightingale, 3 Bing. 421; *In re* Morton Boarding Stables, 108 Fed. Rep. 791, 5 Am. B. R. 763. This case is, however, disapproved *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; *In re* White Star Laundry Co., 117 Fed. Rep. 570, 9 Am. B. R. 30; *In re* Surety, Guarantee & Trust Co. (C. C. A., 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129, and *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139.

[56] *Ex parte* Crabb, 8 De Gex, Mac. & G. 277; *Ex parte* Daubenny, 3 Mont & Ayr, 16, s. c. 2 Deac. 72.

[57] Cobb v. Symonds, 5 B. & A. 516; *Ex parte* Meymet, 1 Atk. 196.

[58] *In re* Suburban Electric Co. (District of Kentucky, 1900, not reported.)

But see *In re* New York & W. Water Co., 98 Fed. Rep. 711, affirmed in *In re* Morris, 102 Fed. Rep. 1004.

[59] *In re* Surety, Guarantee & Trust Co. (C. C. A., 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129; *Ex parte* Conant, 77 Me. 275; *In re* Woodward, No. 18001, Fed. Cas., s. c. 8 Ben. 563; *In re* Moss, No. 9877, Fed. Cas., s. c. 19 N. B. R. 132.

[60] *In re* Smith, No. 12981, Fed. Cas., s. c. 2 Low. 69.

[61] *In re* Woodside Coal Co., 105 Fed. Rep. 56, 5 Am. B. R. 186; *In re* Elk Park Min. & Mill Co., 101 Fed. Rep. 422, 4 Am. B. R. 131; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep. 982, 2 N. B. N. 988, 4 Am. B. R. 327; *In re* Chicago-Joplin Lead & Zinc Co., 104 Fed. Rep. 67, 4 Am. B. R. 712; McNamara v. Helena Coal Co., 5 Am. B. R. 48; *In re* Keystone Coal Co., 109 Fed. Rep. 872, 6 Am. B. R. 377. By the amendment of 1903 a mining company may now be made an involuntary bankrupt.

[62] *In re* Merritt, 7 Fed. Rep. 853.

[63] *In re* Union Pac. R. Co., No. 14376, Fed. Cas., s. c. 10 N. B. R. 178; *In re* Philadelphia & Lewes Transp. Co., 114 Fed. Rep. 403; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139.

[64] *In re* Kimball, 7 Fed. Rep. 461; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139.

[65] *Ex parte* Gallimore, 2 Rose, 424.

If he buys fish from other boats at sea and sells them on shore he is a trader. Heaney v. Birch, 1 Rose, 356, s. c. 3 Camp. 233.

but not in the course of his regular business,[66] or a water supply company engaged in the business of obtaining, transporting and supplying water for municipal and domestic use for fixed rentals,[67] or a saloon and restaurant,[68] or a social club,[69] or a laundry,[70] or a circulating library,[71] or a grain warehouse.[72]

"Mercantile Pursuits."— Mercantile pursuits, as generally understood, are those which pertain to merchants or the traffic carried on by merchants, or having to do with trade or commerce.

This phrase was evidently intended to enlarge the scope of the classes named immediately before it. It is substantially the same as "commercial," which was used in the act of 1867. Trading corporations include most concerns engaged in mercantile pursuits, yet there may be a corporation which has to do with trade and commerce that is not, strictly speaking, within the class of traders. Such corporations may be included in the expression "engaged in mercantile pursuits."[73]

Railroad, steamship, steamboat and canal companies[74] and insurance companies[75] were held subject to be adjudged bankrupts as "moneyed, business or commercial corporations" under the act of 1867.[76] The provisions of the present act are not broad enough to include the railroad and transportation companies and insurance companies.[77] The intent of the

[66] *In re* Chapman, No. 2601, Fed. Cas., s. c. 9 Ben. 311.

[67] *In re* New York & W. Water Co., 98 Fed. Rep. 711, affirmed in *In re* Morris, 102 Fed. Rep. 1004.

[68] *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173.

[69] *In re* Fulton Club, 113 Fed. Rep. 997, 7 Am. B. R. 670.

[70] *In re* White Star Laundry, 117 Fed. Rep. 570.

[71] *In re* Parmelee Library (C. C. A., 7th Cir.), 120 Fed. Rep. 235.

[72] Pacific Coast Warehouse Co., 123 Fed. Rep. 749.

[73] *In re* Mutual Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607.

[74] New Orleans, &c., R. R. Co. v. Delamore, 114 U. S. 506, and cases there collated.

[75] *In re* Independent Ins. Co., No. 7017, Fed. Cas., s. c. 1 Holmes 103; *In re* Hercules Mut. Ins. Co., No. 6402, Fed. Cas., s. c. 6 Ben. 35; *In re* Merchants' Ins. Co., No. 9441, Fed. Cas., s. c. 3 Biss. 162.

[76] R. S. Sec. 5122.

[77] *In re* Philadelphia & Lewes Transp. Co., 114 Fed. Rep. 403; Quimby Freight Forwarding Co.,

framers of this law seems to have been to leave such corporations to be dealt with by the laws of the state creating them.[78] It may be observed that the law and practice with reference to winding up the affairs of such insolvent corporations became very largely settled under the existing statutes during the twenty-five years previous to the passage of the bankrupt act. To have extended the bankruptcy jurisdiction to them would, to a large extent, have unsettled both the rules of law and practice. Congress seems to have hesitated to do this.

A corporation which has committed an act of bankruptcy, although it has been dissolved before the filing of the petition, should nevertheless be adjudicated a bankrupt in order that preferences made unlawful by the bankrupt act may be set aside.[79]

127 Fed. Rep. 139; *In re* Cameron etc., Ins. Co., 96 Fed. Rep. 756, 2 Am. B. R. 372.

[78] See paragraph XII of the statement of the conference committee to the House of Representatives, June 28, 1898, vol. 31, Cong. Record, p. 7205.

[79] Scheurer v. Smith, etc., Co. (C. C. A., 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

CHAPTER VIII.

ACTS OF BANKRUPTCY.

§ 49. Who may commit an act of bankruptcy.

To support an adjudication of bankruptcy the debtor must have committed an act of bankruptcy within four months before the filing of the petition.[1] Any person who may be adjudged a bankrupt may commit an act of bankruptcy. But the act must be committed by the person himself, or at least with his knowledge and consent. It is clear that a person cannot commit an act of bankruptcy by the conduct of his agent without his knowledge or consent.[2]

To support an adjudication of bankruptcy against a partnership it seems that formerly there must have been separate acts of bankruptcy by each partner.[3] The present act provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[4] Under the present act a partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more (but less than all) of the partners, where such

[1] B. A. 1898, Sec. 3*b*.

[2] Cotton v. James, M. & M. 273; *Ex parte* Blain, 12 Chan. Div. 522.

[3] Allen v. Hartley, 4 Doug. 20; *In re* Redmond, No. 11632, Fed. Cas., s. c. 9 N. B. R. 408, and cases cited in opinion. *In re* Weaver, No. 17307, Fed. Cas., s. c. 9 N. B. R. 132; *In re* Waite, No. 17044, Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150, Fed. Cas., s. c. 3 Biss. 122.

It was held not evidence of an act of bankruptcy by three partners of a banking concern, where one of them, who resided at the place where the banking-house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking-house, shut it up and stopped payment. Mills v. Bennett, 2 M. & S. 556; s. c. 2 Rose, 269.

[4] B. A. 1898, Sec. 5*c*.

act was within the scope of the partnership business so as to constitute in fact an act of the firm.[5] The sale by one member of an insolvent firm of his interest to his partner is an act of bankruptcy, and the court will set it aside as fraudulent and proceed to distribute the property as firm property.[6]

§ 50. What are acts of bankruptcy?

The bankrupt statute, as amended Feb. 5, 1903, enumerates five acts of bankruptcy relating to the disposition of the debtor's property and to his circumstances and credit. Acts of bankruptcy under the statute[6*] by a person "consist of his having

First, "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

Second, "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

Third, "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

Fourth, "made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee

[5] *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516; *In re* Grant, 106 Fed. Rep. 496; *In re* Shapiro, 106 Fed. Rep. 495; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794. See also Sec. 97, *post.*

[6] *In re* Waite, No. 17044, Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150, Fed. Cas., 3 Biss. 122; *In re* Shapiro, 106 Fed. Rep. 495.

[6*] B. A. 1898, Sec. 3*a*, and 32 Stat. at L. 797.

In re Empire Metallic Bedstead Co., 98 Fed. Rep. 981, 3 Am. B. R. 575, 2 N. B. N. 304. The circuit court of appeals for the second circuit, said: "When acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class."

has been put in charge of his property under the laws of a state , of a territory, or of the United States; or

Fifth, "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It may be observed that under the former bankrupt statutes there were acts of bankruptcy relating to the person of the debtor. Thus it constituted an act of bankruptcy to depart or be absent from the state, district or territory of which the debtor was an inhabitant, with intent to defraud his creditors,[7] or to conceal himself to avoid service of legal process.[7] There is no such act of bankruptcy under the present statute.

In case a debtor absconds or conceals himself to avoid the service of process and hinder, delay or defraud his creditors by so doing, the remedy under the present act is to commence a suit against his property. Under the laws of the several states this is a ground for attaching the property of the debtor, which may be sold to pay the debt. Hence a creditor may begin legal proceedings under the state law. In case the debtor is solvent, creditors will secure their debts under such proceedings without resorting to bankruptcy. In case the property is insufficient to cover all claims made and satisfy all attachments issued, or one creditor is gaining a preference over another by such proceedings, if such attachments, or any one of them, are not released five days before the sale of the property attached, an act of bankruptcy is committed. The creditors may file a petition to have the debtor adjudged a bankrupt. All attachments so levied, or liens of any nature gained by legal proceedings within four months before the filing of the petition, are null and void.[7*] Thus creditors of every degree will come in equally for proportionate shares of the bankrupt's estate. If, however, an insolvent debtor absconds and takes property with him he commits an act of bankruptcy, as he conceals and removes his property.[8]

[7] For acts of bankruptcy under the acts of 1800 and 1841 see historical sketch, pages 7 and 10, *ante.* For the acts of bankruptcy under the act of 1867, see R. S. Sec. 5021.

[7*] B. A. 1898, Sec. 67*f*.

[8] *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332.

If a debtor has committed an act of bankruptcy he cannot avoid the consequences of it by a subsequent rescission or undoing thereof.[8]* A creditor cannot complain of an act committed before he was a creditor.[9]

§ 50a. Insolvency as an element of an act of bankruptcy.

It should be observed that insolvency of the debtor is an essential element of some acts of bankruptcy and is not a requisite element of other acts of bankruptcy.

It is not necessary that a person who transfers, conveys, etc., property should be insolvent at the time to constitute an act of bankruptcy under the first clause. He must be insolvent at the time the petition is filed. Actual solvency at the time of filing the petition is a complete defense to a petition charging an act of bankruptcy under the first clause and the burden of proving his solvency is on the alleged bankrupt.[9]*

A person cannot commit an act of bankruptcy under the second and third clauses while he is solvent. He must be insolvent at the time of the transfer or of permitting a preference through legal proceedings. If the debtor takes issue on the question of his solvency at that time, the burden of proving insolvency is on the petitioning creditors, except in case of his actual failure to attend with his books, papers and accounts and submit to an examination, as provided in Sec. 3*d*, in which case the burden of proving his solvency rests upon the debtor.[10] Under Sec. 3*a*, clauses 2 and 3, the solvency of the debtor at the time the petition in bankruptcy is filed is immaterial.[10]*

Under clauses 4 and 5 as originally enacted the solvency or insolvency of the debtor either at the time of committing the act of bankruptcy or at the time of filing the petition is immaterial.[11] By the amendment of 1903 [12] it is provided that in

[8]* *In re* Ryan, No. 12183, Fed. Cas., s. c. 2 Saw. 411.

[9] Beers v. Hanlin, 3 Am. B. R. 745, 99 Fed. Rep. 605; *In re* Brinckmann, 103 Fed. Rep. 65.

[9]* B. A. 1898, Sec. 3*c*. *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162.

[10] B. A. 1898, Sec. 3*d*. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; Elliott v. Toeppner, 187 U. S. 327.

[10]* West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[11] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[12] 32 Stat. at L. 797.

the case a receiver or trustee has been appointed to take charge of the property of a person, such person must be insolvent at the time he applied for the receiver or when the appointment was made upon the application of another then at the time the receiver or trustee took charge of his property.[13] Insolvency of the debtor at the time the petition in bankruptcy is filed is immaterial.[14]

A person is deemed insolvent whenever the aggregate of his property exclusive of any property which may be conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[15]

In determining whether a person is solvent or insolvent at a particular time the value of the assets at that time should be taken at a fair valuation.[16] A fair valuation means the actual value — its real or market value — and not the face value of commercial paper.[17] It is what property would sell for in the regular course of business, but not what the property would sell for at a forced sale.[18] Where a levy on the property of a debtor depreciates its value so that the debtor's assets are then less than his liabilities, he is insolvent within the meaning of the statute, although solvent before the levy.[19]

In computing the assets of the debtor to determine his solvency or insolvency all his property which has value should be included. It has been held that in determining the question of solvency there should be included property exempt under the state law,[20] and property transferred in payment of or as security for a just debt irrespective of whether it constitutes a

[13] B. A. 1898, Sec. 3*a*, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L 797.

[14] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[15] B. A. 1898, Sec. 1, cl. 15.

[16] *In re* Coddington, 118 Fed. Rep. 281, 9 Am. B. R. 243.

[17] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

[18] Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649.

[19] Chicago, etc., Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368.

[20] *In re* Baumann, 96 Fed. Rep 946, 3 Am. B. R. 196.

preference or not.[21] But where property is transferred in fraud of creditors the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is solvent.[22] Presumptive profits on goods which have been ordered but not received are not considered as assets.[23]

In determining the solvency or insolvency of a partnership it must appear that not only the firm is insolvent but that each partner is individually insolvent.[24]

The statute provides that "a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived."[25]

"If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance." [25]

This right of jury trial is confined to the debtor. Creditors are not entitled to demand a jury trial on the question of the bankrupt's solvency,[26] nor of the allowance of their claims.[27] The right to a trial by jury on written application of the alleged bankrupt is absolute and cannot be withheld at the discretion

[21] *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547.

[22] *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547. See Lanning Boiler and Engine Co. v. Ryerson (C. C. A. 6th Cir.), 126 Fed. Rep. —.

[23] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

[24] Vaccaro v. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474; Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588. See also *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140.

[25] B. A. 1898, Sec. 19*a* and *b*. See also R. S. Sec. 566.

[26] *In re* Herzikopf (C. C. A. 9th Cir.), 121 Fed. Rep. 544.

[27] *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R. 99.

of the court.[28] In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.[28] The judge and not the referee should preside at a jury trial.

The books of a bankrupt are evidence on the question of his insolvency within four months of the date of filing the petition, but are not conclusive on this subject.[29] The schedules and the inventories and appraisements are also evidence upon the same question.[30] Actual sales of property by a receiver is evidence of the market value of the property.[31] Giving a post-dated check or note is not evidence of insolvency.[32]

The adjudication of bankruptcy raises no presumption of insolvency at a previous date.[33] A debtor is presumed to know his financial condition and he will be presumed to intend to prefer if in effect he was insolvent at the time he created the preference, but he may rebut this presumption with evidence.[34]

Where a referee has twice made a report on the solvency of the debtor the court will refuse to disturb his decision.[35] The judgment of a court on a jury trial may be reviewed in a circuit court of appeals on writ of error.[36]

[28] Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50.

[29] *In re* Docker, Foster & Co., 123 Fed. Rep. 190; 10 Am. B. R. —.

[30] *In re* Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. —.

[31] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300. But see Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839; 5 Am. B. R. 649.

[32] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[33] *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[34] *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101.

[35] *In re* Rome Planing Mills, 99 Fed. Rep. 937, 3 Am. B. R. 766.

[36] Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649; Ins. Co. v. Comstock, 16 Wall. 258.

§ 51. First: Fraudulent transfers.

The first act of bankruptcy mentioned consists of the debtor having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay or defraud his creditors, or any of them.[37] A conveyance or transfer made with intent to hinder, delay or defraud creditors, or any of them, otherwise unobjectionable, is made fraudulent and void by the bankrupt act.[38] What are fraudulent conveyances is considered in another place.[39] The making of a transfer or conveyance of property, with intent to hinder, delay or defraud creditors, or any of them, is made by this provision an act of bankruptcy.[40] It has been held that this clause of the act applies only to transfers which are fraudulent at common law.[41]

A transfer to a *bona fide* purchaser for a present fair consideration is not ordinarily such a transfer as to make the sale an act of bankruptcy.[42] But it may be conceived that if the sale were made with intent on the part of the debtor to hinder, delay or defraud his creditors it might be an act of bankruptcy, although the sale could not be set aside and the *bona fide* purchaser would be protected.[42*] It has been held an act of bankruptcy where an insolvent debtor conveyed all his property to a trustee with directions as to the payment to his creditors without preference and the deed contained a condition of defeasance and equity reserved in the property to the grantor after the satisfaction of the claims of the beneficiaries, in that such transfer was made to hinder, delay and defraud his creditors and not a transfer to prefer creditors.[43] A voluntary pro-

[37] B. A. 1898, Sec. 3*a*, clause 1.

[38] B. A. 1898, Secs. 67*e* and 60.

[39] Sec. 194, *post*.

[40] B. A. 1898, Sec. 3*a*.

[41] Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453. Lansing Engine etc. Co. v. Ryerson (C. C. A. 6th Cir.), 126 Fed. Rep. —, 11 Am. B. R. —.

[42] Tiffany v. Lucas, 15 Wall. 421; Stewart v. Platt, 101 U. S. 731; *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233; *In re* Pusey, No. 11478 Fed. Cas., s. c. 7 B. R. 45.

[42*] See Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; Boyd v. Lemon & Gale Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 8 Am. B. R. 81; *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233.

[43] Rumsey & Sikemier v. Novelty and Machine Mfg. Co., 99 Fed. Rep. 699, 3 Am. B. R. 704, 2 N. B. N. 128.

curing of the appointment of a receiver in proceedings for the dissolution of an insolvent corporation has been held not to be a transfer with intent to hinder, delay, etc.[44] But under the amendment to 3a, cl. 4 this is made an act of bankruptcy. It is not an act of bankruptcy to transfer property where the only creditor is one holding an unliquidated claim for damages for a tort.[45] It should be borne in mind that it is the fraudulent intent of the debtor alone that determines whether the act complained of is an act of bankruptcy or not.[46] It is immaterial whether the purchaser acts in good faith or not.

In addition to making fraudulent transfers, the concealing or removing of property with the same intent and purpose constitutes an act of bankruptcy.[47] It seems that it is not necessary to physically remove or conceal the property, but that the concealment of the actual title to the property by fictitious legal proceedings or otherwise is considered a concealment or removal of property within this provision.[48] It is not concealing property within the meaning of this provision not to disclose property which is not properly assets of the bankrupt.[49]

Actual solvency at the time of filing the petition is a com-

[44] *In re* Harper Bros., 100 Fed. Rep. 266, 3 Am. B. R. 804, 2 N. B. N. 605; *In re* Baker-Ricketson Co., 97 Fed. Rep. 489, 4 Am. B. R. 605; Vacarro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 103; *In re* H. Zeltner Brewing Co., 117 Fed. Rep. 799.

[45] Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745.

[46] *In re* McKibben, No. 8859 Fed. Cas., s. c. 12 N. B. R. 97; *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231, the court said Drummond positively swears that he had no such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely. See also *in re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233.

[47] Anonymous, No. 466 Fed. Cas., s. c. 1 Pac. Law. Rep. 173; Livermore v. Bagley, 3 Mass. 487; Fox v Eckstein, 5009 Fed. Cas., s. c. 4 N. B. R. 373; *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332; Citizens Nat. Bank v. De Pauw Co. (C. C. A. 7th Cir.), 105 Fed. Rep. 926; *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385.

[48] *In re* Hussman, No. 6951 Fed. Cas., s. c. 2 N. B. R. 437; *In re* Williams, No. 17703 Fed. Cas., s. c. 3 N. B. R. 286; O'Neil v. Glover, 5 Gray 159; Anonymous, No. 466 Fed. Cas., s. c. 1 Pac. Law. Rep. 173.

"Conceal" shall include secrete, falsify and mutilate; B. A. 1898, Sec. 1, clause 22.

[49] *In re* Scott, 11 Fed. Rep. 133.

plete defense to proceedings instituted under this clause and the burden of proving solvency is on the alleged bankrupt.[50] Insolvency at the time of the conveyance, transfer, etc., is not essential to constitute an act of bankruptcy under this clause.

§ 52. Second: Preferences created by the debtor.

An act of bankruptcy by a person may consist of his having transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors.[51] To constitute an act of bankruptcy within this provision three things must concur:[52]

First, The debtor must have transferred property of his own to a creditor.[52*] By transfer is included the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.[53]

Second, The debtor must have been insolvent at the time of the transfer. A person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[54]

Third, The debtor must have intended to prefer such creditors over his other creditors.[55]

What constitutes a fraudulent preference under the bank-

[50] B. A. 1898, Sec. 3*c*, and *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162; *In re* West (C. C. A. 2d Cir.), 108 Fed. Rep. 940, 5 Am. B. R. 734.

[51] B. A. 1898, Sec. 3, clause 2.

[52] *In re* Rome Planing Mill Co., 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531, Judge Coxe said: "In order to succeed under this subdivision the petitioners must prove: First: A transfer of the debtor's property to a creditor. Second. The debtor's intent to prefer such creditor. Third. The insolvency of the debtor at the date of the transfer.

[52*] *In re* Foster, 11 Am. B. R. 131.

[53] B. A. 1898, Sec. 1, clause 25.

[54] B. A. 1898, Sec. 1, clause 15. See Sec. 50*a*, *ante*.

[55] *In re* Ewing (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 8 Am. B. R. 269; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

rupt act, and when it may be avoided, is defined by the statute,[56] and is the subject of consideration elsewhere.[57] The present provision makes fraudulent preferences as such acts of bankruptcy.

It should be observed that giving a preference may be an act of bankruptcy, although the trustee may not be able to avoid the preference.[58] The debtor may intend to prefer the creditor, although no fraudulent intent is known to or participated in by the creditor. The statute expressly provides that the trustee may avoid a preference only when the person to be benefited " shall have had reasonable cause to believe that it was intended thereby to give a preference." [59] But the intent of the debtor only is to be considered in determining whether he has committed an act of bankruptcy within this provision. His intent is to be presumed from the nature of the transaction and his acts in connection therewith.[60] If he has knowledge of his insolvency such an intent is conclusively presumed.[61]

Thus it has been held sufficient to constitute an act of bankruptcy for a person to transfer all of his property to a part of

[56] B. A. 1898, Sec. 60.

[57] Preferences, Chap. XVIII.

[58] *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231.

[59] B. A. 1898, Sec. 60.

[60] Johnson v. Wald (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 2 Am. B. R. 84; *In re* McGee, 105 Fed. Rep. 895, 5 Am. B. R. 262.

In Toof v. Martin, 13 Wall. 48, Mr. Justice Field said: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

See also Miller v. Keys, No. 9578 Fed. Cas., s. c. 3 N. B. R. 224; *In re* Oregon Bulletin Print. and Pub. Co., No. 10559 Fed. Cas., s. c. 13 N. B. R. 503.

[61] *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101.

his creditors,[62] or to his wife,[63] or to mortgage all of his property to a creditor,[64] or to effect a composition with all of his creditors but one and pay him in full,[65] or to pay any creditor in full while insolvent,[66] or to pay wages,[67] or to pay a private debt out of partnership property,[68] or to transfer a note to a creditor as security for a preexisting debt,[69] or to transfer property for present and future advances,[70] or to pay an overdraft on a bank,[71] or to sell one's property to a person not a creditor and apply the proceeds in full payment of some creditors leaving others unpaid.[72]

On the other hand, it has been held not to constitute an act of bankruptcy where a payment is made under the belief that the debtor is solvent,[73] or to make a change of securities,[74] or

[62] Johnson v. Wald (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 2 Am. B. R. 84; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Grant, 106 Fed. Rep. 496; *In re* Drummond, No. 4094 Fed. Cas., s. c. 4 Biss. 149; *In re* House, No. 6735 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 348; *In re* Foster, No. 4964 Fed. Cas., s. c. 18 N. B. R. 64.

[63] *In re* Alexander, No. 161 Fed. Cas., s. c. 1 Low. 470.

[64] *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345; Baldwin v. Rosseau, No. 803 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 391; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Dunham, No. 4143 Fed. Cas., s. c. 2 Ben. 488; *In re* Rogers, No. 12002 Fed. Cas., s. c. 2 N. B. R. 397.

[65] Curran v. Munger, No. 3487 Fed. Cas., s. c. 6 N. B. R. 33.

[66] *In re* Oregon Bulletin Printing and Publishing Co., No. 10559 Fed. Cas., s. c. 13 N. B. R. 503; Silverman's case, No. 12855 Fed. Cas., s. c. 1 Saw. 410; *In re* Dibblee, No. 3884 Fed. Cas., s. c. 3 Ben. 283; s. c. Subnom. Clark v. Iselin, 21 Wall. 360.

[67] Kenyon v. Fenton, 6 N. B. R. 238. Note to case No. 17780 Fed. Cas.

[68] *In re* Grant, 106 Fed. Rep. 496; *In re* Mattot, No. 9282 Fed. Cas., s. c. 16 N. B. R. 485.

[69] *Ex parte* Shouse, No. 12815 Fed. Cas., s. c. Crabbe 482.

[70] *Ex parte* Potts, No. 11344 Fed. Cas., s. c. Crabbe 469.

[71] Payne v. Soloman, No. 10856 Fed. Cas., s. c. 14 N. B. R. 162.

[72] Boyd v. Lemon & Gale Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 8 Am. B. R. 81. See also Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453.

[73] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300; Morgan v. Mastick, No. 9803 Fed. Cas., s. c. 2 N. B. R. 521; *In re* Munn, No. 9925 Fed. Cas., s. c. 3 Biss. 442.

[74] Clark v. Iselin, 21 Wall. 360; *In re* Weaver, No. 17307 Fed. Cas., s. c. 9 N. B. R. 132; *In re* Union Pac. R. Co., No. 14376 Fed. Cas., s. c. 10 N. B. R. 178.

the payment of unearned premiums on policies of insurance,[75] or an executory agreement by a railway company to transfer certificates of stock to a creditor,[76] or to pay a percentage on claims of a part of his creditors when the others will receive the same percentage,[77] or the return of a piano ordered for a customer who refused to receive it,[78] or the payment of rent to preserve a valuable lease.[79]

§ 53. Third: Preferences created by legal proceedings.

An act of bankruptcy by a person may consist of his having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.[80]

Two elements are necessary to constitute an act of bankruptcy under this provision.[81] *First,* the debtor must have been insolvent at the time the preference was created, and, *second,* he must have suffered or permitted it without having vacated or discharged it within five days before the sale or disposition of the property.

No intent on the part of the debtor to create a preference is required,[81] as there was under the act of 1867,[82] which provided

[75] Knickerbocker v. Comstock, No. 7879 Fed. Cas., s. c. 9 N. B. R. 484.

[76] Winter v. Railway Co., No. 17890 Fed. Cas., s. c. 2 Dill. 487.

[77] *In re* Hapgood, No. 6044 Fed. Cas., s. c. 2 Low. 200; Jones v. Sleeper, No. 7496 Fed. Cas., s. c. 2 N. Y. Leg. Obs. 131.

[78] Doan v. Compton, No. 3940 Fed. Cas., s. c. 2 N. B. R. 607.

[79] *In re* Pearson, 95 Fed. Rep. 425, 2 Am. B. R. 482; *In re* Merchants Insurance Co., No. 9441 Fed. Cas., s. c. 3 Biss. 162; *Contra,* Smith v. Teutonia Ins. Co., No. 13115 Fed. Cas., s. c. 6 Am. Law Rev. 584.

In re Lange, 97 Fed. Rep. 197, 2 N. B. N. 85, 3 Am. B. R. 231, Judge Brown said: "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded," and held it an act of bankruptcy in that case.

[80] B. A. 1898, Sec. 3, clause 3. *In re* Reichman, 91 Fed. Rep. 624; *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[81] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531.

[82] R. S. Sec. 5021, par. 7th, embracing a part of Sec. 39 of the act of March 2, 1867, 14 Stat. at L. 536, as amended June 22, 1874, 18 Stat. at L. 180.

that a person commits an act of bankruptcy who "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors."

An act of bankruptcy under this clause ordinarily cannot be completed until within five days before the sale or final disposition of the property taken on legal process, for the debtor may at any time prior to that date vacate or discharge the preference. *Non constat* he will do so. In such case no act of bankruptcy is committed. But when the insolvent puts it out of his power to vacate the preference he then commits an act of bankruptcy.[83]

INSOLVENCY OF THE DEBTOR.— The debtor must have been insolvent at the time the preference was created by the legal proceedings. A person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[84]

It is not an act of bankruptcy for a solvent debtor to suffer or permit an execution, levy and sale of his property under legal proceedings. Where a judgment is obtained against a person while he is solvent it has been held that an execution may be subsequently issued when the person is insolvent.[85] The preference is obtained when the lien of judgment attaches, not when execution is issued.[86] Where a levy on property of the debtor depreciates its value so that his assets are then less than his liabilities he is insolvent within the meaning of the statute.[87]

"SUFFERED OR PERMITTED," ETC.— By the phrase "suffered or permitted" congress manifestly intended that a preference might be created by legal proceedings sufficient to consti-

[83] Scheuer v. Smith & Montgomery, etc., Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

[84] B. A. 1898, Sec. 1, clause 15. As to solvency, see Sec. 50*a*, *ante*.

[85] Field v. Baker, No. 4762 Fed. Cas., s. c. 12 Blatch. 438

[86] Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717.

[87] Chicago, etc., Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368.

tute an act of bankruptcy, although the debtor did nothing tending to aid in procuring the preference or to show an affirmative desire, and although he resisted the obtaining of the preference. This construction has been placed upon this phrase by the supreme court.[88]

If a preference is created by the legal proceedings within the meaning of section 60 of the act, such preference may be set aside. If no preference within the meaning of this section is created, the proceedings will be valid and the creditor protected. But whether it is a valid preference under that section has nothing to do with determining whether an act of bankruptcy has been committed or not.

Legal Proceedings.— The phrase legal proceedings, as used in the bankrupt law, undoubtedly refers to any proceedings had in a court of justice, either state or federal. It is equivalent to the words "legal process" used in the act of 1867 [89] as construed by the courts.[90] It is not confined to any particular form of writ, execution or attachment. It is rather a writ, mandate or order of the court taking hold of the property and withdrawing it from the possession and control of the debtor and from the ordinary reach of creditors for the payment of what is due to them. Each and any such proceeding is within the intent and true meaning of the term "legal proceedings" as used in this provision.[91] Thus it may be by an attachment proceeding,[92] or by an execution upon judgment,[93]

[88] Wilson v. Nelson, 183 U. S. 191, 7 Am. B. R. 124. See also Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 10 Am. B. R. 329, affirming 119 Fed. Rep. 989, 9 Am. B. R. 441; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; *In re* Reichman, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577; *In re* Thomas, 103 Fed. Rep. 272, 4 Am. B. R. 571.

[89] R. S. Sec. 5021.

[90] *In re* Merchants' Insurance Co., No. 9441 Fed. Cas., s. c. 3 Biss. 162; *In re* New Amsterdam Fire Ins. Co., No. 10140 Fed. Cas., s. c. 6 Ben. 368; *In re* Bininger, No. 1420 Fed. Cas., s. c. 7 Blatch. 270; *In re* Washington Marine Ins. Co., No. 17246 Fed. Cas., s. c. 2 Ben. 292.

[91] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531.

[92] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; 2 N. B. N. 134; *In re* Reichman, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Harper, 105 Fed. Rep. 900.

[93] *In re* Ferguson, 95 Fed. Rep.

or by levying execution on judgment upon a note containing a warrant of attorney to confess judgment.[94] It does not, however, include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien,[95] nor proceedings under a state statute for the dissolution of a corporation or partnership and the appointment of a receiver to wind up its affairs and distribute its assets.[96] It will be observed in these last two proceedings no preference is given to any one creditor over the others. If such proceedings should create a preference an act of bankruptcy is committed.[97]

The preference must have been acquired within four months.[98] The four months' period begins to run from the date connected with the proceedings after judgment and not from judgment.[99]

§ 54. Fourth: Assignments for the benefit of creditors and receiverships.

An act of bankruptcy by a person may consist of his having made a general assignment for the benefit of creditors,[100] or being insolvent, applied for a receiver or trustee for his prop-

429, 2 Am. B. R. 586; *In re* Storm, 103 Fed. Rep. 618, 4 Am. B. R. 601.

[94] *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577. But see *In re* Nelson, 1 Am. B. R. 63, 98 Fed. Rep. 76; Wilson v. Nelson, 183 U. S. 191.

[95] *In re* Chapman, 99 Fed. Rep. 395, 3 Am. B. R. 607; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717.

[96] *In re* Empire Metallic Bedstead Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 3 Am. B. R. 575, 2 N. B. N. 304; *In re* Harper Bros., 100 Fed. Rep. 266, 2 N. B. N. 605, 3 Am. B. R. 804; Vaccarro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 2 N. B. N. 1037, 4 Am. B. R. 474. Receivership proceedings are now made an act of bankruptcy under Sec. *3a*, cl. 4. 32 Stat. at L. 797.

[97] *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

[98] *In re* Ferguson, 95 Fed. Rep. 429, 2 Am. B. R. 586; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330; 3 Am. B. R. 220; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812; 9 Am. B. R. 717; Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779; Wilson v. Nelson, 183 U. S. 191.

[99] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220.

[100] B. A. 1898, Sec. 3, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L. 797; West Co. v. Lea, 174 U. S. 590; *In re* Gutwillig, 90 Fed. Rep. 475, s. c. 92 Fed. Rep. 337.

erty, or because of insolvency the receiver or trustee has been placed in charge of his property under the laws of a state, of a territory, or of the United States.[101]

The appointment of a receiver was not an act of bankruptcy prior to the amendment of 1903,[102] but was made so by the amendment. Where a receiver was placed in charge of the debtor's property before the amendment it was held not to constitute an act of bankruptcy to continue him in charge after Feb. 5, 1903.[103]

Whether an assignment for the equal benefit of all creditors constituted in itself an act of bankruptcy under the act of 1867 was the cause of much discussion. There is great conflict in the reported opinions of the district and circuit courts on this subject. Some of them held that it was a transfer with intent to hinder, delay or defraud creditors. Others held otherwise. Undoubtedly such an assignment was made an act of bankruptcy in the present statute for the purpose of definitely settling the question.

Such assignments are not in themselves objectionable, and can be set aside only when they fall within the provisions of the act.[104] Whether fraudulent under the act or not, it is in itself an act of bankruptcy which will support an adjudication, and this is true whether ths assignor is solvent or insolvent.[105] An assignment which is void under the state law so

[101] B. A. 1898, Sec. 3*a*, cl. 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[102] *In re* Burrell (C. C. A. 2d Cir.), 123 Fed. Rep. 414; affirming *In re* Varick Bank, 119 Fed. Rep. 991; *In re* Wilmington Hosiery Co., 120 Fed. Rep. 180, 9 Am. B. R. 581; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; Vaccaro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474; *In re* Empire, etc., Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 3 Am. B. R. 575; *In re* Baker-Ricketson Co., 97 Fed. Rep. 489, 4 Am. B. R. 605; *In re* Harper Bros., 100 Fed. Rep. 266, 3 Am. B. R. 804.

[103] Seaboard Steel Casting Co. v. Trigg, 124 Fed. Rep. 75.

[104] See Fraudulent Conveyances, Chap. XVII; Mayer v. Hellman, 91 U. S. 496; Randolph v. Scrugg, 190 U. S. 533, 10 Am. B. R. 1.

[105] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; Day v. Beck & Gregg Hardw. Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 8 Am. B. R. 175; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381. See also Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

that it cannot be enforced is an act of bankruptcy.[106] So also a deed of assignment which is defectively executed may constitute an act of bankruptcy.[107] It has been held that a deed of assignment which is not stamped in accordance with the revenue law cannot be offered in evidence.[108] It has been held that a confession of judgment by a debtor to a trustee for all his creditors amounts to a general assignment for the benefit of creditors, under the law of Pennsylvania, and constitutes an act of bankruptcy.[109]

§ 55. Fifth: Voluntary petition.

An act of bankruptcy by a person may consist of his having admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.[110]

This is the act of bankruptcy upon which an adjudication in voluntary bankruptcy is founded. It is not necessary that the petition be filed in court. All that is required is that it be written and signed by the bankrupt. The admission in a letter by a debtor that he cannot pay his debts and is willing to be declared a bankrupt would undoubtedly be sufficient to constitute an act of bankruptcy under this provision. Whether a debtor can make a legal contract not to make such a declaration in writing may be doubted.[111] In cases of involuntary proceedings under this section the actual solvency of the defendant is no defense.[112]

A corporation can be adjudged a bankrupt upon a petition filed by its creditors, and founded upon an admission in writing to creditors of its insolvency and willingness to be adjudged a bankrupt.[113] This cannot be done where the admis-

[106] *In re* Mendelsohn, No. 9420 Fed. Cas., s. c. 3 Saw. 342.

[107] *In re* Lawrence, No. 8133 Fed. Cas., s. c. 10 Ben. 4. But see Dutton v. Morrison, 17 Ves. 193.

[108] *In re* Dunham, No. 4143 Fed. Cas., s. c. 2 Ben. 488. But see Ponsford v. Walton, 3 L. J. C. P. Cas. 167.

[109] *In re* Green, 106 Fed. Rep. 313, 5 Am. B. R. 848.

[110] B. A. 1898, Sec. 3, clause 5: *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

[111] See Hill v. Cowery, 25 L. J. Ex. 285.

[112] *In re* C. Moench & Sons Co., 123 Fed. Rep. 965, — Am. B. R. —: West Co. v. Lea, 174 U. S. 590.

[113] *In re* C. Moench & Sons Co., 123 Fed. Rep. 965, — Am. B. R. —;

sion is made by the directors, who, by the state corporation laws, have no authority to make such an admission.[114] Such a statement cannot be made after the petition is filed.[115] The petition will not be heard until the other creditors have been notified,[116] and if there is such collusion as to amount to a fraud on the act it will be denied.[117]

§ 56. Computing time.

Proceedings must be instituted within four months after an act of bankruptcy is committed.[118]

Such time does not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[119]

Where the act of bankruptcy is a preference acquired by legal proceedings the four months' period begins to run from the date the lien is acquired and not from the judgment or execution.[120]

In re Mutual Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Marine Machine and Conveying Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; *In re* Peter Paul Book Co., 104 Fed. Rep. 786.

[114] *In re* Bates Machine Co., 91 Fed. Rep. 625, 1 Am. B. R. 129.

[115] *In re* Baker-Ricketson Co., 97 Fed. Rep. 489, 4 Am. B. R. 605.

[116] *In re* Humbert, 100 Fed. Rep. 439, 4 Am. B. R. 76.

[117] *In re* Independent Thread Co., 113 Fed. Rep. 998, 7 Am. B. R. 704.

[118] B. A. 1898, Sec. 3*b*.

[119] B. A. 1898, Sec. 3*b*. See Blennerhassett v. Sherman, 105 U. S. 100. But see Wood v. Owings, 1 Cranch 239; Gibson v. Warden, 14 Wall. 244; *In re* Mingo Valley Creamery Ass., 100 Fed. Rep. 282.

[120] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220, 2 N. B. N. 174; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am B. R. 717.

In computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[121] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[122]

[121] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480.

[122] B. A. 1898, Sec. 1, clause 14.

CHAPTER IX.

PROCEEDINGS IN VOLUNTARY BANKRUPTCY.

§ 57. Who may file a voluntary petition.

The statute declares that any qualified person may file a petition to be adjudged a voluntary bankrupt.[1] Any person who owes debts, except a corporation, is entitled to the benefits of the statute as a voluntary bankrupt.[2] A person is defined by the act itself to include partnerships and women.[3] It would therefore appear that any natural person or association of persons, not incorporated, irrespective of trade, business or profession, may file a petition to be adjudged a voluntary bankrupt.[4]

A person, however, who wishes to file a petition must have certain qualifications before he can do so. He must owe debts, but no limit is fixed to the amount of the debt.[5] He must also have had his principal place of business, resided or had his domicile within the United States for the period of six months, or the greater portion thereof, or if he has not had his principal place of business, resided or had his domicile within the United States, he must have had property within the jurisdic-

[1] B. A. 1898, Sec. 59*a*. Compare R. S. Sec. 5014.

[2] B. A. 1898, Sec. 4. See Who may be voluntary bankrupts, Sec. 41, *ante*. As to corporations, see Sec. 48, *ante*.

In re Maples, 105 Fed. Rep. 919, the court held that it had no jurisdiction of a petition in voluntary bankruptcy which schedules no property except such as is exempt under the laws of the state, and but a single debt, which is a judgment from which the petitioner would not be released by a discharge.

[3] B. A. 1898, Sec. 1, clause 19.

[4] As to the right of an alien, an infant, a lunatic and a married woman to be adjudged bankrupts, see Secs. 44 to 47, *ante*.

[5] B. A. 1898, Sec. 4. Under the act of 1867, R. S. Sec. 5014, a person was required to owe debts, provable in bankruptcy, exceeding the sum of $300.

tion of a court of bankruptcy, or have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have property within jurisdiction of a court of bankruptcy.[6] A state court has no power to enjoin a debtor from applying to a court of bankruptcy to be adjudged a voluntary bankrupt, and to obtain the benefit of the statute.[7]

There was a difference of opinion under the former bankrupt acts with reference to the right of a person to file a voluntary petition after an involuntary petition had been filed against him. It was held that the pendency of a creditors' petition, on which no decree of bankruptcy had been granted, was not a bar to the right of voluntary petition.[8] It was also held that in such cases the voluntary petition was nugatory and void, and would be set aside on motion.[9] Under the present act where a voluntary petition is filed after involuntary proceedings are begun it should not in all cases be either granted or stayed until the involuntary proceedings are disposed of, but notice should be given to the creditors who filed the involuntary petition and such action taken as is for the best interest of the estate.[10] If the voluntary proceedings are not stayed the rights of the creditors should be protected.[11] The court may consolidate the two proceedings.[12] The statute does not forbid a debtor who has made an assignment for the benefit of his creditors in the state court to subsequently file a petition to be adjudged a voluntary bankrupt.[12*] If one petition has been filed and pro-

[6] B. A. 1898, Sec. 2, clause 1. See Sec. 58, *post.*

[7] Fillingin v. Thornton, 49 Ga. 384.

[8] *In re* Flanagan, No. 4850 Fed. Cas., s. c. 5 Saw. 312; *In re* Canfield, No. 2380 Fed. Cas., s. c. 5 Law Rep. 415.

The same rule was recognized *in re* Davidson, No. 3599 Fed. Cas., s. c. 4 Ben. 10, although the question does not seem to have been raised in that case.

[9] *In re* Stewart, No. 13419 Fed. Cas., s. c. 3 N. B. R. 108.

[10] *In re* Dwyer, 112 Fed. Rep 777, 7 Am. B. R. 532; *In re* Waxelbaum, 98 Fed. Rep. 589, 3 Am. B. R 392; *In re* Stegar, 113 Fed. Rep. 978, 7 Am. B. R. 665.

[11] *In re* Stegar, 113 Fed. Rep. 978, 7 Am. B. R. 665.

[12] *In re* Knight, 125 Fed. Rep. 35 at 37.

[12*] This was done *in re* Dunbar, in the district court for the southern district of Ohio, 1899 (not reported). The question of his right to do so was not raised. Both the court and counsel appear to have assumed that such a right existed.

ceedings had thereon, and the petitioner subsequently becomes insolvent, he may file a second petition,[13] irrespective of whether he obtained or was refused a discharge in the former proceedings. Whether he is entitled to a discharge upon the second petition may be affected by his former acts.

§ 58. In what court the petition is to be filed.

The debtor may file his petition in the court of bankruptcy for the district in which he has had his principal place of business, resided or had his domicile for the greater portion of the preceding six months.[14]

Where the debtor has had his domicile, resided and had his principal place of business in the same district there is but one court in which he can file his application. Where he has resided or had his domicile in one district and his principal place of business in another he has an election, and may make his application in either district. If it is conceived that a debtor may have a domicile in one district and reside in another,[15] he may have an election of three districts within which to insti-

[13] *In re* Drisko, No. 4090 Fed. Cas., s. c. 2 Low. 430; Fisher v. Currier, 7 Met. (Mass.) 424.

See also R. S. Sec. 5116, which provided that under the act of 1867 a second discharge should not be granted a bankrupt unless his estate should be sufficient to pay 70 per-centum, or three fourths of his creditors consented to it. No such provision is contained in the present act.

[14] B. A. 1898, Sec. 2.

[15] *In re* Williams, 99 Fed. Rep. 544, 3 Am. B. R. 677; the bankrupt had resided abroad for many years. Judge Hanfords said: "Under the law, as I find it declared by the highest court of this country, the petitioner did not change his domicile when he went to British Columbia in 1893, nor afterwards, because he did not have the intention to remain there, and he did have a definite intention to return to this state. The order made by the referee that the petition be dismissed will be vacated, and the case will proceed in the usual course."

Consult *in re* Watson, No. 17272 Fed. Cas., s. c. 4 N. B. R. 613; *In re* Walker, No. 17061 Fed. Cas., s. c. 1 Low. 237; *In re* Kinsman, No. 7832 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 309; Stiles v. Lay, 9 Ala. 795; Penfield v. C. & O. R. Co., 29 Fed. Rep. 494; Chambers v. Prince, 75 Fed. Rep. 176; Krone v. Cooper, 43 Ark. 547; Tipton v. Tipton, 87 Ky. 243; Rhodes v. Farish, 16 Mo. App. 434; Tazewell County v. Davenport, 40 Ill. 197; Dorsey v. Kyle, 30 Md. 512; Wheeler v. Cobb, 75 N. C. 21.

As to what is a domicile, see Sec. 177, "Domicile of Bankrupt," *post.*

tute voluntary proceedings, namely, the district of his residence, the district of his domicile or the district in which he has had his principal place of business.

Where a debtor has several places of business in different districts he must file his petition in the district in which he has his principal place of business. This limits his right to file a petition on this ground of jurisdiction to one district. The phrase "principal place of business" implies that the debtor is carrying on what is commonly known as business, as distinguished from other vocations or employment. He must provide the money that is needed or have an interest in the business by contributing his labor, or, if the capital is borrowed, the business must be done in the debtor's name. Thus it may be doubted if a debtor is entitled to claim a place of business where he merely superintends the business of another or is employed as a clerk,[16] or where he is engaged in winding up the affairs of an insolvent concern to which he belonged,[17] or where he is engaged in any vocation not properly included in the word business. Where the bankrupt claims to have changed his place of business a short time before filing a voluntary petition the burden is on him to prove it.[18]

The time during which the debtor has had his principal place of business, resided or had his domicile in the district must also be considered. Where he has had his principal place of business, resided or had his domicile within the district during the whole period of the six months immediately preceding his application no question can arise. Where he has had his principal place of business, resided or had his domicile (according to the ground of jurisdiction on which he claims) in different districts during such six months, then the petition must be filed in the district in which he has had his principal place of business, resided or had his domicile for the greater portion of six months, or for more than three months.

[16] *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Magie, No. 8951 Fed. Cas., s. c. 2 Ben. 369; *In re* Kinsman, No. 7832 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 309.

[17] *In re* Little, No. 8391 Fed. Cas., s. c. 3 Ben. 25.

[18] *In re* Waxelbaum, 2 N. B. N. 103, 3 Am. B. R. 267, 97 Fed. Rep. 562.

If he has not had a principal place of business, resided or had a domicile for more than three months in any district, he is not ordinarily entitled to file a petition to be adjudged a voluntary bankrupt.

In case the debtor has not had a principal place of business, resided or had a domicile within the United States, but is entitled to the benefits of the statute under section 2, he must file his petition in the district within which he has property. If he has property in more than one district, he may elect in which of such districts to institute proceedings in voluntary bankruptcy.

The questions relating to who may file a voluntary petition and in what court he is entitled to make his application to be adjudged a voluntary bankrupt are jurisdictional. If the court does not obtain jurisdiction over the person of the debtor in the manner prescribed by the statute the proceedings are void. A creditor may have such proceedings discontinued at any time upon petition filed for that purpose,[19] or may defeat an application for discharge by showing that court has no jurisdiction of the case.[20] If the petition shows jurisdiction, creditors will be held to waive this objection unless it is taken promptly.[21]

When proceedings have been commenced by a debtor in one district he is not entitled to institute similar proceedings in other districts. The jurisdiction is exclusive in the court where it first attaches.[22]

§ 59. The petition.

The application for the benefit of the bankrupt statute is made by petition.[23] A schedule of the debtor's property, list

[19] *In re* Waxelbaum, 98 Fed. Rep. 589, 3 Am. B. R. 392, 2 N. B. N. 228; s. c. 97 Fed. Rep. 562; *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Mason, 99 Fed. Rep. 256, 2 N. B. N. 425, 3 Am. B. R. 599; *In re* Goodfellow, No. 5536 Fed. Cas., s. c. 1 Low. 510; *In re* Walker, No. 17061 Fed. Cas., 1 Low. 237.

[20] *In re* Penn, No. 10926 Fed. Cas., s. c. 4 Ben. 99; *In re* Little, No. 8391 Fed. Cas., s. c. 3 Ben. 25; Jobbins v. Montague, No. 7330 Fed. Cas., s. c. 6 N. B. R. 509; Stiles v. Lay, 9 Ala. 795.

[21] *In re* Mason, 99 Fed. Rep. 256, 2 N. B. N. 425, 3 Am. B. R. 599. Consult Allen v. Thompson, 10 Fed. Rep. 116.

[22] *Ex parte* Hall, No. 5919 Fed. Cas., s. c. 5 Law Rep. 269.

[23] B. A. 1898, Sec. 59*a*. Official Form No. 1, Form No. 1, *post*.

of his creditors and claim for exemptions are required to be filed with the petition.[24]

The petition should be entitled in the court for the proper district. It is regularly addressed to the judge of the district by name, as "To the Hon. A. B., judge of the district court of the United States for the —— district of ——."

The petition should set forth the petitioner's name in full and his place of residence. It should allege that he has had his principal place of business, resided or had his domicile (as may be) within the district for the preceding six months or the greater portion thereof. This averment is jurisdictional and necessary. It should also aver that he is unable to pay all of his debts; that he is willing to be adjudged a bankrupt, to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the statute.

The petition should be signed by the petitioner and be verified under oath,[25] which includes an affirmation.[26] The oath or affirmation may be administered by a referee, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken, or a diplomatic or consular officer of the United States in any foreign country.[27]

The supreme court has provided a form for petitions which should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[28] Printed blanks may usually be had from dealers in law stationery. All the petitions and schedules filed therewith must be printed or written out plainly without abbreviation or interlineation, except where an abbreviation or interlineation may

[24] B. A. 1898, Sec. 7, clause 8.

See also "Schedules," Sec. 60, *post*.

[25] B. A. 1898, Sec. 18*c*. Official Form No. 1, Form No. 1, *post*. *In re* Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387.

[26] B. A. 1898, Sec. 1, clause 17, and Sec. 20*b*.

[27] B. A. 1898, Sec. 20. The verification may be taken before the attorney for the bankrupt as notary public. *In re* Kindt, 98 Fed. Rep. 403, 3 Am. B. R. 443.

[28] Gen. Ord. 38. See Official Form No. 1, Form No. 1, *post*.

be for the purpose of reference.[29] Under the act of 1867 it was held that dots could not be used to indicate anything which was necessary to be stated.[30]

The petition should be endorsed with the style of the court, the name of the petitioner, and a brief statement of the character of the petition, as "Debtor's petition."

§ 60. Schedules.

It is the duty of the bankrupt to prepare, make oath to and file in court a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to.[31] The object of such schedule is to show the true condition of the bankrupt's affairs as clearly and lucidly as possible. Each debtor should prepare his schedule with this end in view. A voluntary bankrupt must file a schedule of this nature with his petition,[32] and an involuntary bankrupt must file such a schedule within ten days after the adjudication, unless further time is granted by the court.[32] The schedule in either case must be filed in triplicate, one copy for the clerk, one for the referee and one for the trustee.[32]

The supreme court of the United States has provided forms of schedules which should be observed and used with such alterations as may be necessary to suit the circumstances of each particular case.[33] The same form of schedule is used in

[29] Gen. Ord. 5. See also *In re* Malcolm, No. 8986 Fed. Cas., s. c. 4 Law Rep. 488; Anon. No. 458 Fed. Cas., s. c. 1 N. B. R. 216.

In Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770, Judge Purnell said: "Several proceedings of late have made necessary the adoption of a rule, which will be enforced, that petitions in bankruptcy will not be filed or considered unless they are on the prescribed printed forms. Written or typewritten petitions and schedules will be returned to parties without action."

[30] *In re* Orne, No. 10582 Fed. Cas., s. c. 1 Ben. 420.

[31] B. A. 1898, Sec. 7, clause 8.

[32] B. A. 1898, Sec. 7, clause 8.

[33] Gen. Ord. 38. Official Form 1, schedules A and B; see Forms Nos.

voluntary and involuntary proceedings, and in proceedings to have a partnership declared bankrupt.[34]

The schedule required by the statute to be filed in court and the form provided by the supreme court are divided into two general parts. The first part, schedule A, is a list of creditors of the bankrupt, with the amount due each of them. The second part, schedule B, is a statement of all the property of the bankrupt. Each part is divided into separate classes, as set forth below. Each class is stated in detail in a separate paper prepared for that purpose. In classifying the creditors and the property the notes and instructions placed on each division of the forms should be carefully noted. All the separate forms prepared by the supreme court should be used in each case. If a debtor has no creditor or no property properly classified in a particular form he should so state the fact in that form; but he should not omit the form for the reason that he has no creditor or property properly classified under that head. Each sheet or form should be signed by the debtor. At the end of schedule A and again at the end of schedule B the debtor must make oath in the form prescribed. When the parts of the schedule are completed they should be fastened neatly and firmly together and filed as one paper. This is "the schedule" of the statute. It consists of schedule A, schedule B and a summary of debts and assets taken from the statements of the debtor in these two parts of his schedule.

One copy of the schedule is referred to the referee as soon as may be after it is filed. It is the duty of the referee to examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended.[35] The referee's finding is not conclusive so as to preclude inquiry at the proper time and in a proper manner as to the sufficiency of the schedule.[36]

2 and 3, *post*. Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770. See also *in re* Sallee, No. 12256 Fed. Cas., s. c. 2 N. B. R. 228.

[34] Consult Official Form No. 1, schedules A and B, and note at the end of Official Forms Nos. 2 and 3. See Forms Nos. 2, 3, 4 and 5, *post*.

[35] B. A. 1898, Sec. 39, clause 2.

[36] *In re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321.

SCHEDULE A. A STATEMENT OF ALL DEBTS OF BANKRUPT.—Schedule A consists of five separate divisions by means of which the creditors are divided into as many distinct classes. The *first division* is a list of all creditors who are to be paid in full, or to whom priority is secured by law. The *second division* is a list of creditors holding securities. The *third division* is a list of creditors whose claims are unsecured. The *fourth division* is a statement of the debtor's liabilities on notes or bills discounted, which ought to be paid by the drawers, makers, acceptors or endorsers. The *fifth division* is a statement of the bankrupt's liability on accommodation paper. In classifying the debts the notes and instructions placed on each division of the forms should be carefully noted.

In schedule A the debtor should set forth a full and true list of his creditors, showing their residences if known, if unknown, that fact should be stated, the amount due each of them, the consideration therefor, and the security held by them, if any.[37] The statement of the debts should be full and accurate as the debtor may not otherwise be able to obtain a discharge.[38] It is better practice to include debts, although barred by the statute of limitations.[39] The amount and date of the debt is sufficient without the computation of interest, for the exact amount can be ascertained at any stage of the proceedings.[40] Where a note has been given or judgment rendered on the note, or in case there is a person jointly liable for the debt, this fact should be stated.[41] Where the creditor is a copartnership the name of the firm and not of the individual partners is proper.[42] Where the debt is due a news-

[37] B. A. 1898, Sec. 7, clause 8; Official Form No. 1, Schedule A; see Form No. 2, *post*.

[38] *In re* Kallish, No. 7599 Fed. Cas., s. c. Deady 575; *In re* Whetmore, No. 17508 Fed. Cas., s. c. Deady 585; *In re* Redfield, No. 11624 Fed. Cas., s. c. 2 Ben. 71; *In re* Cushman, No. 3512 Fed. Cas., s. c. 7 Ben. 482.

[39] *In re* Kingsley, No. 7819 Fed. Cas., s. c. 1 Low. 216; *In re* Ray, No. 11589 Fed. Cas., s. c. 2 Ben. 33; *In re* Cushman, No. 3512 Fed. Cas., s. c. 7 Ben. 482; *In re* Harddin, No. 6048 Fed. Cas., s. c. 1 N. B. R. 395.

[40] *In re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321.

[41] *In re* Orne, No. 10582 Fed. Cas., s. c. 1 Ben. 420.

[42] Anon., 457 Fed. Cas., s. c. 1 N. B. R. 122.

paper the names of the proprietors should be given and not the name of the newspaper only.[43]

SCHEDULE B. STATEMENT OF ALL PROPERTY OF BANKRUPT.—Schedule B consists of six separate divisions. The *first division* is a statement of all the real estate of the bankrupt, together wth its location, description, encumbrances and value.[44] The *second division* is an itemized statement of the personal property of the bankrupt, together with the value thereof.[45] The *third division* is a statement of all choses in action in which the bankrupt has an interest. The *fourth division* is a statement of all property in reversion, remainder or expectancy, including property held in trust for the debtor or subject to any power or rights to dispose of or charge it. In this form is included also property theretofore conveyed for the benefit of creditors and money paid counsel for services rendered or to be rendered in bankruptcy. The *fifth division* is a particular statement of the property claimed as exempted from the operation of the acts of congress relating to bankruptcy, giving each item of property and its valuation, and if any portion of it is real estate, its location, description and present use should be stated.[46] The *sixth division* is a complete list of all books, papers, deeds, rights, etc., relating to the business dealings, estate and effects of the bankrupt.

The object of schedule B is to set forth a complete statement of all the property of the debtor, including such property as he claims to be exempted under the laws of the state of his domicile. All his property not exempted by statute

[43] Anon., 462 Fed. Cas., s. c. 2 N. B. R. 141.

[44] The name of the town, county and state and the grantor were held sufficiently accurate *in re* Dodge, No. 3946*a* Fed. Cas., but a description as "an interest in half a lot in Buffalo," is not, *in re* Frisbee, No. 5130 Fed. Cas., s. c. 4 Law Rep. 483.

[45] See *in re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321; *In re* Malcom, No. 8986 Fed. Cas., s. c. 4 Law Rep. 488.

An interest in the net profits of a business as additional compensation need not be scheduled. *In re* Brown, No. 1978 Fed. Cas., s. c. 5 Law Rep. 121.

[46] As to what property is exempted by the laws of the several states, see Exemptions, Chap. XVII.

Military uniforms, arms and equipments are exempted by R. S. Sec. 1628.

passes to the trustee for the benefit of his creditors.[47] All such property must be set forth in the schedule. It is not necessary to repeat at length what property so passes to the trustee, for this is the subject of a separate chapter.[48]

§ 61. Of filing the petition and schedules.

The petition and schedule must be filed in the office of the clerk of a court of bankruptcy, and not with a referee or judge.[49]

The statute provides that the petition shall be in duplicate, one copy for the clerk and one for service on the bankrupt.[50] In voluntary bankruptcy it would seem that one copy of the petition is all that is required. It is not necessary to serve on the bankrupt a copy of his own petition. Three copies of the schedule are required to be filed, one copy for the clerk, one for the referee, and one for the trustee.[51]

As soon as the petition and schedules are deposited with the clerk, he endorses on each paper the day and hour of filing.[52] He thereupon enters the case upon a docket which is kept for that purpose, together with a memorandum of the filing of the petition.[53] The cases are entered and numbered in the order in which they are commenced.[53] He also makes a similar endorsement upon any subsequent paper filed with him, except such papers as have been previously filed with the referee.[54] The papers in each case should be kept in a file by themselves.

At the time of filing the petition the petitioner must deposit $30 with the clerk as costs in the case. Of this amount the clerk is to receive $10, the referee $15, and the trustee $5. Where a partnership files a voluntary petition, in which the individual partners join, it is a single proceeding and only one

[47] B. A. 1898, Sec. 70.

[48] Chap. XVI.

[49] See *In re* Sykes, 106 Fed. Rep. 669.

[50] B. A. 1898, Sec. 59*c*.

[51] B. A. 1898, Sec. 7, clause 8.

[52] Gen. Ord. 2.

This is conclusive of the particular time at which the papers were filed. Ala. & C. R. Co. v. Jones, No. 127 Fed. Cas., s. c. 7 N. B. R. 145.

[53] Gen. Ord. 1.

[54] Gen. Ords. 1 and 2.

deposit fee of thirty dollars is required.[55] Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.[56] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[56]

No deposit is required upon the filing of a petition by a voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, money with which to pay such fees.[57] In such cases the bankrupt is permitted to proceed *in forma pauperis*. But the judge, at any time during the pendency of the proceedings in bankruptcy, may order the regular fees to be paid out of the estate; or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[58]

The practice with reference to procedure *in forma pauperis* is not uniform in the several districts. In some districts rules have been promulgated by the court. It has been held that a petitioner receiving thirty dollars per month was not entitled to proceed as a poor person.[59] A voluntary bankrupt is not required to make a deposit of his filing fee out of his exempt property and is not required to solicit gifts or loans from his friends for that purpose.[60] A bankrupt proceeding as a poor person is required in one district, at least, to make the deposit before he receives his discharge or show that "by reason of ill-

[55] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Langslow, 98 Fed. Rep. 869, 3 Am. B. R. 529*n*; but see *In re* Barden, 101 Fed. Rep. 553, 4 Am. B. R. 31.

[56] Gen. Ord. 10.

[57] B. A. 1898, Sec. 51, clause 2; *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[58] Gen. Ord. 35.

[59] *In re* Collier, 93 Fed. Rep. 191, 1 Am. B. R. 182.

[60] Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529. But see *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

health or circumstances of peculiar misfortune he is a worthy object of charity."[61] The statutory affidavit is *prima facie* evidence of the bankrupt's inability to make the deposit.[62] This may be contested and the bankrupt examined with reference to his individual means, earnings and circumstances.

The petition may be filed by the bankrupt in person in his own behalf, or he may appear and conduct the proceedings by attorney, who must be an attorney or counselor authorized to practice in the circuit or district court.[63] The name of the attorney or counselor, with his place of business should be entered upon the docket with the date of the entry.[63]

§ 62. The order of adjudication and reference.

The judge of the court of bankruptcy regularly hears a voluntary petition and makes the adjudication or dismisses the petition.[64] No answer by the creditors will be permitted.[65] Where one partner files a voluntary petition to have the partnership adjudged a bankrupt, another partner can resist it the same as if it were involuntary,[66] but a creditor can not.[67]

When the petition does not show jurisdiction, or is not regularly filed, or is materially defective the court may dismiss it or permit an amendment thereto.[68] No notice is required to creditors before making the order adjudicating the petitioner a bankrupt. It is an *ex parte* proceeding. This order is merely a judicial finding that the petitioner has become a

[61] *In re* Fees Payable by Voluntary Bankrupt, 95 Fed. Rep. 120. But see *In re* Plimpton, 103 Fed. Rep. 775, 4 Am. B. R. 614.

[62] *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[63] Gen. Ord. 4.

[64] B. A. 1898, Sec. 18*g*; Official Forms Nos. 11 and 12, Forms Nos. 28 and 29, *post*.

[65] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498; *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692; *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

It has been held that where a person manifestly able to pay his debts, files a voluntary petition in order to embarrass a particular creditor, and adjudication on such a petition may be set aside by the creditor as being a fraud on the act. *In re* Carleton, 115 Fed. Rep. 246 at 250, 8 Am. B. R. 270 at 274.

[66] Gen. Ord. 8; *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[67] *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[68] Gen. Ord. 11.

bankrupt; that is, that he has previously committed an act of bankruptcy. The filing of the petition by a debtor is such an act of bankruptcy.[69] The order of adjudication, unless set aside by a judge or by an appellate court is conclusive upon the insolvency of the debtor, his willingness to surrender his property and his desire to take the benefit of the statute.[70] But it may be contested upon any other fact which goes to defeat the jurisdiction of the court.[71]

At the time of making the order adjudging the petitioner a bankrupt the court regularly refers[72] the case for subsequent proceedings to a referee within the county of which the debtor is a resident. He may refer the case to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[73]

All the proceedings thereafter, except such as are required by the statute or by the general orders to be had before the judge, are had before the referee.[74]

Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, must be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.[75]

The order referring a case to a referee should name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive

[69] B. A. 1898, Sec. 3, clause 5.

[70] *In re* Fowler, No. 4998 Fed. Cas., s. c. 1 Low. 161.

[71] *In re* Goodfellow, No. 5536 Fed. Cas., s. c. 1 Low. 510; *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69; *In re* Scott, 111 Fed. Rep. 144, 7 Am. B. R. 39; *In re* Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re* Waxelbaum, 97 Fed. Rep. 562, 3 Am. B. R. 267. See *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692.

[72] Official Form No. 14, Form No. 31, *post.*

[73] B. A. 1898, Sec. 22.

[74] Gen. Ord. 12. Gen. Ord. 27.

[75] Gen. Ord. 12. B. A. 1898, Sec. 38, clause 4, and Sec. 41.

from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order must forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court.[76] The time when and the place where the referee shall act upon the matters arising under the several cases referred to him shall be fixed by special order of the judge, or by the referee, and at such times and places the referee may perform the duties which he is empowered by the act to perform.[76]

If the judge is absent from the district, or the division of the district, in which the petition is filed at the time of the filing, the clerk forthwith refers the case to the referee.[77] In such cases the referee is authorized to consider the petition and make the adjudication or dismiss the petition[78] with the same effect as if it has been made by the judge. The referee is not authorized to make an adjudication in other cases.

§ 63. Amendments to petition and schedules.

The petitioner may conclude after his petition and schedules have been filed that they are defective, or may find that he has omitted something by mistake or inadvertence. In such case he may apply to the court for leave to amend. The court is expressly authorized to allow amendments to the petition and schedules upon the application of the petitioner.[79]

In his application for leave to amend the petitioner must state the cause of error in the paper originally filed.[80] The application may be by motion or petition. It should be accompanied with a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions and schedules.[80] The verification should be according to the circumstances of the amendment. The form will not be precisely the same as an oath to an original petition. If the amendments are made

[76] Gen. Ord. 12.

[77] B. A. 1898, Sec. 18*g*. Official Form No. 15, Form No. 32, *post*.

[78] B. A. 1898, Sec. 38, clause 1.

[79] Gen. Ord. 11.

[80] Gen. Ord. 11.

to separate schedules, the same must be made separately with proper references.[80] The amendment should state no more of the original paper than may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief subject of the amendment. The proceeding is *ex parte,* and no notice need be given to creditors, nor has any creditor the right to oppose it.[81] The granting or refusing to grant leave to amend the petition or schedules rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed.

Where the petition is referred to a referee to make the adjudication he may allow amendments to the petition. He is expressly authorized, and it is his duty, to examine all schedules of property and lists of creditors filed by bankrupts, and to cause such as are incomplete or defective to be amended.[82] The referee may also refuse to allow an amendment. Whether he grants or refuses to permit an amendment to be made, the question is subject to be reviewed by the judge.[83]

§ 64. Voluntarily dismissing a petition.

After a voluntary petition has been filed in court it can not be dismissed by the petitioner or petitioners for want of prosecution, or by the consent of parties until after notice to creditors.[84] The rule under the former acts seems to have been otherwise.[85] A voluntary bankrupt has been permitted to withdraw his petition on motion, where no creditors had

[80] Gen. Ord. 11.

[81] *In re* Watts, No. 17293 Fed. Cas., s. c. 3 Ben. 166; *In re* Heller, 41 Howard Prac. 213.

[82] B. A. 1898, Sec. 39, clause 2; *In re* Brumelkamp, 95 Fed. Rep. 814, 2 Am. B. R. 318.

[83] Gen. Ord. 27.

[84] B. A. 1898, Sec. 59*g*.

[85] See *In re* Randall, No. 11550 Fed. Cas., s. c. 5 Law Rep. 115; *In re* Harris, No. 6110 Fed. Cas., s. c. 3 N. Y. Leg. Obs. 152; Dudley's case, No. 4114 Fed. Cas., s. c. 1 Pa. Law Jour. 302; *Ex parte* Bennett, No. 1309 Fed. Cas., s. c. 1 Pa. Law Jour. 145; *In re* Gile, No. 5423 Fed. Cas., s. c. 5 Law Rep. 224.

proved claims or objected thereto.[86] Subsequent creditors, who have liens on after acquired property, can not be heard to object to such a dismissal.[86] It has been held that where a voluntary partnership petition has been filed by the firm and subsequently withdrawn in part and a new petition made including the individual schedules of the partners, the date of the filing was the date the later or amended petition was filed.[87]

§ 65. Proceedings subsequent to the adjudication.

Proceedings in voluntary bankruptcy subsequent to the order of adjudication and reference are not essentially different from the proceedings had upon an involuntary petition, or a petition for the purpose of having a partnership, or the members thereof, adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of a trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate will be considered hereafter under appropriate heads.

[86] *In re* Hebbart, 104 Fed. Rep. 322; but see *In re* Salaberry, 107 Fed. Rep. 95.

[87] *In re* Washburn, 99 Fed. Rep. 84, 3 Am. B. R. 585.

CHAPTER X.

PROCEEDINGS IN INVOLUNTARY BANKRUPTCY.

§ 66. Who may institute involuntary proceedings.

Proceedings in involuntary bankruptcy are instituted by a creditor or creditors filing a petition, praying that the debtor may be declared a bankrupt, and that his property may be distributed according to law. By creditor is meant anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[1]

The wife of the alleged bankrupt may file a petition against her husband where there are less than twelve creditors.[2] Firm creditors have been held entitled as such to join in a petition against an individual member of the firm[3]; but a person who owns an unliquidated demand against an insolvent debtor is not a creditor who can file a petition.[4] The reason for this is that a petitioning creditor must be the owner of a provable debt and Sec. 63*b* of the Bankrupt Act provides that an unliquidated claim must be liquidated before it becomes provable. The owner of an unliquidated claim arising in tort can not be a petitioning creditor for the additional reason that a claim for damages in tort does not constitute a debt and therefore is not a provable claim.[5] It was held that a creditor who had received a preference or who had levied an attachment

[1] B. A. 1898, Sec. 1, clause 9.

[2] *In re* Novak, 101 Fed. Rep. 800, 4 Am. B. R. 811.

[3] *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626.

[4] *In re* Big Meadows Gas Co., 113 Fed. Rep. 974, 7 Am. B. R. 697; but see *In re* Manhattan Ice Co., 114 Fed. Rep. 399, 7 Am. B. R. 408, affirmed by C. C. A. 2d Cir. in 116 Fed Rep. 604, 8 Am. B. R. 569; and *In re* Grant Shoe Co., 125 Fed. Rep. 576, in which cases the court seems to have overlooked the word "thereafter" in Sec. 63*b* of the bankrupt act.

[5] *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425.

within four months could not join in filing the petition,[6] but it would seem to be the better view that he may be a petitioning creditor.[7] The courts hold that such a preference must be surrendered before there will be an adjudication.[7]

A petition in involuntary bankruptcy is regularly filed by three or more creditors who have provable claims against any person (including a corporation, partnership or a woman[8]) which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over.[9] In case all of the creditors of such person, corporation or partnership are less than twelve in number, then one of such creditors whose unsecured claim equals five hundred dollars may file a petition to have him adjudged a bankrupt.[10] Where there are more than twelve creditors three must join in filing the petition although most of the twelve are creditors for nominal sums only and are induced not to join in the petition by the solicitation of the bankrupt.[11]

In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, only the general or unsecured creditors are counted. Creditors holding claims which are secured or have priority are not counted in computing the number of creditors or the amount of their claims, unless the amount of such claims exceed the values of such securities or priorities, and then only for such excess.[12] Where a creditor has security or has received a preference he may make a voluntary surrender of it and prosecute a petition on the original debt.[13]

It has been held that creditors who have assented to a general assignment made by their debtor, and who therefore can not join in a petition in bankruptcy against him, are not

[6] *In re* Rogers Milling Co., 102 Fed. Rep. 687, 4 Am. B. R. 540; *In re* Burlington Malting Co., 109 Fed. Rep. 777, 6 Am. B. R. 369; *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162.

[7] *In re* Hornstein, 122 Fed. Rep. 266; *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119; *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140.

[8] B. A. 1898, Sec. 1, clause 19.

[9] B. A. 1898, Sec. 59*b*.

[10] B. A. 1898, Sec. 59*d*.

[11] *In re* Brown, 111 Fed. Rep. 979, 7 Am. B. R. 102; but see Gage & Co. v. Bell, 124 Fed. Rep. 371.

[12] B. A. 1898, Sec. 56*b*, and Sec. 59*b*.

[13] B. A. 1898, Sec. 59*g*; *In re* Marcer, No. 9060 Fed. Cas., s. c. 6 N. B. R. 351; *In re* Hunt, No. 6882 Fed. Cas., s. c. 5 N. B. R. 433.

to be counted, in determining the number of his creditors, and, if the creditors who have not assented are less than 12 in number, one of such creditors may file the petition.[13]*

Creditors may be estopped by their own consent to an act from alleging it against their debtor as proof of an act of bankruptcy. A creditor, who assents to the making of an assignment or other conveyance, which, but for such consent, would be an act of bankruptcy, can not allege the same against his debtor to procure an adjudication. The ground of the rule is, that to allow him to do so would be inconsistent with good faith and fair dealing, encourage deceit and put it within the power of creditors to entrap the debtor by inducing him to commit acts apparently fraudulent as to them, which they intend afterwards to repudiate to his disadvantage. A person will not therefore be allowed to complain of an act of bankruptcy where he induced the act, or after its commission has so acted with regard to it that others have the right to act on the faith of its validity so far as his subsequent conduct can effect it.[14] The mere fact of proving a claim in a state assign-

[13]* *In re* Miner, 104 Fed. Rep. 520; 4 Am. B. R. 710; 2 N. B. N. 1073.

[14] Simonson v. Sinsheimer (C. C. A. 6th Cir.), 95 Fed. Rep. 948; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Miner, 104 Fed. Rep. 520, 4 Am. B. R. 710; 2 N. B. N. 1073; Durham Paper Co. v. Seaboard Knitting Mills, 121 Fed. Rep. 179, 10 Am. B. R. 29.

In Simonson v. Sinsheimer, *supra*, after reviewing the cases, the court said: "Coming to apply our conclusions to the case at bar, we cannot doubt that the answer tendered made a case of estoppel against the petitioners. They are alleged to have become parties to the assignment proceedings, to have filed their claims under the assignment, to have requested a reference to pass upon the claims, the accounts of the assignee, and the questions of distribution. They waited three months and a half before filing their petition. By their acquiescence they certainly induced the assignors, the assignee, and the purchasers of the assets from the assignee to believe that they would not seek to set aside the assignment."

The case was reversed and remanded to the district court, where answer was filed and evidence taken. The court held that the evidence did not establish an estoppel and adjudged the respondents to be bankrupts (96 Fed. Rep. 579). This decree was affirmed on appeal by the circuit court of appeals for the sixth circuit (100 Fed. Rep. 426, 3 Am. B. R. 824).

See also on question of estoppel of petitioning creditors Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387; *In re* Curtis (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 2 Am. B. R. 226; affirming 91 Fed. Rep. 739; *In re*

ment proceedings is not of itself sufficient to estop a creditor from maintaining a petition against the debtor,[15] nor will the acceptance of the position of assignee by a person who is secretary of a corporation estop the corporation.[16] There is an exception where the act of bankruptcy committed is that covered by Sec. 3 a, cl. 5 of the Bankrupt Act. In such a case the creditor is not trying to repudiate or set aside the act done and therefore is not estopped though it was done at his solicitation.[17]

Creditors who were employed by the debtor at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, are not to be counted.[18] Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor and run downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other."[19]

In order to institute proceedings in involuntary bankruptcy a petitioning creditor or creditors must have claims against the debtor, *first,* which are provable against his estate and unsecured, and, *second,* they must amount in the aggregate to five hundred dollars or over. When the proceedings are against a partnership these debts clearly must be partnership debts. Under all circumstances the debts must be provable against the estate of the bankrupt.

C. Moench & Sons Co., 123 Fed. Rep. 965.

In re Williams, No. 17706 Fed. Cas., s. c. 14 N. B. R. 132; *In re* Massachusetts Brick Co., No. 9259 Fed. Cas., s. c. 2 Low. 58; Perry v. Langley, No. 11006 Fed. Cas., s. c. 1 N. B. R. 559.

[15] Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387; *In re* Curtis (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 2 Am. B. R. 226.

[16] *In re* Winston, 122 Fed. Rep. 187.

[17] *In re* C. Moench & Sons Co., 123 Fed. Rep. 965.

[18] B. A. 1898, Sec. 59*e*.

[19] 2 Black. Com. 206; Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Addams, 45 Penn. St. 432.

The statute declares[20] that "debts of the bankrupt may be proved and allowed against his estate which are

"*First,* a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

"*Second,* due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

"*Third,* founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

"*Fourth,* founded upon an open account, or upon a contract express or implied; and

"*Fifth,* founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

What debts are provable under this section is treated at length in another place, to which the reader is referred.[21] If the debt or debts are provable against the estate of the bankrupt and unsecured, the creditor is entitled to join in the petition to have the debtor declared a bankrupt and his property distributed according to law.

The amount of the claims of the petitioning creditors must amount in the aggregate to five hundred dollars or over.[22] Interest may be added in computing any of these amounts.[23] The creditor may purchase claims against the debtor in good

[20] B. A. 1898, Sec. 63.
[21] Provable Debts, Chap. XIII.
[22] B. A. 1898, Sec. 59*b*.
[23] Sloan v. Lewis, 22 Wall. 150.

faith for the purpose of enabling him to unite in the petition.[24] Creditors who have been paid by another creditor for the purpose of inducing them to join in the petition and who no longer have any interest will not be allowed to join in the petition.[25] The amount at which the claim of the secured creditor is to be reckoned is for the amount the claim exceeds the value of the security or priority.[26]

§ 67. Against whom a petition may be filed.

To warrant or justify the institution of involuntary proceedings against a debtor, individual, corporation or partnership, two things must concur with reference to such debtor: *First,* such debtor must be one who may be adjudged an involuntary bankrupt and be subject to the provisions and entitled to the benefits of the statute; *second,* he must have committed an act of bankruptcy within four months prior to the filing of the petition. If the act of bankruptcy alleged is that set forth in Sec. 3*a* cl. 1 of the bankrupt act he must be insolvent at the time of filing the petition.[27]

The Debtor must be one who may be Adjudged an Involuntary Bankrupt.—It is evident that unless the debtor may be adjudged a bankrupt and his property distributed in accordance with the bankrupt statute the proceeding against him would be futile.

The statute declares that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."[28]

The actual owner is subject to be adjudged a bankrupt and

[24] *In re* Woodford, No. 17972 Fed. Cas., s. c. 1 Cin. Law Bul. 37; *Ex parte* Shouse, No. 12815 Fed. Cas., s. c. Crabbe 482.

[25] *In re* Burlington Malting Co., 109 Fed. Rep. 777, 6 Am. B. R. 369.

[26] B. A. 1898, Sec. 56*b*.

[27] B. A. 1898, Sec. 3*c*.

[28] B. A. 1898, Sec. 4, 32 Stat. at L. 797. For a further consideration

it is not necessary to join with him a person who has loaned him the capital with which to do business.[29] Although a corporation has been dissolved by receivership proceedings it may be adjudged a bankrupt in order that preferences made fraudulent by the bankrupt act may be set aside.[30]

ACTS OF BANKRUPTCY.—A petition can not be filed against a debtor until he has done or allowed to be done something which the statute defines to be an act of bankruptcy. The act of bankruptcy must have been committed within four months prior to the filing of the petition.[31]

The statute declares that "acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."[32]

These are the only acts committed by a debtor which are acts of bankruptcy. Unless the acts complained of by the creditor or creditors comes within this enumeration it is not an act of bankruptcy, and can not be made a ground for insti-

of who may be adjudged bankrupts, see Chap. VII.

[29] *In re* Kenney, 97 Fed. Rep. 554, 2 N. B. N. 140, 3 Am. B. R. 353.

[30] Scheuer v. Montgomery, etc., Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

[31] B. A. 1898, Sec. 3*b*.

[32] B. A. 1898, Sec. 3*a*, 32 Stat. at L. 797. For a further consideration of what constitutes acts of bankruptcy, see Chap. VIII.

tuting involuntary proceedings. Where, however, the act is one of those named in the statute, and the debtor subject to be adjudged a bankrupt, then one creditor, if the creditors are less than twelve in number, otherwise three or more creditors, may apply to have him declared a bankrupt, provided the application is made within four months after the commission of the act of bankruptcy, and such creditor or creditors have provable claims amounting to five hundred dollars.

Insolvency at the Time of Filing the Petition.—The statute provides that a petition may be filed against a person who is insolvent.[33] In construing this clause the supreme court has held that solvency at the time the petition was filed is a defense only when an act of bankruptcy under cl. 1 of Sec. 3*a* is charged in the petition.[34] Though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy such an issue becomes superfluous where other acts of bankruptcy are charged.[34] Where the issue is material the bankrupt is entitled to have a trial by jury in respect to the question of his insolvency upon filing a written application therefor at or before the time within which an answer may be filed.[35] If such application is not filed within such time a trial by jury is deemed to be waived.[35] In such case the question is tried before the court without a jury.

Under the present statute a person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[36]

It should be observed that the term insolvent, as used in the present act, has quite a different meaning from the same term as used in the former acts. Under the act of 1867 the term insolvency was held not to mean the absolute inability to

[33] B. A. 1898, Sec. 3*b*.

[34] West v. Lea, 174 U. S. 590, 2 Am. B. R. 463. See also Day v. Hardware Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 8 Am. B. R. 175.

[35] B. A. 1898, Sec. 19; Bray v. Cobb, 91 Fed. Rep. 102, 1 Am. B. R. 153. See also Elliot v. Toeppner, 187 U. S. 327.

[36] B. A. 1898, Sec. 1, clause 15. See Sec. 50*a*, *ante*.

pay one's debts at a future time upon a settlement or winding up of all the debtor's concerns; but a trader was held to be insolvent when he was not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do.[37]

§ 68. In what court an involuntary petition is filed.

The court in which involuntary proceedings may be instituted depends upon where the debtor has had his domicile, resided or had his principal place of business for the greater portion of the preceding six months,[38] irrespective of the residence of the creditors. A creditors' petition must be filed in a court of bankruptcy in which the debtor could have filed a voluntary petition. The remarks that have already been made in regard to the court in which a voluntary petition may be filed apply equally to where proceedings in involuntary bankruptcy may be instituted.[39]

It is obvious that involuntary petitions may be filed against the same debtor in two or more districts; or that two or more petitions may be filed against the same debtor by different creditors in the same district. The order of proceedings in such cases is regulated by the general orders.[40]

[37] Wager v. Hall, 16 Wall. 599; Toof v. Martin, 13 Wall. 40; Sawyer v. Turpin, 91 U. S. 114; Wilson v. City Bank, 17 Wall. 473.

[38] B. A. 1898, Sec. 2, clause 1; *In re* Plotke (C. C. A. 7th Cir.), 5 Am. B. R. 171, 104 Fed. Rep. 964; *In re* Filer, 5 Am. B. R. 332; *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577.

In Dressel v. North State Lumber Co., 107 Fed. Rep. 255, it was held that a district court has jurisdiction of proceedings in bankruptcy against a corporation which carries on the business for which it was incorporated and has its property and assets entirely within the district, notwithstanding its incorporation in another state, and a provision in its articles of association that its principal office shall be at a place named in such state.

In re Marine Machine and Conveyor Co., 91 Fed. Rep. 630, a Rhode Island corporation, had shut down its manufacturing works at Warren, R. I., five months before a petition in bankruptcy was filed against it, but maintained its office for the transaction of its executive and banking business in New York city, it was held that the petition was rightly filed in the southern district of New York as being the principal place of business of the corporation during the greater part of the preceding six months.

[39] See Sec. 58, *ante*.

[40] Gen. Ords. 6 and 7. See Secs. 84 and 85, *post*.

§ 69. The petition.

The application to have a debtor adjudged a bankrupt and his property distributed according to the bankrupt law is made by petition. The supreme court of the United States has prescribed forms which should be observed and used with such alterations as may be necessary to suit the circumstances in any particular case.[41] The petition must be printed or written out plainly, without abbreviations or interlineations, except where such abbreviations or interlineations may be for the purpose of reference.[42] It should be prepared in duplicate, one copy for the clerk and one for service upon the bankrupt.[43]

The petition should be entitled in the proper court of bankruptcy. The caption is regularly A. B., C. D. and E. F., petitioners, v. X. Y., respondent. Although the title of the court and the style of the case are not required to be stated in a caption, and in many of the early cases were never put in the petition, it is more convenient for reference, and is now frequently inserted by the best pleaders. The petition is addressed to the judge of the court in which it is to be filed,[44] as to the Honorable S. R., judge of the district court of the United States for the district of ——.

The petition should state the names and residences of both the petitioning creditors and the debtor. It should contain a sufficient description of the debtor to show that he is subject to be adjudged an involuntary bankrupt, and should charge his insolvency at the time of filing the petition.[45] A petition against a corporation must state that it is such a corporation as may be adjudged a bankrupt[46] and a petition against an individual that he is not a wage earner or a person engaged

[41] Gen. Ord. 38; Official Form No. 3, Form No. 5, *post;* Gage & Co. v. Bell, 124 Fed. Rep. 371.

[42] Gen. Ord. 5; Mahoney v. Ward, 100 Fed. Rep. 278, 2 N. B. N. 538. See also criticism of Judge Woolson, 1 N. B. N. 239; West Co. v. Lea, 1 N. B. N. 410.

[43] B. A. 1898, Sec. 59*c*.

[44] In Anon., No. 459 Fed. Cas., s. c 1 N. B. R. 216, leave was asked to present an involuntary petition addressed to "Hon. Nye K. Hale, District Judge." It was held that the name of the judge must be given correctly if at all; that it cannot be stricken out as surplusage, and consequently permission to file was denied.

[45] B. A. 1898, Sec. 3*b; In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929. See West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[46] *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

chiefly in farming or the tillage of the soil.[47] If such allegation is omitted and the defendant answers on the merits the defect is waived.[48] The defect may be cured by amendment.[49] It should set forth all the matters that are requisite to give jurisdiction to the court over the particular case. It should show that the debtor had had his principal place of business, resided or had his domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months.[50] If he has not had a principal place of business, resided or had a domicile within the United States, it must show that he has property within the jurisdiction of the court.[51] If one creditor only petitions, it must be averred that all the creditors of the bankrupt are less than twelve in number.[52] The petition must also allege that the debtor owes debts to the amount of one thousand dollars.[53]

The petition must set forth and describe the claim or claims of the petitioning creditor or creditors sufficiently to show that they are provable claims and amount in the aggregate to five hundred dollars or over.[54] Ordinarily where the debt is founded upon a written instrument, as a note, bond, contract, etc., the paper is annexed to the petition as an exhibit, and proper reference to it is made in that part of the petition which is designed to describe the debt or claim. Where several claims or debts are stated in the petition each debt should be set forth in a separate paragraph, with sufficient particularity to show that it is a provable claim.

The petition should contain an allegation that the act of bankruptcy (setting forth in detail the act of the debtor which is relied upon as an act of bankruptcy) was committed within the period of four months prior to the filing of the petition.

[47] *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515; *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310.

[48] Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[49] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736.

[50] B. A. 1898, Sec. 2, clause 1.

[51] B. A, 1898, Sec. 2, clause 1.

[52] B. A. 1898, Sec. 59*d*; *In re* Miner, 104 Fed. Rep. 520, 2 N. B. N. 1073, 4 Am. B. R. 710; *In re* Novak, 101 Fed. Rep. 800, 4 Am. B. R. 811.

[53] B. A. 1898, Sec. 4*b*.

[54] B. A. 1898, Sec. 59*b*; *In re* Western Sav. & T. Co., No. 17442 Fed. Cas., s. c. 4 Saw. 490; *In re* Hadley, No. 5894 Fed. Cas., s. c. 12 N. B. R. 366.

The allegation in regard to the act of bankruptcy must be positive, full and unqualified.[55] Evidence of acts not set up in the petition will not be received or considered.[56] Where the petition is filed against a partnership the allegation should set forth an act of bankruptcy on the part of the firm. It has been held that an averment of an act of bankruptcy upon the part of one of the members of the firm is insufficient.[57] Several acts of bankruptcy may be charged in the same petition. When this is done they should be alleged conjunctively.[58] In such case it is enough if either of them is satisfactorily proven.[58]

The petition should not include an application for a warrant to seize property. If it does the petition is bad for multifariousness.[59]

The petition should conclude with a prayer that service of the petition with a subpœna may be made upon the debtor (naming him) as provided in the acts of congress relating to bankruptcy, and that he should be adjudged by the court to be a bankrupt within the purview of said acts.[60]

The petition should be signed by the petitioning creditor or creditors, or their attorney or agent.[61] It must be verified as to matters of fact by an affidavit under oath.[62] Neither the

[55] *In re* Muller, No. 9912 Fed. Cas., s. c. Deady 513; Orem v. Harley, No. 10567 Fed. Cas., s. c. 3 N. B. R. 263; *In re* Nelson, 98 Fed. Rep. 76; *In re* Cliffe, 2 Am. B. R. 317, 94 Fed. Rep. 354; *In re* Ewing (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 8 Am. B. R. 269; Seaboard Steel Casting Co. v. Trigg Co., 124 Fed. Rep. 75.

[56] *Ex parte* Potts, No. 11344 Fed. Cas., s. c. Crabbe 469.

[57] *In re* Redmond, No. 11632 Fed. Cas., s. c. 9 N. B. R. 408; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; but see *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385; *In re* Grant, 106 Fed. Rep. 496, 3 N. B. N. 425; see also Chap. XI, *post.*

[58] Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779; see also *In re* Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 8 Am. B R. 713; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 231; *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231; *In re* McKibben, No. 8859 Fed. Cas., s. c. 12 N. B. R. 97.

[59] *In re* Kelly, 91 Fed. Rep. 504; Mather v. Coe, 92 Fed. Rep. 333; *In re* Ogles, 93 Fed. Rep. 426.

[60] See Official Form No. 3, Form No. 5, *post.*

[61] *In re* Raynor, No. 11597 Fed. Cas., s. c. 11 Blatch. 43; Wald v. Wehl, 6 Fed. Rep. 163.

[62] B. A. 1898, Sec. 18*c*; *In re* Donnelly, 5 Fed. Rep. 783; *In re* Raynor, No. 11597 Fed. Cas., s. c. 11 Blatch. 43; Wald v. Wehl, 6 Fed. Rep. 163.

The oath attached to the creditor's petition, Form No. 54, under

statute nor the general orders require the petition to be signed or verified by the petitioners personally. An agent or attorney may make the oath if it appears that he has knowledge of the facts. This, however, is not good practice where it is not inconvenient for the petitioning creditors to make it.[63] Where it does not appear that the attorney has knowledge of the facts the defect is waived if answer is made on the merits.[64] The oath or affirmation may be administered by a referee, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country.[65]

§ 70. The time and manner of filing the petition.

The petition must be filed in the office of the clerk of a court of bankruptcy, and not with a referee.

A petition in bankruptcy is deemed filed within the meaning of the statute from the time it is presented to the clerk in his office, and not from the time when it is presented to the judge for his action.[66] No schedule is required to be filed with a petition in involuntary bankruptcy. The statute provides that the petition shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.[67] The petition is received by the clerk and filed and the case docketed as in volun-

the act of 1867, provided for making oath on information and belief. The oath attached to the creditor's petition, Form No. 3, under the present statute, provides only for a positive statement and not for a verification upon information and belief.

[63] *In re* Herzikopf, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re* Hunt, 118 Fed. Rep. 282, 9 Am. B. R. 251; *In re* Chequasset Lumber Co., 112 Fed. Rep. 56, 7 Am. B. R. 87; but see *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

[64] *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Simonson v. Sinsheimer (C. C. A. 6th Cir.), 95 Fed. Rep. 948.

[65] B. A. 1898, Sec. 20.

[66] *In re* Von Borcke, 94 Fed. Rep. 352, 2 Am. B. R. 322; *In re* Appel, 103 Fed. Rep. 931, 4 Am. B. R. 722, 2 N. B. N. 907; *In re* Bear, 5 Fed. Rep. 53; *In re* Abrahams, No. 20 Fed. Cas., s. c. 5 Law Rep. 328.

[67] B. A. 1898, Sec. 59*c*. If only one petition is filed it will be dismissed. *In re* Dupree, 97 Fed. Rep. 28; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R. 66.

tary proceedings.[68] The deposit for costs should be made by the petitioning creditors as by a voluntary debtor.[69] There is one exception, namely, the petitioning creditors are not permitted to proceed *in forma pauperis,* without making a deposit.

The petition must be filed within four months after the commission of the act of bankruptcy upon which it is founded.[70] Such time does not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property, with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[70] Where the act of bankruptcy complained of is a preference resulting from legal proceedings, the four months period begins to run from the date connected with the proceedings after judgment and not from judgment.[71] Where the petition is filed within four months after the commission of the act of bankruptcy charged, it has been held sufficient if other creditors join in the petition before an adjudication thereon, although after the four months period, and are reckoned in the making up of the requisite number of creditors and amount of claims.[72] Where the debtor suffers a preference to be gained by legal proceedings the creditor need not wait for the sale, but can file his petition within the five days before the advertised date of the sale.[73]

[68] Sec. 61, *ante.* Gen. Ords. 1 and 2.

[69] Consult Sec. 61, *ante.*

[70] B. A. 1898, Sec. 3*b*; *In re* Mingo Valley Creamery Association, 100 Fed. Rep. 282, 4 Am. B. R. 67; *In re* Romanow, 92 Fed. Rep. 510.

[71] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; 2 N. B. N. 174.

[72] *In re* Romanow, 92 Fed. Rep. 510; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288, 3 N. B. N. 428; *In re* Ryan, 7 Am. B. R. 562, 114 Fed. Rep. 373.

[73] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123.

In computing the four months within which the petition is to be filed the first day is excluded and the last day included, unless the last day falls upon a Sunday or a legal holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.[74] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[75]

The authority of an attorney to file a petition should be challenged by rule to show his authority supported by affidavits and not by answer.[76]

§ 71. The writ of subpoena.

The eighteenth section of the bankruptcy act provides that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time."

The first step, therefore, after filing a petition in involuntary bankruptcy in the clerk's office, is to have issued and served a writ of subpœna.[77] This is a writ issuing out of the court of bankruptcy directed to the marshal, commanding him to summon the defendant or defendants, naming them, to appear before a day certain and answer the matters alleged against them.[78]

[74] B. A. 1898, Sec. 31; Dutcher v. Wright, 91 U. S. 553; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480.

[75] B. A. 1898, Sec. 1, clause 14; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R. 66; *In re* Dupree, 97 Fed. Rep. 28.

[76] Gage & Co. v. Bell, 124 Fed. Rep. 371.

[77] For form of subpœna, see Official Form No. 5, Form No. 8, *post*.

[78] Gen. Ord. 3.

In the United States courts a subpœna is directed to the marshal, although it may be observed that formerly the writ of subpœna differed from other writs of process in equity in being directed to the party himself, whereas the subsequent writs are directed to certain ministerial officers commanding them to take proceedings against the defendant calculated to enforce obedience. See Daniels Chan. Prac. (1 ed.) 554.

This writ is issued as of course upon application of the plaintiff.[79] The subpœna is issued under the seal of the court of bankruptcy, and is signed by the clerk of that court.[80] The writ bears teste of the judge or, when that office is vacant, of the clerk of that court,[81] as of the date of issuing the writ.[82]

The subpœna is returnable within fifteen days unless the judge for cause fixes a longer time.[83] Formerly a writ of subpœna named a money penalty in case of disobedience, but this has fallen into disuse in equity, and is unnecessary in bankruptcy for the reason that the plaintiff has a remedy in procuring an adjudication of bankruptcy, provided neither the bankrupt nor a creditor appears to controvert the facts alleged in the petition.[84]

At the bottom of the subpœna in equity is placed a memorandum that the defendant is to enter his appearance in the suit and plead in the clerk's office on or before the day on which the writ is returnable, otherwise the bill may be taken *pro confesso,*[85] but form No. 5 in bankruptcy contains no such memorandum. If no service is made before the return day, other subpœnas *totics quoties* may be issued until the defendants are all served.[86]

§ 72. In what cases a subpoena is necessary.

A subpœna is necessary in case of a petition for involuntary bankruptcy,[87] but not when the petition is filed by the bankrupt himself. To bring a defendant who is charged with being a bankrupt before the court in the first instance the personal service of a subpœna is proper and necessary. He can not be brought in any other way. But he may voluntarily enter his appearance and thereby he waives any want of or defect in the service of a subpœna.[88] A subpœna should be issued and served on all the defendants named in the petition.

[79] Equity Rule 12.

Form 4 provides for an order to show cause, etc., directing a subpœna.

[80] R. S. Sec. 911; Gen. Ord. 3.

[81] R. S. Sec. 911.

[82] R. S. Sec. 912.

[83] B. A. 1898, Sec. 18.

[84] B. A. 1898, Sec. 18*d*.

[85] Equity Rule 12; B. A. 1898, Sec. 18*d*; Official Form No. 5, Form No. 8, *post*.

[86] Equity Rule 14.

[87] B. A. 1898, Sec. 18.

[88] *In re* Ulrick, No. 14327 Fed. Cas., s. c. 3 Ben. 355; Johnson v. Waters, 111 U. S. 673; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98;

§ 73. **The service of a subpoena.**

A subpœna and copy of the petition are served by the marshal or his deputy, or some other person specially appointed by the court for that purpose.[89] The service can be made only within the territorial jurisdiction of the bankruptcy court issuing the writ.[90] The writ can not be served by the marshal of another district within his jurisdiction.

The manner of serving the subpœna and petition is prescribed by Equity Rule 13, which is as follows: "The service of all subpœnas shall be by delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." This must be strictly followed or the service will be defective and may be set aside.[91]

Service is required to be made on each defendant at least five days before the return day.[92] Hence in a suit against a husband and wife each must be personally served.[93] In a suit against an infant service should be made upon him personally, and not only upon his guardian or parent.[94]

Service is regularly made upon a corporation by serving the

Henderson v. Carbondale Co., 140 U. S. 25; Buerk v. Imhaeuser, 8 Fed. Rep. 457.

[89] Equity Rule 15, R. S. Secs. 788-790; Bray v. Cobb, 91 Fed. Rep. 102; United States v. Montgomery, 7 Dall. 335; Hyman v. Chales, 12 Fed. Rep. 855; Deacon v. Sewing Machine Co., No. 3694*a* Fed. Cas., s. c. 14 Reporter 43.

[90] Jobbins v. Montague, No. 7329 Fed. Cas., s. c. 5 Ben. 422; Paine v. Caldwell, No. 10674 Fed. Cas., s. c. 1 Hask. 452; *In re* Hirsch, No. 6529, Fed. Cas., s. c. 2 Ben. 493; *In re* Litchfield, 13 Fed. Rep. 868; Herndon v. Ridgway et al., 17 How. 424. But see Babbitt v. Burgess, No. 693, Fed. Cas., s. c. 2 Dill. 169. Toland v. Sprague, 12 Pet. 300; Butterworth v. Hill, 114 U. S. 128; Pacific Railroad v. Missouri Pacific Railway Co., 3 Fed. Rep. 772.

[91] Romaine v. Union Insurance Co., 28 Fed. Rep. 635-6, and cases there collated; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods 98.

[92] See Official Form 4, Form No. 7, *post.*

[93] O'Harra v. McConnell, 93 U. S. 151.

[94] In Woolridge v. McKenna, 8 Fed. Rep. 670, Judge Hammond said: "But never is service of process upon the guardian or parent or other substituted process of that character sufficient to bind the infant where he is personally an essential party defendant." See also O'Harra v McConnell, 93 U. S. 150, where service was made on the husband of an infant. In Smith v. Marshal, 2 Atk. 70, a service on the mother of infants was held good, it appearing that the infants were secreted.

subpœna upon one or more of its officers within the district within which it is domiciled.[95] It can not be made on an officer of a nonresident corporation temporarily within the district.[96] It will be observed that the cases cited arose under the act of August 13, 1888,[97] where it is provided that a person shall be sued only in the district of his residence. The bankrupt act provides that a person may be adjudged a bankrupt who has his principal place of business, resides or had his domicile within the jurisdiction of the court for the preceding six months, or the greater portion thereof, or aliens who have property within the jurisdiction of the court.[98] But the general rule is probably applicable to bankruptcy suits that service can not be made upon a nonresident defendant temporarily within the district for the purpose of attending court, either state or federal,[99] nor upon a public officer in the discharge of his duty within the district,[100] nor upon a person fraudulently enticed into the district for the purpose of getting service on him.[101] So also a person is free to attend upon bankruptcy proceedings as a witness or to prove a debt, etc., without interference by service of process of any kind.[102]

Where personal service on a resident defendant by delivery

[95] Shaw v. Mining Co., 145 U. S. 444; Galveston Ry. v. Gonzales, 151 U. S. 496; Southern Pacific Co. v. Denton, 146 U. S. 202.

As to where the domicile of a corporation is located, see Interstate Com. Com. v. Ry. Co., 57 Fed. Rep. 948, s. c. 6 C. C. A. 653; Harvey v. Richmond, etc., R. Co., 64 Fed. Rep. 19. As to corporations created by two states, see Williamson v. Krohn, 66 Fed. Rep. 662.

[96] Goldey v. Morning News, 156 U. S. 518; Fidelity Trust and Safety Vault Co. v. Mobile St. R. R. Co., 53 Fed. Rep. 850.

[97] 25 Stat. at L. 434.

[98] B. A. 1898, Sec. 2, clause 1.

[99] Kauffman v. Kennedy, 25 Fed. Rep. 785; Parker v. Hotchkiss, No. 10739, Fed. Cas., s. c. 1 Wall. Jr. 269; Matthews v. Puffer, 10 Fed. Rep. 606; Brooks v. Farwell, 4 Fed. Rep. 167; Kinne v. Lant, 68 Fed. Rep. 436.

[100] Lyell v. Goodwin, No. 8616, Fed. Cas., s. c. 4 McLean, 29; see also U. S. Const., Art. 1, Sec. 6, with reference to senators and congressmen; Miner v. Markham, 28 Fed. Rep. 387.

[101] Union Sugar Refinery v. Mathieson, No. 14397, Fed. Cas., s. c. 2 Cliff. 304; Steiger v. Bonn, 4 Fed. Rep. 17; Plimpton v. Winslow, 9 Fed. Rep. 365; Blair v. Turtle, 5 Fed. Rep. 394.

[102] Matthews v. Tuffts, 87 N. Y. 568, and cases cited in appellant's brief; cases cited in note to *ex parte* Hawkins, 4 Ves. Jr. 691.

Brett v. Brown, 13 Abb. Pr., N. S. (N. Y.) 295; Sanford v. Chase, 3 Cowen (N. Y.) 381; Norris v. Beach, 2 Johns. (N. Y.) 294; Lampkin v. Starkey, 7 Hun (N. Y.) 479.

of a copy of the subpœna to him is impracticable or inconvenient, the rule provides that the copy shall be left at his house or usual place of abode.[103] Leaving a copy with the clerk of a hotel at which the defendant resided and of which he was proprietor was held sufficient.[104] It is sufficient under this provision if a copy of the subpœna is left "with some adult person who is a member or resident in the family" on the steps or on a portico, or in some outhouse or barn adjoining to or immediately connected with the family mansion.[105] But it seems that such service in the corner of the yard, one hundred and twenty-five feet away from the house is not sufficient.[106] The copy must be left at the present and not at some former residence of the defendant.[107]

Voluntary Appearance Waives Service.— A person may voluntarily appear and plead without being served with subpœna. In such case the court has complete jurisdiction over him as though he had been legally served with process.[108] So also if a nonresident of the district comes into the case for the purpose of proving a claim he is subject to the jurisdiction of the court, irrespective of his place of residence,[109] and is bound to take notice of and obey the orders of the court to the same extent as a party to the suit.

§ 74. The return of the subpoena.

On or before the day named in the writ on which it is returnable the officer returns it to the clerk's office, with his action therewith endorsed on the back of it. This is called the marshal's return to the writ,[110] which should state the day

[103] Equity Rule 13. See also Form No. 4.

[104] *In re* Risteen, 122 Fed. Rep. 732.

[105] Phœnix Ins. Co. v. Wulf, 1 Fed. Rep. 775; Kibbe v. Benson, 17 Wall. 624.

[106] Kibbe v. Benson, 17 Wall. 624, where the service considered was made under a state statute very similar to Rule 13.

[107] Hyslop v. Hoppock, No. 6988, Fed. Cas., s. c. 5 Ben. 447.

[108] *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[109] Clay v. Smith, 3 Pet. 411; *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 482.

[110] See Loveland's Forms of Federal Prac. No. 333.

on which the writ was received, and when, where and how service was made. It is then signed by the marshal, or in the name of the marshal by his deputy.[111] The truth of an unverified return of a marshal or his deputy is not to be questioned in the cause.[112] If he makes a false return he is liable for any damage that may be sustained in consequence of it.[113]

When a writ is served by one specially appointed for that purpose, proof of the service is made by an affidavit of the one who served it.[114] The return of the marshal may be amended to comply with the facts,[115] but not to supply a fatal omission,[116] as the absence of the clerk's signature, or the authority in whose name it is issued, or the like.

If the officer has failed to make service of it on the defendants, or any of them, he should return the writ and state in his return the reason why no service has been made, as that the defendant named has not been found within the district. An alias subpœna may then be issued.[117]

The endorsement on the writ that service is accepted and signed by the defendant, dated at a place within the district, is sufficient.[118] But accepting service without the district "to have the same effect as if duly served on me by a proper officer" is not a sufficient service.[119]

§ 75. Service by publication.

Section 18 of the act also provides that "in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as pro-

[111] See Hill v. Gordon, 45 Fed. Rep. 278.

[112] Phœnix Insurance Co. v. Wulf, 1 Fed. Rep. 775; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98; McClaskey v. Barr, 45 Fed. Rep. 151.

[113] See Walker v. Robbins, 14 How. 584; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods 98.

[114] Equity Rule 15.

[115] R. S. Sec. 954; Phœnix Ins. Co. v. Wulf, 1 Fed. Rep. 775.

[116] Dwight v. Merritt, 4 Fed. Rep. 614; Peaslee v. Haberstro, No. 10884, Fed. Cas., s. c. 15 Blatch. 472; United States v. Rose, 14 Fed. Rep. 681.

[117] Equity Rule 14.

[118] The proper endorsement in such a case is "I promise to appear at the return of the within writ and pray the court to enter my appearance accordingly," and signed by the defendant. This form is sufficient if made by a nonresident defendant without the district.

[119] Butterworth v. Hill, 114 U. S. 132-3.

vided by law for notice by publication in suits in equity in courts of the United States."

The reference here is to the method prescribed by section 8 of the act of March 3, 1875.[120] This provides that it shall be lawful for the court to make an order directing such absent defendant or defendants to appear and plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of the property, if any there be, or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks, and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within such further time to be allowed by the court in its discretion, and upon proof of the service and publication of such order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with such process within said district. The method prescribed by this section should be strictly followed.

It has been held that where service of the order on a petition in involuntary bankruptcy is made upon the defendant outside the district, without an appearance on his part, no order can be made which will apply to him in person, but the proceeding will affect only property within the district which can come into possession of the trustee.[120*]

§ 76. How to object to an irregularity of service or subpoena.

Objections are properly raised to the sufficiency of the service by a motion to set aside the return of the marshal;[121] to

[120] 18 Stat. at L. 470, 1 Supp. 84. See also Bracken v. Union Pac. Ry. Co., 56 Fed. Rep. 447, s. c. 5 C. C. A. 548; Batt. v. Procter, 45 Fed. Rep. 515; Beach v. Mosgrove, 16 Fed. Rep. 305.

For practice in bankruptcy and form of order, see *In re* Murray, 3 Am. B. R. 601, 96 Fed. Rep. 600.

[120*] *In re* Appel, 103 Fed. Rep. 931, 2 N. B. N. 907.

[121] Romaine v. Union Ins. Co., 28 Fed. Rep. 634-5, where the authorities are examined and the practice

an irregularity in issuing the subpœna by a motion to quash the writ;[121] to an order for substituted service improperly granted by a motion to set aside the order or service or both.[122] In these cases the motion should be accompanied with a special appearance for the purpose of the motion only, for by a general appearance the defendant submits himself to the jurisdiction of the court.[123]

§ 77. Interlocutory orders to protect the estate.

Upon filing the petition in bankruptcy it may be desirable and necessary to apply to the court for a temporary order to protect and preserve the estate of the bankrupt until the appointment of a trustee competent to take and administer the estate. Such application may be made in voluntary or involuntary proceedings. An application of this nature, however, is very rarely made in a case of voluntary bankruptcy.

It is obvious that in every case of involuntary proceedings in bankruptcy a considerable interval of time is bound to elapse between the filing of the petition and the appointment and qualification of a trustee. Thus, after the petition is filed a subpœna must issue, be served and returned.[124] The bankrupt is entitled to ten days thereafter within which to plead.[125] He may demand and have a jury trial.[126] All this takes place prior to the adjudication. Not less than ten nor more than thirty days after the adjudication a meeting of creditors is required to be held, at which a trustee of the bankrupt's estate is chosen by the creditors.[127] Upon their failure to agree the trustee is appointed by the court.[128] If there is danger during this interval of the bankrupt or any other person wasting or disposing of the property, or of a creditor obtaining an undue advantage over the other cred-

is explained. See also Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 850; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98; Am. Bell Tel. Co. v. Pan Electric Tel. Co., 28 Fed. Rep. 625; Pacific R. Co. v. Missouri R. R. Co., 3 Fed. Rep. 772; Gregory v. Pike, 79 Fed. Rep. 520, s. c. C. C. A.

[122] Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 850; Bowen v. Christian, 16 Fed. Rep. 730; Rogers v. Riessner, 31 Fed. Rep. 591.

[123] *In re* Smith, 9 Am. B. R. 98.

[124] B. A. 1898, Sec. 18*a*.

[125] B. A. 1898, Sec. 18*b*.

[126] B. A. 1898, Sec. 19*a*.

[127] B. A. 1898, Secs. 44 and 55; Gen. Ord. 13.

[128] B. A. 1898, Sec. 44.

itors either by judicial process or otherwise, it is the duty of the court, upon proper application, to prevent such injury by making such orders as may be most beneficial to the estate and the creditors generally.

There are four ordinary modes of proceeding for this purpose:

First. The court is expressly authorized to appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.[129]

The court will not appoint a receiver except upon application of a party in interest for cause shown. The application may be by motion or petition supported by affidavits.

The court may authorize the business of a bankrupt to be conducted for limited periods by receivers, the marshals or trustees, if necessary in the best interests of the estates.[130]

Second. The court may order a suit, which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, to be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.[131]

Third. The court may restrain the debtor or any other person or persons from making any transfer or disposition of any part of the debtor's property, not excepted by the statute from the operation thereof, and from any interference therewith.[132] This proceeding is further considered in section 78.

[129] B. A. 1898, Sec. 2, clause 3. See Sec. 77*a*, *post;* Lazarus v. Hanks, 7 Cin. Court Index, No. 85, Jan. 13, 1899; Lansing v. Manton, No. 8077, Fed. Cas., s. c. 14 N. B. R. 127; *In re* Cooke, No. 3167, Fed. Cas., s. c. 30 Leg. Int. 404; Keenan v. Shanan, No. 7640 Fed. Cas., s. c. 9 N. B. R. 441; M. & M. Nat. Bank v. Brady's Iron Co., No. 9018, Fed. Cas., s. c. 5 N. B. R. 491.

[130] B. A. 1898, Sec. 2, clause 5.

[131] B. A. 1898, Sec. 11*a*. As to staying suits see also Sec. 22, *ante*.

[132] B. A. 1898, Sec. 2, clause 15.

Fourth. The court may in a proper case issue a warrant to a marshal to seize and hold the property of a debtor subject to further orders. Proceedings of this nature are further considered in section 79.

Applications for orders of this nature may be made by petition or motion supported by affidavits. The application should be made to the judge and not to a referee. But the judge may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts.[133] In case the judge is absent from the judicial district, sick or unable to act, the clerk may certify this fact to a referee who may exercise the powers of the judge for taking possession and releasing the property of the bankrupt.[134]

§ 77a. Receivers in bankruptcy.

The court is expressly authorized to appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified.[135] The courts have frequently exercised this power under the present act.[136]

The application for a receiver should be made by a party in interest. The application may be made by petition or motion supported by affidavits.[137] The petition should show that it is necessary for the preservation of the estate that a receiver be appointed. A receiver is regularly appointed by the judge but a referee has power to make the appointment.[138] The appointment should not be made until the adverse interests have

[133] Gen. Ord. 12.

[134] B. A. 1898, Sec. 38, clause 3.

[135] B. A. 1898, Sec. 2, cl. 3.

[136] *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822; Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re* Sievers, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619; *In re* Florcken, 107 Fed. Rep. 241, 5 Am. B. R. 802; Booneville Nat. Bank v. Blakey (C. C. A., 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; *In re* Rogers (C. C. A., 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. —.

[137] For form of petition, see Form No. 23.

[138] *In re* Florcken, 107 Fed. Rep. 241; 5 Am. B. R. 802; *In re* Maher, reported p. 117, note, *ante; In re* Kelly Dry Goods Co., 102 Fed. Rep. 747; 4 Am. B. R. 528.

notice and an opportunity to be heard.[139] The receiver must qualify and give bond before he takes possession of the property.[140] It has been intimated that a court will not appoint an ancillary receiver in aid of another court which is administering the estate of a debtor.[141]

A receiver in bankruptcy derives his power from the statute and possesses such power only as the statutes confer or such as may be fairly inferred from the general scope of the law of his appointment.[142] He is not a general receiver in the sense that receivers are appointed by courts of equity. A receiver in bankruptcy is a temporary custodian until a trustee is appointed. He does not exercise the powers of a trustee.[142] The court may order him to sell property of the bankrupt and may appoint appraisers when such a course is necessary for the preservation of the value of the estate,[143] or to take any other steps incident to the protection of the property in his custody.[144] A receiver may insure property in his possession. The court will not authorize a receiver to take possession of property held and claimed adversely by third parties,[149] or to institute actions for the recovery of property claimed to belong to the bankrupt's estate.[150] A receiver may apply for an injunction to stay suit for removal of goods of bankrupt from leased premised for non-payment of rent, when the receiver is in possession of such goods.[151]

The statute provides that the court may authorize the business of the bankrupt to be conducted for limited periods by receivers if necessary in the best interests of the estates.[152]

[139] Ross-Meehan Foundry Co. v. Southern Car & Foundry Co., 124 Fed. Rep. 403, 10 Am. B. R. 624.

[140] Beach v. Macon Grocery Co., 116 Fed. Rep. 143, 8 Am. B. R. 751.

[141] Ross-Meehan Foundry Co. v. Southern Car & Foundry Co., 124 Fed. Rep. 403.

[142] Booneville Nat. Bank v. Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13.

[143] *In re* Rogers (C. C. A., 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. —; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re* Steyer, 98 Fed. Rep. 290, 3 Am. B. R. 424; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

[144] *In re* Hamilton (Ref.), 4 Am. B. R. 543, 2 N. B. N. 959.

[149] Beach v. Macon Grocery Co., 116 Fed. Rep. 143, 8 Am. B. R. 751.

[150] Booneville Nat. Bank v. Blakey (C. C. A., 7th Cir.), 107 Fed. Rep. 891; 6 Am. B. R. 13.

But see *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822.

[151] *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R. 604.

[152] B. A. 1898, Sec. 2, cl. 5.

Where there is a delay in the appointment of the trustee and it is for the best interests of the estate that the business be conducted by the receiver, the court may authorize such receiver to borrow money and issue receivers' certificates. This should only be done when it is made to appear that it is for the best interests of the estate to continue the business and that it cannot be continued without borrowing money for that purpose.

The compensation of receivers is an expense of the administration of the estate and is entitled to priority under Sec. 64*b* of the bankrupt act. The amount of compensation of receivers rests in the discretion of the court to be exercised upon the consideration of particular services rendered. The amendment of 1903 provides for compensation for services of receivers not greater than that allowed trustees for similar services.[153] A receiver has been allowed two hundred and fifty dollars for one hundred and nine days in charge of three stores containing a stock of general merchandise, and one dollar and ninety-five cents a day for each store for his actual expenses in taking care of the property and clerk hire.[154]

Objections to receivers' reports should be made promptly. The court will not allow a re-examination after a report has been approved by the creditors and a period of acquiescence has elapsed thereafter.[155]

§ 78. Temporary injunction or restraining order.

One means of protecting the estate of the bankrupt mentioned in the last section is by a temporary injunction or restraining order. The court of bankruptcy is expressly authorized to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the bankrupt statute.[156] Under this provision the court may, upon proper application and cause shown, restrain the debtor or any other party to the bankruptcy proceedings from mak-

[153] B. A. 1898, Sec. 2, cl. 5, as amended February 5, 1903, 32 Stat. at L. 797.

[154] *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625.

[155] *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

[156] B. A. 1898, Sec. 2, clause 15.

ing any transfer or disposition of any part of the debtor's property not excepted by the statute from the operation thereof, or from any interference therewith.[157] It has been held that a court of bankruptcy can not restrain a stranger from dealing with property in his possession which he claims to own.[157*]

The mode of applying for a temporary restraining order is regularly by a separate petition or motion supported by affidavits.[158] The petition is entitled and filed in the bankruptcy proceedings. It should be positive in its averments, and not on information and belief,[159] and should contain a description of the property. It must be verified by the oath of the petitioner or his agent or attorney.[160] A bill in equity has also been issued.[161] The hearing may be had *ex parte*. An order may be passed and an injunction issued without notice to the adverse party.[162] The injunction or restraining order is merely temporary, but continues until vacated by order of the court. The present statute does not limit the duration of such injunction. The writ of injunction issues out of the court under the seal thereof, and is tested by the clerk.[163] The writ

[157] Beach v. Macon Grocery Co. (C. C. A., 5th Cir.), 116 Fed. Rep. 143, 8 Am. B. R. 751; *In re* Gutwillig, 90 Fed. Rep. 475; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. Rep. 691.

Stengel-Rothschild v. Leidigh Carriage Co., Southern District of Ohio (not reported). The Leidigh Carriage Co., of Dayton, O., on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount of something like fifty thousand dollars. Attachments were issued and levies made under these judgments prior to the assignment, and some of the property had been sold, but funds arising therefrom had not been distributed. Upon an application for a temporary injunction filed with the petition of the creditors, Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from disposing of or interfering with the property of the debtor.

[157*] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215, 3 N. B. N. 216.

[158] Irving v. Hughes, No. 7076, Fed. Cas., s. c. 2 N. B. R. 61; Creditors v. Cozzens, No. 3378, Fed. Cas., s. c. 3 N. B. R. 281.

[159] *In re* Bloss, No. 1569, Fed. Cas., s. c. 4 N. B. R. 427.

[160] *In re* Fendley, No. 4728, Fed. Cas., s. c. 10 N. B. R. 250.

[161] Blake, Moffitt & Towne, v. Francis-Valentine Co., 89 Fed. Rep. 691; *In re* Fendley, No. 4728, Fed. Cas., s. c. 10 N. B. R. 250; Blackburn v. Stannard, No. 1468, Fed. Cas., s. c. 5 Law Rep. 250.

[162] *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513, and cases cited in the opinion.

[163] Rev. Stat., Sec. 911; Gen. Ord. 3.

is then served upon the parties by the marshal and a return made as upon other process.

Any party having an interest in the property covered by the injunction may appear and move for a dissolution thereof. At the hearing affidavits and counter affidavits may be read by either party.[164] When the affidavits filed upon a motion to dissolve an injunction do not sustain the allegation of the petition, but disclose the existence of another ground for an injunction, the petition may be amended so as to cover that ground.[165] It can not be urged as a ground for dissolving an injunction that the petition does not allege at what time the act of bankruptcy was committed or contain any positive charge of the act of bankruptcy, or because there is an irregularity in the proceedings. These are also matters that may be corrected by amendment. Nothing would be gained by dissolving the injunction and then reissuing upon the same state of facts. In order to obtain the dissolution of an injunction the *prima facie* case made out by the petition and affidavits in support thereof must be rebutted.[166]

§ 79. The seizure of the debtor's property.

Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt an application may be made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending the hearing of the petition.[167] There was no provision corresponding to this one in the former bankrupt acts. The application may be by petition or motion supported by an affidavit that the bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value.[168] If satisfactory proof is made by the applicant the judge may issue a warrant to the marshal to

[164] *In re* Bloss, No. 1562, Fed. Cas., s. c. 4 N. B. R. 147.

[165] *In re* Bloss, No. 1562, Fed. Cas., s. c. 4 N. B. R. 147.

[166] *In re* Binns, No. 1422, Fed. Cas., s. c. 4 Ben. 152; *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513.

[167] B. A. 1898, Sec. 3*e* and Sec. 69.

[168] B. A. 1898, Sec. 69; *In re* Kelly, 91 Fed. Rep. 504.

seize and hold the property of the bankrupt, or any part of it, subject to further orders.[169]

The application must regularly be made to the judge. A referee is authorized to exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act.[170]

Before a warrant can be issued the petitioner applying therefor must enter into a bond,[171] with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.[172] If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property.[172] Counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond.[172]

When the marshal receives a warrant general in its nature it is his duty to take possession of the bankrupt's property. If the warrant commands him to seize certain specified property it is his duty to take possession only of the property specified. He is not entitled to seize property which has been transferred by a bankrupt to another person. Such transfers are voidable, but the title is in the transferee and will not ordinarily be questioned until after the adjudication.[173]

[169] B. A. 1898, Sec. 69.

[170] B. A. 1898, Sec. 38, clause 3.

[171] B. A. 1898, Sec. 3*c* and Sec. 69.

[172] B. A. 1898, Sec. 3*c*.

[173] *In re* Harthill, No. 6161, Fed. Cas., s. c. 4 Ben. 448; Doyle v. Sharpe, 74 N. Y. 154, affirming 41 N. Y. Super. 312; 43 *id.* 545.

But see Stevenson v. McLaren, 14 N. B. R. 403, s. c. 3 Cent. Law Jour. 478.

In re Rockwood, 91 Fed. Rep. 363. Judge Shiras, construing this section, says: "It does not authorize the court to issue a warrant to the marshal to take the property away from the possession of a third party who holds it under a claim of right

In such cases the transferee may obtain an order, upon a petition filed in the court of bankruptcy for that purpose, to have

to title. According to the showing made in the application the mortgagee has a good title to and the right to possession of the property in question unless such title and right are defeated under the provisions of the bankrupt law. Whether these provisions will become operative against the title and right of the mortgagee depends primarily upon the question whether Rockwood will be adjudicated to be a bankrupt on the petition of the creditors, which is set down for hearing at a future day. The mortgagee, Mary Boehlen, is not a party to these proceedings, and in my judgment Sec. 69 does not confer any authority on the court to arbitrarily deprive her of the possession of property held by her under claim of title. It can not be judicially known at the present time whether Rockwood will or will not be adjudged a bankrupt, and until he is so adjudged there is no ground shown for attacking the possession of the property now held by the mortgagee. Sec. 69 is intended to authorize the court to prevent the wasting, deterioration, or loss of the bankrupt's property in his possession, pending the hearing on the petition for adjudication, but it is not intended to authorize the taking away from third parties of property to which they assert title. The section provides that before the issuance of a warrant of seizure a bond must be executed conditioned to indemnify the bankrupt for such damages as he may sustain if the seizure be wrongfully obtained, it being further provided that the property seized shall be released if the bankrupt give bond conditioned to turn over the property or its value to the trustee in case he is adjudged a bankrupt.

"These provisions clearly show that the section is intended to apply only to seizure of property in possession of the bankrupt, and it does not authorize the seizure of property which has passed from the possession of the bankrupt before the institution of proceedings under the act. In a proper case and upon a proper showing an injunction or restraining order may be obtained upon an application to which the third person is made a party, restraining the sale or other disposition of the property until the hearing upon the petition for adjudication and the appointment of the trustee, but the proper showing therefor must be made.

"The present application for a warrant directing the marshal to seize property in the possession of the mortgagee must be refused for the reasons stated." See also *In re* Kelly, 91 Fed. Rep. 504.

In Goldman, Bettman & Co. v. Smith, District Court for, etc., 7 Cin. Court Index, No. 70, Dec. 24, 1898, s. c. Vol. 41 W. L. Bul. 4, a petition for involuntary bankruptcy was filed by four Cincinnati creditors against one Newton M. Smith. It was alleged that some four weeks before the filing of the petition Smith came to Cincinnati, in pursuance of a scheme to defraud his creditors, and with money that was advanced him by his brother-in-law, paid his creditors such amounts as he was then owing them on account. He immediately purchased large amounts of merchandise, and two weeks thereafter transferred to his brother-in-law his entire stock including the merchandise last purchased. The conveyance was founded upon a pretended consideration of a pre-existing debt, consisting large-

such property released from the marshal's possession.[174] The marshal is not justified in taking any property which belongs to a third person. If he does so, it has been held that his warrant will protect him only so far as the goods belong to the bankrupt.[175]

In case the bankrupt desires to have possession of his property until the adjudication, and a bond has been given by the petitioning creditors, the property must be released to him upon his giving a bond in a sum which is fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property or pay the value thereof in money to the trustee in the event of his being adjudged a bankrupt pursuant to such petition.[176]

§ 80. Appearing for the purpose of becoming a party to the proceedings.

Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.[177] This may be done more than four months after the act of bankruptcy was committed.[178] The word creditor, as used in the bankrupt statute, includes anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[179]

A person who has no provable claim is not entitled to

ly of the money advanced as above. Upon application of the petitioning creditors and proof of the facts by affidavit, Judge Barr issued an order directing the marshal to forthwith seize the property and hold it, subject to the further order of court, the creditors being required to give bond for the value of the property.

[174] *In re* Harthill, No. 6161, Fed. Cas., s. c. 4 Ben. 448.

[175] Marsh v. Armstrong, 20 Minn. 81, s. c. 11 N. B. R. 125; *In re* Havens, No. 6230, Fed. Cas., s. c. 8 Ben. 309; *In re* Marks, No. 9095, Fed. Cas., s. c. 2 N. B. R. 575; *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513.

[176] B. A. 1898, Sec. 69.

[177] B. A. 1898, Sec. 59*f*; *In re* Bates Mach. Co., 91 Fed. Rep. 625; *In re* Romanow, 92 Fed. Rep. 510; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A., 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288; *In re* Ryan, 7 Am. B. R. 562.

[178] *In re* Stein (C. C. A., 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288; *In re* Mammouth Pine Lumber Co., 109 Fed. Rep. 308, 8 Am. B. R. 651.

[179] B. A. 1898, Sec. 1, clause 9. See also Sec. 66, *ante*.

become a party for the purpose of opposing the prayer of the petition.[180] When a creditor intervenes for the purpose of joining in the petition he has a right to prosecute the original petition in the same manner as the petitioning creditors could have done.[181] When a creditor intervenes for the purpose of opposing the prayer of the petition he has the same right as any other party respondent.[182] A preferred creditor may so intervene without surrendering his preference.[183] An intervening creditor has a right to insist upon a trial, although the petitioning creditors may consent to continue the case.[184]

The proceedings may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court.[185] The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be endorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion.[185] Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.[185]

[180] *In re* Columbia Real Estate Co., 112 Fed. Rep. 643, 7 Am. B. R. 441. As to what are claims, see "Provable Debts," Chap. XIII.

[181] *In re* Romanow, 92 Fed. Rep. 510; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A., 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288, 3 N. B. N. 428; *In re* Ryan, 7 Am. B. R. 562; *In re* Lacy, No. 7965, Fed. Cas., s. c. 12 Blatch. 322.

[182] Mattoon Nat. Bank v. First Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976.

[183] *In re* Moench & Sons Co., 123 Fed. Rep. 977; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266.

[184] Knickerbocker Ins. Co. v. Comstock, No. 7879, Fed. Cas., s. c. 9 N. B. R. 484.

[185] Gen. Ord. 4.

An attorney at the time of filing the petition not admitted to practice will not be recognized; *In re* O'Halloran, No. 10463, Fed. Cas., s. c. 8 Ben. 128.

There is no objection to a person living without a district entering his appearance voluntarily. In such case the court has complete jurisdiction over him as though he had been legally served with process.[186] If a nonresident comes into the case for the purpose of proving a claim he thereby submits himself to the jurisdiction of the court irrespective of his place of residence.[187] He thereby makes himself a party to the proceedings, and is bound to take notice of and obey the orders of the court to the same extent as any other party. When a voluntary appearance has been entered it can not be withdrawn without permission of the court.[188]

§ 81. Schedules.

It is the duty of the bankrupt to prepare and make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to.[189]

He is required to file this schedule in triplicate, one copy for the clerk, one for the referee, and one for the trustee.[189] The form of schedule is the same as in voluntary proceedings.[190] The remarks that have already been made in regard to schedules in voluntary petitions apply equally to proceedings in involuntary bankruptcy.

There is one class of cases, however, in which a special provision is made in the general orders, which relates solely to involuntary proceedings. When the bankrupt is absent or can not be found, it is the duty of the petitioning creditor

[186] *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355.

[187] *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 483.

[188] *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355; see also U. S. v. Curry, 6 How. 106; Eldred v. Mich. Ins. Bank, 17 Wall. 545.

[189] B. A. 1898, Sec. 7, clause 8.

[190] See note at the end of Form No. 3. See Sec. 60, *ante*.

to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor.[191] If the debtor is found and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.[191]

§ 82. Pleading to the petition.

As soon as a petition in bankruptcy is filed and the respondent is served with process, he should consider his response to such petition. The bankrupt or any creditor may appear and plead to the petition within ten days after the return day or within such further time as the court may allow,[192] but creditors can not be compelled to intervene.[193] Where a respondent waives service and files a written admission of the truth of the allegations of the petition, no adjudication can be made until after the expiration of the ten days within which creditors may intervene.[194] Any creditor with a provable claim may intervene to join in the petition,[195] or for the purpose of opposing the prayer of the petition.[196] When a creditor so intervenes he has the same right as any other party and may file an answer if a respondent.[196] Although the statute does not expressly require a written de-

[191] Gen. Ord. 9.

[192] B. A. 1898, Sec. 18*b*; *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577.

[193] *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119.

[194] *In re* Humbert Co., 100 Fed. Rep. 439; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965.

[195] *In re* Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112.

[196] Mattoon Nat. Bank v. 1st Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* C. Moench & Sons Co., 123 Fed. Rep. 977.

In Neustadter v. Dry Goods Co., 96 Fed. Rep. 830, 3 Am. Bankr. R. 96, it was said that "There is no right given to other creditors to come in and take the conduct of the case out of the hands of the original petitioners, and it cannot reasonably be presumed that congress intended to authorize different creditors to come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual."

murrer, plea or answer, it evidently contemplates a formal written pleading of some kind.

In what way the bankrupt or creditor may properly plead to the petition depends upon the circumstances in each particular case. Where the averments of the petition are not sufficiently precise and distinct the debtor may file exceptions, declining to answer upon that ground, and ask that the allegations be made more definite and certain or be stricken out.[197] If the averments are not sufficient in law to sustain the proceedings he may demur,[198] or may move to dismiss the petition.[199] He should, however, consider before making any of these dilatory pleas whether he desires a jury trial as to insolvency. If he desires a trial by jury of this question, it is necessary to file a written application therefor at or before the time within which the answer may be filed.[200] If no such application is filed within such time, a trial by jury is deemed to have been waived.[200] It seems that a debtor may file objections by way of demurrer and an answer at the same time and thus obtain a jury trial.[201] Where a demurrer or exceptions or a motion to dismiss is filed, it should be set down for hearing and disposed of before proceeding further in the case. If either a demurrer, motion or exception is sustained the court will ordinarily allow the petition to be amended.[202] If it is overruled the court will allow the respondent to answer within a time fixed in the order.

As soon as the petition is adjudged to be correct, or is made so by amendment, or when no dilatory pleading is resorted to, the debtor should put in his defense, if any, on the merits. This is regularly done by answer, which is treated in the next section.

By pleading to the merits in the first instance he waives objection to formal defects in the petition which do not go to the jurisdiction of the court.[203]

[197] *In re* Randall, No. 11551, Fed. Cas., s. c. Deady, 557.

[198] *In re* Benham, 8 N. B. R. 94; Orem v. Harley, No. 10567, Fed. Cas., s. c. 3 N. B. R. 263.

[199] *In re* Melick, No. 9399, Fed. Cas., s. c. 4 N. B. R. 97.

[200] B. A. 1898, Sec. 19.

[201] *In re* Nickodemus, No. 10254, Fed. Cas., s. c. 3 N. B. R. 230.

[202] See Amendments, Sec. 63, *ante;* Gen. Ord. 11.

[203] Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 1 N. B. N. 387, 2 Am. B. R. 383; Simonson v. Sensheimer (C. C.

§ 83. **The answer.**

The general defense to a petition in bankruptcy is regularly put in by answer. The answer is entitled in the court in which the petition is filed followed by a caption or style of the proceedings as it appears upon the docket. The commencement of the answer may be in substantially these words: "And now the said X. Y., respondent (*or*, intervening creditor, *as may be*), appears and for answer" admits, denies or says, as may be. The answer usually admits the allegations of the petition which are true, if any, before stating the defenses.

The defense is then set forth. Each defense must be specifically stated. The true object of pleading at law, in equity or in bankruptcy is to narrow the controversy to the point or points really in dispute between the parties. No greater latitude in pleading should be allowed the defense in a petition in bankruptcy than in ordinary actions or suits.[204]

In order to maintain bankruptcy proceedings to have a debtor adjudged a bankrupt it must appear from the petition that the debtor has committed an act of bankruptcy within four months prior to the filing of such petition.[205] It is also stated in the petition that the debtor is insolvent,[206] but unless the act of bankruptcy is that covered by Sec. 3*a*, clause 1, this allegation is superflous;[207] that he owes debts to the amount of one thousand dollars and is otherwise subject to be adjudged an involuntary bankrupt;[208] that he has had his principal place of business, resided or had his domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months; or, if against a person residing without the United States, that he has property within the territorial jurisdiction of the court.[209] The defense set up may go to any of these matters and there may be several defenses to any one of them.[210] In such case the defenses must

A. 6th Cir.), 95 Fed. Rep. 948; *In re* Mason, 99 Fed. Rep. 256, 2 N. B. N. 425; *In re* Cliffe, 2 Am. B. R. 317, 94 Fed. Rep. 354; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[204] *In re* Sutherland, No. 13638, Fed. Cas., s. c. Deady, 344.

[205] B. A. 1898, Sec. 3*b*.

[206] B. A. 1898, Sec. 3*b*, and Form No. 3.

[207] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[208] B. A. 1898, Sec. 4*b*.

[209] B. A. 1898, Sec. 2, clause 1.

[210] *In re* Paige, 99 Fed. Rep. 538,

be separately pleaded.[211] Unless all the essential facts required by the petition concur, the petitioners have no right to prosecute the petition, and it must be dismissed.

The principal defense consists in a denial that the debtor has committed the act or acts of bankruptcy complained of in the petition. When the petition alleges two or more acts of bankruptcy, and one of them is established by proof, it is sufficient. The answer therefore should deny each act separately. This defense is regularly made by the general denial provided for in form No. 6, which is in these words: "And now the said X. Y. appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged." When this defense is made the answer should conclude according to whether the debtor wishes the question tried by the court or a jury in substantially these words: "and this he prays may be inquired of by the court; *or* he demands that the same may be inquired of by a jury." If this defense is established by proof the petition must be dismissed.

The question of how far a plea of solvency is a defense to an involuntary petition was considered by the supreme court in West Co. *v.* Lea.[212] It is a complete defense to the first act of bankruptcy to show solvency at the time the petition is filed.[213] It is a complete defense to the second and third classes of acts of bankruptcy and to that part of the fourth class which relates to receivers to show solvency at the time the acts were committed.[214] It was directly ruled in West Co. *v.* Lea that a deed of general assignment for the benefit of creditors is made by the bankrupt act alone sufficient to justify an adjudication in involuntary bankruptcy

3 Am. B. R. 679; Mather v. Coe, 92 Fed. Rep. 333; *In re* Etheridge Furniture Co., 92 Fed. Rep. 329.

[211] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; Silverman's case, No. 12855, Fed. Cas., s. c. 1 Saw. 410; *In re* Sutherland, No. 13638, Fed. Cas., s. c. Deady, 344; *In re* Finlay, No. 4789, Fed. Cas., s. c. 5 Biss. 480.

[212] 174 U. S. 590, 2 Am. B. R. 463.

[213] B. A. 1898, Sec. 3*c*.

[214] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531. See also *In re* Coddington, 118 Fed. Rep. 281, 9 Am. B. R. 243.

against the debtor making such deed without reference to his solvency at the time of the filing of the petition and a denial of insolvency is not a defense. Under the fifth class of acts the debtor has admitted his insolvency at the time of committing the act of bankruptcy and solvency at the time of filing the petition is no defense.[215]

A person against whom an involuntary petition has been filed is entitled to have a trial by jury in respect to the question of his insolvency, where the question is material, except as otherwise provided in the act, and any act of bankruptcy alleged in such petition to have been committed upon filing a written application therefor at or before the time within which an answer may be filed.[216] If such application is not filed within such time, a trial by jury shall be deemed to have been waived.[216] This right is limited to the bankrupt and is not extended to intervening creditors contesting such issues.[217]

The answer may also deny that the petitioners or any one of them is a creditor owning a provable debt,[218] or that the debts claimed by the petitioning creditors amount to five hundred dollars,[219] or that his total indebtedness amounts to one thousand dollars; or, when there is but one petitioning creditor he may set up the fact that the number of his creditors is more than twelve;[220] or he may set up a set-off for the pur-

[215] West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[216] B. A. 1898, Sec. 19. See also Miller v. Keyes, No. 9578, Fed. Cas., s. c. 3 N. B. R. 224.

[217] *In re* Herzikopf, 121 Fed. Rep. 544.

[218] *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695; *In re* Morales, 105 Fed. Rep. 761; Hill v. Levy, 98 Fed. Rep. 94; *In re* Big Meadows Gas Co., 113 Fed. Rep. 974, 7 Am. B. R. 697; but see *In re* Manhattan Ice Co., 114 Fed. Rep. 400, 7 Am. B. R. 409.

The following opinion was handed down May 21, 1901, by Brown, District Judge: "The practice in this district is that a creditor having a provable debt may be a petitioning creditor, though the debt is unliquidated. These creditors evidently have a present fixed debt to some amount. Only a trial can determine the amount of the debts. If insufficient in amount, the petition will be dismissed, unless others join. The defense must be taken by answer. Motion denied."

In re Cornwall, No. 3250, Fed. Cas., s. c. 9 Blatch. 114; National Exchange Bank v. Moore, No. 10041, Fed. Cas., s. c. 2 Bond 170; *In re* Skelley, No. 12921, Fed. Cas., s. c. 3 Biss. 260.

[219] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; *In re* Cal. Pac. R. Co., No. 2315, Fed. Cas., 3 Saw. 240.

[220] In such a case he must file a list of his other creditors, giving

pose of reducing the amount of such debts to less than five hundred dollars;[221] or may aver that the debts claimed are barred by the statute of limitations;[222] or may challenge the jurisdiction of the court,[223] or plead infancy,[224] or that the debtor was *non compos mentis* at the time the alleged act of bankruptcy was committed.[225] In those estates where a married woman has no separate property rights and can not contract debts she may defend on the plea of coverture.[226]

A plea of payment, in whole or in part, of the debt of the petitioning creditor will not ordinarily defeat the petition for adjudication in bankruptcy.[227] If the debtor is insolvent he has no right to offer payment nor the creditor to accept it. This would amount to a preference, which can be avoided by the trustee. There are, however, a few exceptions to this rule in which a plea of payment may be made as a defense to the petition. Thus, when there is only one creditor of the debtor payment may be pleaded.[228] When a payment has been made after the petition has been filed and before the trial the receipt of such payment by the petitioning creditors has been held a waiver sufficient to defeat the adjudication if the payment was sufficient in amount to reduce the indebtedness below the minimum established by the act.[229]

The answer should be signed and verified [230] under oath by the person answering or his agent or attorney.

The answer is filed with the clerk of the court, and not

particulars in regard to the debts. Gage & Co. v. Bell, 124 Fed. Rep. 371.

[221] *In re* Osage, etc., R. Co., No. 10592, Fed. Cas., s. c. 9 N. B. R. 281; *In re* Skelley, No. 12921, Fed. Cas., s. c. 3 Biss. 260; *In re* Sheehan, No. 12738, Fed. Cas., s. c. 8 N. B. R. 353.

[222] *In re* Cornwall, No. 3250, Fed. Cas., s. c. 9 Blatch. 114.

[223] *In re* Williams, No. 17706, Fed. Cas., s. c. 14 N. B. R. 132.

[224] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232.

[225] *In re* Maroin, No. 9178, Fed. Cas., s. c. 1 Dill. 178; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96; *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Murphy, No. 9946, Fed. Cas., s. c. 10 N. B. R. 48.

[226] *In re* Rachel Goodman, No. 5540, Fed. Cas., s. c. 5 Biss. 401; *In re* Howland, No. 6791, Fed. Cas., s. c. 2 N. B. R. 357.

[227] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; *In re* Williams, No. 17703, Fed. Cas., s. c. 1 Low. 406.

[228] *In re* Sheehan, No. 12738, Fed. Cas., s. c. 8 N. B. R. 353.

[229] *In re* Skelley, No. 12921, Fed. Cas., s. c. 3 Biss. 260.

[230] B. A. 1898, Sec. 18*c*.

with a referee. It should be filed within ten days after the return day of the subpœna or within such further time as the court may allow.[231]

§ 84. The order of proceeding where petitions are filed in different districts.

It is obvious that two or more petitions may be filed against the same debtor in different districts. In such cases[232] the first hearing is had in the district in which the debtor has his domicile,[232] and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed is first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and in either case the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy retains jurisdiction over all proceedings therein until the same shall be closed.[232]

In case two or more petitions are filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, takes and retains jurisdiction over all proceedings in such bankruptcy until the same is closed; and if such petitions are filed in the same district, action is first had upon the one first filed.[232]

But the court so retaining jurisdiction must, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.[232]

[231] B. A. 1898, Sec. 18*b*.

[232] B. A. 1898, Sec. 32; Gen. Ord. 6; *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484; *In re* Boston, etc., R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409.

§ 85. The order of proceeding where two or more petitions are filed in the same court.

It is clear that a debtor having a large number of creditors is liable to have several petitions filed against him in the same court by different creditors. The same or different acts of bankruptcy may be alleged as a ground for having him adjudged a bankrupt.

Whenever two or more petitions have been filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition is first heard and tried which alleges the commission of the earliest act of bankruptcy.[233] In case several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated and proceed to a hearing as upon one petition.[234] If an adjudication of bankruptcy is made upon either petition, or for the commission of a single act of bankruptcy, it is not necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.[234]

§ 86. The reply.

Where the answer contains simply a general denial or traverse of the allegations of the petition no replication or reply is needed.[235] If the petitioning creditors wish to contest a defense raising new matter they must put in a replication and have a trial before an adjudication is made.[236] Where a case is submitted on petition and answer, the allegations of the answer are taken to be true.[236] The reply may be filed on the day of the hearing.

It may be observed that where the answer contains pleas which are irrevalent and immaterial it is proper to move to

[233] Gen. Ord. 7.

[234] Gen. Ord. 7.

[235] *In re* Dunham, No. 4143, Fed. Cas., s. c. 2 Ben. 488; *In re* Hawkeye Smelting Co., 8 N. B. R. 385.

[236] Mattoon Nat. Bank v. First Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929.

have them stricken out. If they are insufficient in law it has been held that the proper practice under the present statute and general orders is to set the case down for hearing upon petition and answer, as in equity, and that a demurrer to the answer is improper.[237]

§ 87. The hearing or trial.

If the bankrupt or any of his creditors appear within the time limited and controvert the facts alleged in the petition, a hearing or trial is had as soon as may be thereafter upon the issues presented by the pleadings.[238] It is the duty of the judge to determine the issues so made without the intervention of a jury, except in cases where a jury trial is given by the statute.[238*] The case may be set for hearing by either party upon any day after the issues have been made at which it can be heard by the judge. He should serve notice upon the opposing party of the day of hearing or trial.

The debtor is entitled to have a trial by jury in respect to the question of his insolvency and any act of bankruptcy alleged in the petition against him to have been committed upon filing a written application therefor at or before the time within which an answer may be filed.[238*] If any such written application is not filled within such time the debtor is deemed to have waived his right to trial by jury,[238*] and these questions are then determined by the judge.[239]

This right of jury trial is confined to the debtor. Creditors are not entitled to demand a jury trial on the question of the

[237] In Goldman, Bettman & Co. v. Smith, 93 Fed. Rep. 182, Judge Barr said: "If we are to apply the rules of equity practice to proceedings in bankruptcy — and we understand these are to be applied (see Rule 37, Supreme Court), the sufficiency of an answer can not be raised by a demurrer, but can only be done by setting the case for hearing upon the bill and answer."

Consult as to the practice in equity, Banks v. Manchester, 128 U. S. 244; Walker v. Jack, 88 Fed. Rep. 576; Grether v. Wright, 75 Fed. Rep. 742, s. c. 23 C. C. A. 500.

[238] B. A. 1898, Sec. 18*d*; Mattoon Nat. Bank v. 1st Nat. Bank, 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387; *In re* Baumann, 96 Fed. Rep. 946, 3 Am. B. R. 196.

[238*] B. A. 1898, Sec. 19*a*. See also Simonson v. Sinsheimer (C. C. A., 6th Cir.), 100 Fed. Rep. 426, 3 Am. B. R. 824; Bray v. Cobb, 91 Fed. Rep. 102; 1 Am. B. R. 153; Elliott v. Toeppner, 187 U. S. 327.

[239] B. A. 1898, Sec. 18*d*.

bankrupt's solvency,[240] nor of the allowance of their claims.[241] The right to a trial by jury on written application of the alleged bankrupt is absolute and cannot be withheld at the discretion of the court.[242] In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.[242] The judge and not the referees should preside at a jury trial.

Where the bankrupt has seasonably demanded in writing a trial by jury the issues may be tried before any jury in attendance upon the court. If a jury is not in attendance upon the court one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties, when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.[243]

Where the bankrupt has controverted other allegations of the petition in addition to those relating to his insolvency and commission of acts of bankruptcy there is nothing in the statute prohibiting the court from submitting all the issues to the jury. Section 19*c* of the act would seem to be authority for such proceedings. It would also seem that the judge may submit the questions of insolvency and the commission of an act of bankruptcy, with proper instructions as to the other matters.

At the hearing or trial the petitioners must establish by proof the truth of the facts alleged in the petition. The burden of proof rests upon the petitioners in all cases,[244] except

[240] *In re* Herzikopf (C. C. A., 9th Cir.), 121 Fed. Rep. 544.

[241] *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R. 99.

[242] Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50.

[243] B. A. 1898, Sec. 19*b*.

[244] *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Lange, 97 Fed. Rep. 197; *In re* Price, No. 11411, Fed. Cas., s. c. 8 N. B. R. 514; Brock v. Hoppock, No. 1912, Fed. Cas., s. c. 2 N. B. R. 7; *In re* Oregon Bulletin Co., No. 10559, Fed. Cas., s. c. 13 N. B. R. 503.

in respect to the question of insolvency. With reference to the question of solvency the burden of proof is regulated by the statute.[245] It declares that it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of section 3 to allege and prove that the party proceeded against was not insolvent, as defined in the statute, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. Whenever a person against whom a petition has been filed, as hereinbefore provided under the second and third subdivisions of section 3, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Where a bankrupt contests the debt of a petitioning creditor on the ground that it is illegal because founded on a gambling or wagering contract the burden of proof is upon the bankrupt.[246]

The evidence is put in in the same manner as at any other civil trial. The court may summon any person who is a competent witness to appear in court to be examined.[247] The right to take depositions at such a trial is determined by and enjoyed according to the United States laws in force at that time relating to the taking of depositions.[248] When the evidence in chief, evidence in reply and evidence in rebuttal

[245] B. A. 1898, Sec. 3*c* and 3*d*;, West Co. v. Lea, 174 U. S. 590.

[246] Hill v. Levy, 98 Fed. Rep. 94, 3 Am. B. R. 374, 2 N. B. N. 180. See also as to presumption of legality of contracts, Irwin v. Williar, 110 U. S. 507.

[247] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Woodward, No. 18000, Fed. Cas., s. c. 8 Ben. 112.

[248] B. A. 1898, Sec. 21*b*. The sections of the Revised Statutes which apply particularly to the right to take depositions are found in chap. 17 of the Revised Statutes relating to evidence and particularly sections 861 to 870. This subject has been quite fully discussed by the supreme court in an opinion by Mr. Justice Miller in *ex parte* Fisk, 113 U. S. 713.

has been introduced the case is closed and arguments of counsel of the parties heard. The court submits the case to the jury with instructions as in a common law action. When there is no conflicting testimony the court may direct a verdict.[249] A scintilla of conflicting testimony is not sufficient to require a submission to the jury. The court has power to set aside a verdict upon the grounds recognized in other civil actions.[250] Where the case is submitted to the judge without the intervention of a jury the evidence is not usually introduced with the same formality as in a jury trial. In such case the court determines the issues presented by the pleadings upon the proofs after arguments of counsel, and either makes an adjudication of the bankruptcy or dismisses the petition.

§ 88. Order of adjudication.

If the facts set forth in the petition are sufficient and established by proof to be true, either by a jury or by the court, it is the duty of the court to adjudge the debtor to be a bankrupt.[251] An order of adjudication ought not to be made until the expiration of the time for creditors to intervene and oppose the petition although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service.[252] An adjudication of bankruptcy against a partnership will be denied, where the existence of the partnership is put in issue by some of the members, until the existence of the partnership is established.[252*] The form of adjudication of bankruptcy is prescribed by the supreme court in form No. 12. This order should be entered by the clerk of record. A mere memorandum not conforming substantially to this form is not an adjudication.[253]

[249] Hardy v. Clark, No. 1420 Fed. Cas., s. c. 3 N. B. R. 385; *In re* Jelsh, No. 7257, Fed. Cas., s. c. 9 N. B. R. 412.

[250] *In re* Dunn, No. 41713, Fed. Cas., s. c. 12 Blatch. 42; *In re* De Forest, No. 3745, Fed. Cas., s. c. 9 N. B. R. 278.

[251] B. A. 1898, Sec. 18*e*.

[252] *In re* Humbert Co., 100 Fed. Rep. 439; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965.

[252*] *In re* McLaren, 125 Fed. Rep. 835.

[253] Consult *in re* Hill, No. 6484, Fed. Cas., s. c. 7 Ben. 378; *In re* Boston, H. & E. R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409; B. A. 1898, Sec. 1, clause 2.

When the debtor resists an adjudication and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor is entitled to recover and be paid out of the estate the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner.[254]

§ 89. Proceedings to set aside an adjudication.

An adjudication of bankruptcy which is correct in form and made by a district court having jurisdiction of the bankrupt is conclusive of the fact decreed.[255] Until vacated by a direct proceeding in the court of bankruptcy it is binding upon all the parties and can not be attacked collaterally.[255] Thus an adjudication by default on the ground that the bankrupt created a preference is conclusive against the bankrupt and the creditor preferred.[256] The court of bankruptcy is always open for a reexamination of its decrees in an appropriate form. Any order made in a case may be set aside and vacated on proper showing made, due regard being had to rights which have become vested under it and which will be disturbed by its revocation.

After the order has been formally entered an application may be made to set aside the adjudication and grant a new trial or hearing. The application is usually by motion. The court has power to grant such a motion in a proper case.[257] The party applying to set aside the adjudication must file his motion within a reasonable time after the order is entered.[258]

The motion to set aside the adjudication may be made by the bankrupt or a creditor.[259] Thus an attaching creditor or

[254] Gen. Ord. 34.

[255] Michaels v. Post, 21 Wall. 398; Shawhan v. Wherritt, 7 How. 643; Sloan v. Lewis, 22 Wall. 150; Chapman v. Brewer, 114 U. S. 158; Graham v. Boston H. & E. R. Co., 118 U. S. 161; *In re* Gretchell, No. 5371, Fed. Cas., s. c. 8 Ben. 256; *In re* Ives, No. 7145, Fed. Cas., s. c. 5 Dill. 146; *In re* McKinley, No. 8864, Fed. Cas., s. c. 7 Ben. 562; Lewis v. Sloan, 68 N. C. 557; Mount v. Manhattan Co., 41 N. J. Eq. 211.

[256] *In re* American Brewing Co., 112 Fed. Rep. 752, 7 Am. B. R. 463.

[257] *In re* Dunn, No. 4173, Fed. Cas., s. c. 12 Blatch. 42; *In re* De Forest, No. 3745, Fed. Cas., s. c. 9 N. B. R. 278; *In re* Great Western Telegraph Co., No. 5739, Fed. Cas., s. c. 5 Biss. 359.

[258] *In re* Neilson, No. 10090, Fed. Cas., s. c. 7 N. B. R. 505; Leiter v. Payson, No. 8226, Fed. Cas., s. c. 9 N. B. R. 205.

[259] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

a creditor whose security is impeached as a preference,[260] but not a secured or a general creditor,[261] has such an interest as will entitle him to make such a motion.

It is not a sufficient ground for setting aside an adjudication in bankruptcy, where the debtor has admitted an act of bankruptcy, that the admission was not true,[262] nor that a prior petition was pending in another district,[263] nor on the ground that there was a misjoinder or a nonjoinder of creditors who filed the petition, unless there is proof that the adjudication was obtained by fraud or in bad faith.[264]

§ 90. Order of reference.

At the time of making the order adjudging the debtor to be bankrupt the court regularly refers[265] the case for subsequent proceedings to a referee within the county of which the debtor is a resident or has his principal place of business. It may refer the case to any referee within the territorial jurisdiction of the court if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[266]

All the proceedings thereafter, except as required by the statute or by the general orders to be had before a judge, are had before the referee,[267] subject to be reviewed by the judge.[268] Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state must be heard and decided by the judge.[269] But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.[269] A person claiming to be the

[260] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232; Fogarty v. Gerrity, No. 4895, Fed. Cas., s. c. 1 Saw. 233.

[261] *In re* Bush, No. 2222, Fed. Cas., s. c. 6 N. B. R. 179; Karr v. Whittaker, No. 7613, Fed. Cas., s. c. 5 N. B. R. 123. See Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[262] *In re* Thomas, No. 13891, Fed. Cas., s. c. 11 N. B. R. 330; Lea v. West Co., 91 Fed. Rep. 237.

[263] *In re* Harris, No. 6111, Fed. Cas., s. c. 6 Ben. 375.

[264] *In re* McKinley, No. 8864, Fed. Cas., s. c. 7 Ben. 562; *In re* Duncan, No. 4131, Fed. Cas., s. c. 8 Ben. 365; *In re* Funkenstein, No. 5158, Fed. Cas., s. c. 3 Saw. 605.

[265] Order of Reference, Official Form No. 14, Form No. 31, *post*.

[266] B. A. 1898, Sec. 22.

[267] Gen. Ord. 12.

[268] Gen. Ord. 27.

[269] Gen. Ord. 12.

owner of property in the hands of the trustee is entitled to a jury trial and can not be compelled to submit his claims to a referee.[270] Upon the filing of an answer to an involuntary petition in bankruptcy it is quite usual to have one of the referees take the evidence and report upon the various questions presented.[271]

The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee, and from that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.[272]

A copy of the order must forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. The time when and the place where the referee shall act upon the matters arising under the several cases referred to him shall be fixed by special order of the judge, or by the referee; and at such times and places the referee may perform the duties which he is empowered by the act to perform.[272]

§ 91. Proceedings on default.

If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge on the next day, if present, or as soon thereafter as practicable, makes the adjudication or dismisses the petition.[273]

If the judge is absent from the district or the division of the district in which the petition is pending on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk must forthwith refer the case to the referee.[274] In such cases the referee is authorized to consider all such petitions and make the adjudications or dismiss the petitions,[275] with

[270] *In re* Russell (C. C. A., 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658.

[271] Clark v. American Mfg., etc., Co. (C. C. A., 4th Cir.), 101 Fed. Rep. 962, 4 Am. B. R. 351.

[272] Gen. Ord. 12.

[273] B. A. 1898, Sec. 18*e*.

[274] B. A. 1898, Sec. 18*f*; Official Form No. 15. Form No. 32, *post*.

[275] B. A. 1898, Sec. 38, clause 1.

the same effect as if the order had been made by the judge. The referee is not authorized to make an adjudication in other cases. An adjudication made after the debtor or any creditor has failed to file pleadings is as binding as one made upon a trial or hearing, unless set aside by order of the court.[276]

§ 92. Amendments in involuntary proceedings.

The court may, upon proper application, allow amendments to the petition and schedules.[277] Such applications are addressed to the judicial discretion of the court. Mere formal amendments may be asked in open court at the time of the hearing or trial and allowed, when justice may be done by so doing, even after all the testimony in the case has been taken.[278]

When new matter is sought to be introduced, leave must be first obtained of the court to file the amendment. The application is regularly made by petition or motion. It should be accompanied by a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions or schedules.[279] If the amendments are made to separate schedules the same must be made separately with proper references.[279] The amendment should state no more of the original paper than may be absolutely necessary to introduce and to make intelligible the new matter, which should alone constitute the chief subject of the amendment. The application for leave to amend must state the cause of the error in the paper originally filed.[279] In other words, it must be shown that the petitioner or his attorney had no knowledge of and could not have ascertained with

[276] *In re* American Brewing Co., 112 Fed. Rep. 752, 7 Am. B. R. 463. *In re* Le Favour, No. 8208, Fed. Cas., s. c. 8 Ben. 43.

As to the binding force of a decree in equity *pro confesso*, see Thomson v. Wooster, 114 U. S. 104.

[277] Gen. Ord. 11.

[278] *In re* Bininger, No. 1420, Fed. Cas., c. s. 7 Blatch. 262; *In re* Craft, No. 3316, Fed. Cas., s. c. 2 Ben. 214; *In re* Haughton, No. 6223, Fed. Cas., s. c. 1 N. B. R. 460; *In re* Gallinger, No. 5202, Fed. Cas., s. c. 1 Saw. 224.

Formal defects are usually waived by answering on the merits. *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Simonson v. Sinsheimer (C. C. A., 6th Cir.), 95 Fed. Rep. 948; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[279] Gen. Ord. 11.

reasonable diligence the facts sought to be added by the amendment at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake or other reason which would excuse such omission.[280] The application for leave to amend must be made within a reasonable time after the discovery of such facts.[281] A copy of the petition and amendment should be served upon the adverse party.

The granting or refusing to grant leave to amend rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed.[282] The courts, in allowing such amendments, are governed by substantially the same principles which apply to similar cases in other courts. Thus it has been held that where the proof discloses acts of bankruptcy not averred in the petition that the petition may be amended so as to conform to the proofs.[283] Where the original petition set out the conveyance of certain premises by the debtor and charged that the same was made without consideration and with intent to delay, hinder and defraud his creditors and to defeat the operation of the bankrupt act, an amendment was allowed which set out the same conveyances but charged that the conveyance was made upon the pretended consideration of prior indebtedness and with intent to prefer, etc.[284] Where the verification is defective it may be amended.[285] Supplemental affidavits may be filed to show an agent's authority to sign and verify the petition.[286] Where

[280] White v. Bradley Timber Co., 116 Fed. Rep. 768.

[281] *In re* Freudenfels, No. 5112*a*, Fed. Cas.

[282] *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 231, 2 N. B. N. 85; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63, *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re* Cliffe, 94 Fed. Rep. 354, 2 Am. B. R. 317; *In re* Miller, 104 Fed. Rep. 764.

[283] White v. Bradley Timber Co., 116 Fed. Rep. 768; *In re* Miller, 104 Rep. 764; *In re* Lange, 97 Fed. Rep. 197, 2 N. B. N. 85, 3 Am. B. R. 231; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re* Gallinger, No. 5202, Fed. Cas., s. c. 1 Saw. 224.

[284] *In re* Henderson, 9 Fed. Rep. 196.

[285] *In re* Simmons, No. 12864 Fed. Cas., s. c. 10 N. B. R. 253; *In re* Sargent, 12361 Fed. Cas., s. c. 13 N. B. R. 144; *In re* Cal. Pac. R. Co. No. 2315 Fed. Cas., s. c. 3 Saw. 240; *In re* Donnelly, 5 Fed. Rep. 783; *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63.

[286] *In re* Rosenfields, No. 12061 Fed. Cas., s. c. 11 N. B. R. 86.

leave to amend is granted, costs may be taxed against the petitioner.[287] The amendment to a petition in bankruptcy relates back to the time of the filing of the original petition, and has the same force and effect as though included in that petition.[288]

Where the proposed amendments to a petition state entirely new acts of bankruptcy they may be allowed if new acts were committed prior to that alleged in the original petition but not if they were subsequent.[289] Leave to amend will not be granted for the purpose of adding a member of a firm as a new party after all the evidence has been taken and the case is before the court for final hearing.[290] An amended petition can not be filed as an original petition by erasing "amended" after execution.[291]

Where a petition is referred to a referee to make the adjudication he may also allow amendments to the petition. He is expressly authorized and it is his duty to examine all schedules of property and lists of creditors filed by bankrupts and to cause such as are incomplete and defective to be amended.[292] The referee may also refuse to allow an amendment. Whether he grants or refuses an amendment to be made, the question is subject to review by the judge.[293]

§ 93. Dismissing a petition.

After an involuntary petition has been filed in court it can not be dismissed by the petitioning creditors or for want of prosecution or by consent of parties until after notice to the creditors.[294]

The court may dismiss a petition by consent of the petitioning creditors after the time has expired within which other creditors may intervene to join in the petition or to be heard in opposition to it. The reason is that the notice required

[287] *In re* Howland, No. 6791 Fed. Cas., s. c. 2 N. B. R. 357.

[288] Sherman v. International Bank, No. 12765 Fed. Cas., s. c. 8 Biss. 371.

[289] *In re* Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294; but see *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 231. See also White v. Bradley Timber Co., 116 Fed. Rep. 768.

[290] *In re* Pitt, No. 11188 Fed. Cas., s. c. 8 Ben. 389.

[291] *In re* Hyde & Gload Mfg. Co., 103 Fed. Rep. 617, 4 Am. B. R. 602.

[292] B. A. 1898, Sec. 39, clause 2; *In re* Miller, 104 Fed. Rep. 764.

[293] Gen. Ord. 27.

[294] B. A. 1898, Secs. 59*g* and 58*a*.

by Sec. 58*a* is to be given to the creditors of the bankrupt as they appear in the papers in the case. If no other creditors appear in the papers in the case, the petitioning creditors may dismiss the petition for want of prosecution or by consent. Such a dismissal is valid though there are other creditors and they have received no notice of the proceedings. Such creditors may move to have the proceedings reinstated but must do so within a reasonable time.[295] A petition will not be dismissed if one of the petitioning creditors objects to such dismissal.[296] The court will not permit a petitioning creditor to withdraw to reduce the amount of debts represented on the petition below the jurisdictional amount.[297] It has been held that the provisions of the bankrupt act with reference to notice to creditors before dismissal of proceedings relates to dismissals by consent of parties and not by order of court.[298] Where a petition had been dismissed without notice to creditors and creditors thereafter petition to re-open the case their application was denied with leave to institute new proceedings.[298]

The rule was otherwise under the former acts.[299] The death of a person against whom an involuntary petition has been filed after the service of the subpœna and before the return day does not authorize a dismissal of the petition.[300] If the court is satisfied that a petition in involuntary bankruptcy was not presented in good faith, or for sinister, oppressive and vexatious purposes, it has power to dismiss the proceedings after notice to the creditors.[301] The court may dismiss the petition upon condition that the majority of the creditors desiring a dismissal give security for the payment of the debts of the objecting creditors.[302]

[295] *In re* Jemison Mercantile Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 7 Am. B. R. 588.

[296] *In re* Cronin, 98 Fed. Rep. 584, 3 Am. B. R. 552.

[297] *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355.

[298] Neustadter v. Dry Goods Co., 96 Fed. Rep. 830, 3 Am. B. R. 96.

[299] *In re* Camden Rolling Mill Co., No. 2338 Fed. Cas., s. c. 3 N. B. R. 590.

[300] *In re* Hicks, 107 Fed. Rep. 910, 6 Am. B. R. 182.

[301] *In re* Hamlin, No. 5994 Fed. Cas., s. c. 8 Biss. 122. See also *Ex parte* Ashworth, 18 L. R. Eq. 705; *Ex parte* Harcourt, 2 Rose 203; *Ex parte* Bourne, 2 Glyn. & J. 137.

[302] *In re* Indianapolis, etc., R. C., No. 7023 Fed. Cas., s. c. 5 Biss. 287.

§ 94. Involuntary proceedings as to grounds for a suit for damages.

Proceedings by a creditor to force a debtor into bankruptcy can not be resorted to as proceedings *in terrorem* for the purpose of collecting a debt. The malicious institution of such proceedings in bankruptcy may be the foundation for an action for damages sustained.[303] In order to maintain an action for damages it is necessary to allege and prove that the proceedings were instituted maliciously and without probable cause and terminated without an adjudication in bankruptcy.[304]

§ 94a. Costs.

Where a petition is contested the petitioning creditors if successful may recover the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor may recover like costs against the petitioners.[305] But this does not authorize the taxation of attorneys' fees.[306] Upon an application for a warrant of seizure the court may allow attorneys' fees as costs of the proceedings when the petition is dismissed.[307] Witness fees must be paid according to statute; one dollar and fifty cents per day for actual attendance and mileage.[308] No allowance will be made for expert witnesses.[308]

Where an adjudication is made the petitioning creditors are entitled to have the deposit of thirty dollars refunded to them out of the estate.[309] It is competent for the court to make a reasonable allowance as indemnity for costs and expenses in preserving the estate,[310] but no such allowance will be made for vain attempts to discover concealed assets made

[303] Farley v. Danks, 4 El. & Bl. 493; Chapman v. Pickersgill, 2 Wilson 145; Cooley on Torts, 187; Addison on Torts, 867.

[304] Stewart v. Sonneborn, 98 U. S. 187, reversing No. 13176 Fed. Cas., s. c. 2 Woods 599; Whitworth v. Hall, 2 B. & Ad. 695.

[305] Gen. Ord. 34.

[306] *In re* Ghiglione, 93 Fed. Rep. 186, 1 Am. B. R. 580. As to attorneys' fees, see Sec. 41*a*, *ante*.

[307] *In re* Abraham, 93 Fed. Rep. 767 (785), 2 Am. B. R. 266. As to attorneys' fees, see Sec. 41*a*, *ante*.

[308] *In re* Carolina Cooperage Co., 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23.

[309] *In re* Silverman, 97 Fed. Rep. 325, 4 Am. B. R. 83, 2 N. B. N. 760; *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 419.

[310] *In re* Carolina Cooperage Co., 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23; *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 758, 2 N. B. N. 599.

at the suggestion of the attorney for the creditors and against the objection of labor claimants, whose claims will exhaust the entire estate.[311] A person can not recover expenses and costs incurred by him in an attachment suit to enforce a lien, which was invalidated by the bankruptcy proceedings.[312] An assignee is entitled to pay for services in a state assignment proceedings when the property is subsequently administered in bankruptcy.[313]

The costs and expenses of administration of an estate in bankruptcy must be paid out of the estate before there is any distribution to creditors.[314]

§ 95. Proceedings subsequent to the adjudication.

Proceedings in involuntary bankruptcy subsequent to the order of adjudication and reference are not different from the proceedings had upon a voluntary petition or a petition for the purpose of having a partnership or the members thereof adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of the trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate will be considered hereafter under appropriate heads.

[311] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830, 2 N. B. N. 787.

[312] *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

[313] Randolph v. Scrugg, 190 U. S. 533, 10 Am. B. R. 1; *In re* Pauly (Ref. Op.), 2 Am. B. R. 333; *In re* Scholtz, 106 Fed. Rep. 834.

In Sinsheimer v. Simonson (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, the circuit court of appeals held that where an assignee in a state court had been paid a fee and had paid his attorney for services rendered in a state proceeding that such sums could not be recovered in a court of bankruptcy by a rule to show cause. Affirmed Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421.

[314] B. A. 1898, Sec. 64; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

CHAPTER XI.

PROCEEDINGS PECULIAR TO PARTNERSHIPS.

§ 96. Partnership bankruptcy generally.

The mode of proceeding to have a partnership adjudged to be bankrupt is the same as in the case of an individual debtor.[1] Partners may present a voluntary petition, or a petition may be filed against them by creditors, or a petition may be presented by or against the partners individually as by or against any other person. Where a creditor brings the petition against a firm an act of bankruptcy and a sufficient debt must be alleged and proved, as in the case of an individual. There are, however, some peculiarities connected with the bankruptcy of partnerships which should be noticed and which will be dealt with in this chapter. These peculiarities arise partly from the rights of partners between themselves and partly from the rule which has long prevailed in equity for the distribution of the effects of insolvent partners among their creditors, according to which the joint creditors are entitled to priority of payment out of the joint estate, and the separate creditors of each partner out of his separate estate.[2]

The general scheme of the bankrupt act with reference to the settlement of the estates of firms and the partners is founded upon and its provisions merely declaratory of recognized equitable principles of the administration of insolvent partnerships.[3] By the provisions of section 5 of the bankrupt

[1] B. A. 1898, Sec. 5; compare R. S. Sec. 5121.

[2] B. A. 1898, Sec. 5*f* and *g*; *In re* Melick, No. 9399 Fed. Cas., s. c. 4 N. B. R. 97; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; Harrison v. Sterry, 5 Cranch 289; Collins v. Hood, No. 3015 Fed. Cas., s. c. 4 McLean 186; Murrill v. Neill, 8 How. 414; *Ex parte* Cook, 2 P. Wms. 500; Gray v. Chiswell, 9 Ves. 118; Ridgeway v. Clare, 19 Beav. 111.

[3] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Amsinck v. Bean, 22 Wall. 403; Murray v. Murray, 2 Johns. Chan. 60; Colly. Part. 854.

act, "a partnership," during the continuance of the business, or after its dissolution and before the final settlement of its business, may be adjudged a bankrupt, and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners. The section provides that the creditors of the partnership shall appoint the trustee; that the trustee shall keep separate accounts of the partnership property and of the individual property; that the expenses shall be paid from the partnership property and the individual property in such proportion as the court may determine; and that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and any surplus added to the assets of the individual partners, and the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts, and any surplus to the payment of the partnership debts. It authorizes the partnership estate to prove against the individual estates, and vice versa, and directs the assets of the partnership estate and the individual estates to be marshaled so as to prevent preferences, and secure the equitable distribution of the property of the several estates. It further provides that the property of a partnership shall not be administered in bankruptcy when less than all the members are adjudged bankrupt; and in that event the partner not adjudged bankrupt is to settle the partnership business expeditiously, and account for the interests of the adjudged bankrupt.

§ 96a. Individual petition by or against a partner.

There is nothing in the bankrupt statute to prevent a petition by or against a partner individually and separately without joining the other members of the firm. The statute contains no restrictions upon partners because they are partners with respect to the right to adjudge them bankrupts individually as other persons. The statute recognizes the right of such a proceeding.[4] It expressly provides that in the event of one or more but not all of the members of a partnership being ad-

[4] B. A. 1898, Secs. 5*c*, 5*h* and 16; *In re* Hirsch, 97 Fed. Rep. 571; 2 N. B. N. 137; *In re* Mercur (C. C. A. 3d Cir.), 122 Fed. Rep. 384.

judged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.[5] This provision applies to a proceeding by or against one partner or any number less than all, and means that the bankruptcy of one partner shall not preclude the other members from settling the partnership business,[6] unless by the consent of the solvent partners. This consent may be inferred from the acts of the partners.[7] Such proceedings are simply voluntary or involuntary by or against the individual. The partnership debts and assets are not drawn into bankruptcy to be administered. Only the individual debts and assets, including the interest of the bankrupt partner or partners in the partnership as accounted for by the solvent partners, is administered in bankruptcy. All debts of the partnership having been settled by the solvent partners, a discharge granted the bankrupt partner will release him from all liability for partnership as well as his individual debts.[8]

It has been held that if the petition does not pray that the firm be adjudged bankrupt the co-partners cannot come in voluntarily and make themselves parties to the proceedings for the purpose of adjudicating the firm bankrupt.[9] A partnership creditor may join in a petition against one of the partners individually.[10]

Petitions by an insolvent partner of a partnership, which has ceased to do business and has no assets, have attracted con-

[5] B. A. 1898, Sec. 5*h;* Amsinck v. Bean, 22 Wall. 395; Moses v. Pond, 4 Am. B. R. 655.

As to the power of a solvent partner to compromise, see *In re* Saul, 5 Fed. Rep. 715.

[6] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976; 3 Am. B. R. 559; *In re* Hirsh, 97 Fed. Rep. 571; 3 Am. B. R. 344; 2 N. B. N. 137.

[7] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976; 3 Am. B. R. 559; *In re* Duguid, 100 Fed. Rep. 274; 3 Am. B. R. 794; 2 N. B. N. 607; *In re* Grant, 106 Fed. Rep. 496; 3 N. B. N. 425.

[8] Jarecki Mfg. Co. v. McElwaine, 7 Fed. Rep. 249.

[9] Mahoney v. Ward, 100 Fed. Rep. 278; 2 N. B. N. 538; *In re* Boylan, No. 1757 Fed. Cas., s. c. 1 Ben. 266; *In re* Mercur (C. C. A. 3d Cir.), 122 Fed. Rep. 384.

[10] *In re* Mercur, 95 Fed. Rep. 634; s. c. (C. C. A. 3d Cir.), 122 Fed. Rep. 384.

siderable atention. How can such a partner proceed to be relieved of his liability for partnership debts as well as individual debts? Two methods of procedure have been adopted under the present act.

An insolvent partner of such a firm has filed his individual petition, scheduled the partnership and his individual debts, averred that the firm has no assets, set forth his property if he had any, and prayed to be adjudged a bankrupt without asking an adjudication against the firm. The prevailing opinion seems to be that in such cases he must at least give notice to his former partners of the proceeding and his desire to be discharged from partnership debts.[11] It has been held that a discharge upon an individual petition releases the debtor from his liability for individual and partnership obligations.[12]

The other and safer course to pursue is to have the partnership and himself adjudicated bankrupts upon a petition by less than all of the partners.[13] In this way the partnership affairs are surely brought into the bankruptcy proceedings and there can be no question but what a discharge will operate as a release of both firm and individual obligations.

§ 97. When a partnership may be adjudged bankrupt.

A partnership which owes debts is entitled to be adjudged a voluntary bankrupt.[14] Any unincorporated company owing debts to the amount of one thousand dollars or over may be adjudged an involuntary bankrupt upon default or impartial trial, and is subject to the provisions and is entitled to the benefits of the statute.[15] In order to maintain proceedings against a partnership they must also be alleged and proved to

[11] *In re* Meyers, 96 Fed. Rep. 408; s. c. 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* McFaun, 96 Fed. Rep. 592; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Laughlin, 96 Fed. Rep. 589; *In re* Hartman, 96 Fed. Rep. 593.

[12] Jarecki v. McElwaine, 107 Fed. Rep. 249. See also *In re* Meyer, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111.

[13] For proceedings on such a petition, see Sec. 98, *third post.*

In re Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601.

[14] B. A. 1898, Sec. 4*a* and Sec. 1, clause 19.

[15] B. A. 1898, Sec. 4*b*. In Davis v. Stevens, 104 Fed. Rep. 235, a corporation *non de jure* was adjudged bankrupt as a partnership.

be insolvent,[16] to have committed an act of bankruptcy within four months prior to filing the petition,[17] and to have had their principal place of business within the territorial jurisdiction of the court.[18] In other words, the same things must concur in respect to the partnership as in case of proceedings against an individual.[19]

A partnership may be adjudged bankrupt at any time during the continuation of the partnership business, or after its dissolution and before the final settlement thereof.[20] The language of this provision is simply declaratory of a well-recognized rule that where there are assets or debts of a partnership remaining, the partnership, even after dissolution, may properly be considered as subsisting as to its creditors and for the purpose of applying its joint stock and property to the payment of its creditors.[21]

When a partnership is dissolved by the death of one of the partners the firm can not be adjudged to be bankrupt.[22] The reason for this rule is that a court of bankruptcy has no jurisdiction to adjudge a deceased person to be a bankrupt or to administer his estate. It has, however, been held that a surviving partner may be adjudged to be a voluntary[23] or an

[16] Vaccaro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364; Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763, 3 N. B. N. 131.

[17] B. A. 1898, Sec. 3*b*; *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385; *In re* Grant, 106 Fed. Rep. 496, 3 N. B. N. 425; *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Albany Bank v. Johnson, No. 133 Fed. Cas.; 5 L. R. Rep. 313.

[18] B. A. 1898, Sec. 2, clause 1; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364.

[19] For further consideration of this subject, see Sec. 98, *post*.

[20] B. A. 1898, Sec. 5*a*; *In re* Meyers (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Levy, 95 Fed. Rep. 812; *In re* Rudnick, 102 Fed. Rep. 750, 2 N. B. N. 975, 4 Am. B. R. 531; *In re* Rosenbaum, 1 N. B. N. 541.

[21] *In re* Crockett, No. 3402 Fed. Cas., s. c. 2 Ben. 514; *In re* Noonan, No. 10292 Fed. Cas., s. c. 3 Biss. 491; *In re* Stowers, No. 13516 Fed. Cas., s. c. 1 Low. 528; *In re* Foster, No. 4962 Fed. Cas., s. c. 3 Ben. 386; *In re* McFarland, No. 8788 Fed. Cas., s. c. 10 N. B. R. 381.

[22] *In re* Temple, No. 13825 Fed. Cas., s. c. 4 Saw. 92; Adams v. Terrell, 4 Fed. Rep. 802; Vaccaro v. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037.

[23] Briswalter v. Long, 14 Fed. Rep. 153; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979.

involuntary[24] bankrupt, both individually and as surviving partner of the firm. By this method the property of a partnership dissolved by the death of a partner can be drawn into the court of bankruptcy and the administrator has nothing to do with it, except to receive the share of the surplus, if any there be, after settlement of the partnership affairs belonging to the deceased partner.[25]

The trustee cannot take possession of any property of which the administrator has custody without his consent.[26]

Where one of the partners is an infant the adjudication may be made against the firm and the partner who is of age.[27] In such case the petition should be dismissed as to the minor partner without costs and with a specific statement that the dismissal is made by reason of his minority.[27]

§ 98. How to institute proceedings to have a partnership declared bankrupt.

Proceedings to have a partnership declared to be bankrupt may be instituted upon three descriptions of petitions. The proceedings may be begun, *first,* upon the petition of all the partners of the firm; *second,* upon the petition of creditors of the partnership; and, *third,* upon the petition of less than all of the partners.

First. The petition of all the partners is a purely voluntary petition under section 4*a*.[28] Where they all unite in it the jurisdiction must be shown, as that they have had their principal place of business or resided or have had their domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months. It is not necessary to allege an act of bankruptcy to have been committed. The filing of such a petition is an act of bankruptcy.[29]

[24] *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; Vaccaro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436; 4 Am. B. R. 474, 2 N. B. N. 1037.

[25] Briswalter v. Long, 14 Fed. Rep. 153; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979.

[26] *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979; Moses v. Pond, 4 Am. B. R. 655.

[27] *In re* Dunnigan, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

[28] See Voluntary Proceedings, Chap. IX.

[29] B. A. 1898, Sec. 3*a*, clause 5.

Second. The proceeding upon the petition of creditors of the firm is a purely involuntary proceeding under section 4*b*.[30] Such a petition must specify an act of bankruptcy to have been committed and set forth other requisites of an involuntary petition.

To support an adjudication of bankruptcy against a partnership it seems that formerly there must have been separate acts of bankruptcy by each partner.[31] The present act provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[32] A partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more (but less than all) of the partners, where such act was within the scope of the partnership business so as to constitute in fact an act of the firm.[33] Where it is sought to have the individual partners also declared bankrupts in the same proceeding it is necessary to show that they have committed or been participants in committing one of the enumerated acts.[34] A general assignment by a partnership is an act of bankruptcy by the firm and the partners.[35] The sale by one member of an insolvent firm of his interest to his partner is an act of bankruptcy.[36] If

[30] See Involuntary Proceedings, Chap. X.

[31] Allen v. Hartley, 4 Doug. 20; *In re* Redmond, No. 11632 Fed. Cas., s. c. 9 N. B. R. 408, and cases cited in opinion; *In re* Weaver, No. 17307 Fed. Cas., s. c. 9 N. B. R. 132; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150 Fed. Cas., s. c. 3 Biss. 122.

It was held not evidence of an act of bankruptcy by three partners of a banking concern, where one of them resided at the place where the banking house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking house, shut it up and stopped payment. Mills v. Bennett, 2 M. & S. 556, s. c. 2 Rose 269.

[32] B. A. 1898, Sec. 5*c*.

[33] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Grant, 106 Fed. Rep. 496, 3 N. B. N. 425; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607; *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

[34] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385.

[35] Green River Deposit Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[36] *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150 Fed. Cas., s. c. 3 Biss. 122.

a partnership has committed any one or more of the enumerated acts of bankruptcy it is sufficient to support an adjudication.

To maintain an adjudication against a partnership it must generally be shown to be insolvent. Each partner is liable *in solido* for the debts of the firm so that they are debts of each individual partner. It has accordingly been held that a partnership is not insolvent within the meaning of the bankrupt act while any of the partners are able to pay the firm liabilities.[37] Where a partnership has made a general assignment, which is charged as an act of bankruptcy, it should be adjudged bankrupt irrespective of its solvency.[38]

Third. Proceedings upon petition of less than all the partners to have a firm adjudged bankrupt is a proceeding which necessarily is neither wholly voluntary nor wholly involuntary. So far as the petitioners are concerned, it is voluntary.[39] So far as the partners not petitioning are concerned, it is not involuntary in the sense of section 4*b*, unless the adjudication is asked on the ground of the commission of an act of bankruptcy, although it may be involuntary in the sense of not being voluntary under section 4*a*.[39] Where it is not involuntary in the sense of section 4*b* the adjudication may be asked for on the ground that the members of the partnership are unable to pay all their debts in full. Form No. 2, prescribed by the supreme court, is a petition of this character.

Any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt is entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership. Notice of the filing of the petition must be given to him in the same manner as provided by law and by the rules in the case of a debtor petitioned against.[40] He has the right to appear

[37] Vaccaro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; 2 N. B. N. 364, Davis v. Stevens, 104 Fed. Rep. 763, 3 N. B. N. 131, 4 Am. B. R. 763.

[38] West Co. v. Lea, 174 U. S. 590.

[39] *In re* Murray, 96 Fed. Rep. 600, 1 N. B. N. 570, 3 Am. B. R. 601; *In re* Carleton, 115 Fed. Rep. 246; 8 Am. B. R. 270.

[40] Gen. Ord. 8; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Altman, 95 Fed. Rep. 263; *In re* Moore, No. 9750 Fed. Cas., s. c. 5 Biss. 79; *In re* Prankard, No.

at the time fixed by the court for the hearing of the petition and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act.[41]

In any proceeding to have a partnership declared bankrupt all of the partners should be named in the petition and brought before the court.[42] One who holds himself out as a partner, although he has actually retired from the firm, may be made a bankrupt as a member of the firm upon a creditor's petition.[43] It is not necessary, however, to name or serve a secret or dormant partner in order to have a valid adjudication in bankruptcy.[44] If the name of such partner is known, he should be made a party to the proceedings.

The petition to have a partnership adjudged to be bankrupt may be filed in the district where the firm has had its principal place of business for the greater portion of the six months preceding the filing of the petition.[45] It may be filed in any district in which a court of bankruptcy has jurisdiction of one of the partners.[46] If the court has jurisdiction of one of the partners of a firm it may have jurisdiction of all the partners and of the administration of the partnership and of the individual property.[46] In case two or more petitions are filed in different districts by different members of the same partner-

11366 Fed. Cas., s. c. 1 N. B. R. 297; *In re* Lewis, No. 8311 Fed. Cas., s. c. 2 Ben. 96.

For form of notice when service is made by publication, see *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601.

[41] Gen. Ord. 8; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Fowler, No. 4998 Fed. Cas., s. c. 1 Low. 161.

[42] *In re* Moore, No. 9750 Fed. Cas., s. c. 5 Biss. 79; *In re* Lewis, No. 8311 Fed. Cas., s. c. 2 Ben. 96; *In re* Prankard, No. 11366 Fed. Cas., s. c. 1 N. B. R. 297; Gen. Ord. 8; *In re* Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1.

[43] *In re* Krueger, No. 7941 Fed. Cas., s. c. 2 Low. 66.

[44] Metcalf v. Officer, No. 9496 Fed. Cas., s. c. 5 Dill. 565; *In re* Harris, 4 Am. B. R. 132, 108 Fed. Rep. 517.

[45] B. A. 1898, Sec. 2, clause 1.

[46] B. A. 1898, Sec. 5*c*; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364; *In re* Murray, 96 Fed. Rep. 600, 1 N. B. N. 570, 3 Am. N. B. R. 601.

In re Strauss & Stern, a partnership, S. D. O. (not reported), it was ruled under this clause that the court had jurisdiction of the partnership by virtue of Stern's residing within the district. Strauss was a nonresident of the district and the firm had no place of business.

ship for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction takes and retains jurisdiction over all proceedings in such bankruptcy until the same are closed.[47] If such petitions are filed in the same district, action is first had upon the one first filed. But the court so retaining jurisdiction may, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.[48]

Where a petition is filed by partners, whether all or a part only join, the petition must be in the prescribed form.[49] It must be accompanied by a separate schedule of the liabilities and assets of the partnership and by separate schedules of the individual liabilities and assets of each petitioning partner.[50] These schedules are prepared in the manner required in a case of voluntary bankruptcy.[51] If any partner refuse to join in the petition to have the partnership declared bankrupt and an adjudication is made, such partner must file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.[52] In the case of a petition filed by creditors the schedules are prepared as in involuntary proceedings.

It is not necessary to file a petition by or against all the partners and also a separate petition against each in order to administer the joint and separate estates of the firm and the several partners.[53] A petition by or against a partnership is one proceeding. Only one deposit for costs need be made.[53] The statute expressly authorizes the court of bankruptcy which

[47] Gen. Ord. 6.

[48] B. A. 1898, Sec. 32; Gen. Ord. 6.

[49] Official Form No. 2, Form No. 4, *post.*

[50] *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Brick, 4 Fed. Rep. 804; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511.

[51] Official Form No. 1, Schedules A and B; see Forms Nos. 2 and 3, *post.*

[52] Gen. Ord. 8.

[53] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Langslow, 98 Fed. Rep. 869, 1 N. B. N. 232, 3 Am. B. R. 529*n*; but see *In re* Barden, 101 Fed. Rep. 553, 2 N. B. N. 741, 4 Am. B. R. 31; *In re* Farley, 115 Fed. Rep. 359, 8 Am. B. R. 266.

has jurisdiction of one of the partners to administer the partnership and individual property.[54]

A creditor will not be permitted ordinarily to intervene to oppose an adjudication of a partnership upon petition of a partner.[55]

§ 98a. The adjudication and reference in partnership cases. The proceedings leading up to an adjudication and reference in partnership cases are the same as in other voluntary or involuntary proceedings according as the petition seeking an adjudication is voluntary or involuntary.[56]

When a petition on behalf of a part of the members of a firm is filed in the clerk's office, it cannot then be classed as an involuntary proceeding, because it may never become such, and, in the absence of the judge from the district or division, it is the duty of the clerk to refer the case to the proper referee. The case, however, whether coming before the judge or a referee, cannot be properly proceeded with until notice of the pendency of the proceeding has been given to the member or members of the firm who have not joined in the petition as filed, and, under the provisions of general order No. 8, a time must be fixed for a hearing upon the petition, of which due notice must be given.

If the nonjoining member or members of the firm can be found, in the district or out of it, personal service of the notice must be made; but, if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice cannot be made, an order of publication of notice will be made, as provided for in section 18 of the act, which enacts that notice by publication shall be given in the same manner, and for the same time, as in cases in equity in courts of the United States, which are governed by the provisions of section 8 of the judiciary act of March 3, 1875.[57] which requires the court to make an order requiring the named party to appear and plead to the petition by a named day, and to direct the publication of such order, if personal service

[54] B. A. 1898, Sec. 5*c*.

[55] *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[56] *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601, 1 N. B. N. 570.

[57] 18 Stat. at L. 472.

thereof cannot be made, in such a manner as the court may direct, not less than once a week for six consecutive weeks. If, upon the hearing thus provided for, the nonpetitioning member or members of the firm join with their copartners in the prayer of the petition, or, by failing to enter an appearance, show that they do not purpose to contest the adjudication, then the referee will enter the adjudication, and the case will be proceeded with as in other voluntary proceedings.

If the nonpetitioning members of the firm should appear at the hearing, and, by proper pleading, should make defense to the proceedings, as provided for in general order No. 8, then the referee must certify the case to the judge, before whom the issue will be heard, a jury trial being had if the party has demanded the same under the provisions of section 19 of the act; that is, by filing with the referee a written demand for a jury at or before the time fixed for the hearing before him.

Where a proper case is made by the petition and proofs the firm and the individual partners are regularly adjudicated bankrupt in one proceeding. As the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual partners cannot be adjudged bankrupts in such a proceeding, who have not committed, or been participants in committing, one or more of the enumerated acts.[58] This draws into the court of bankruptcy the estates and debts of the partnership and the individual estates and debts of the several partners to be administered.[59] The firm and the individual partners may thereupon be discharged from both firms and individual debts.[58]

A partnership may be adjudged a bankrupt in a voluntary or involuntary proceeding, without an adjudication against any or some of the partners individually.[60] Such a proceeding may draw to the administration the individual estates of the

[58] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385; *In re* Hale, 6 Am. B. R. 35, 107 Fed. Rep. 432.

[59] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Grant, 106 Fed. Rep. 496, 3 N. B. N. 425; *In re* Langslow, 98 Fed. Rep. 869, 1 N. B. N. 232. See also *In re* Barden, 101 Fed. Rep. 553, 2 N. B. N. 741; *In re* Farley, 115 Fed. Rep. 359, 8 Am. B. P. 266.

[60] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Stokes, 106 Fed. Rep. 312; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

partners as well as the partnership assets, and marshal and distribute them according to equity.[60] The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupts. If there is an adjudication of any of the partners there is nothing to prevent such partners from receiving a discharge individually, if they are otherwise entitled to it under the act.[61] The partners are not entitled to a discharge individually if they are not adjudicated bankrupts.[62]

§ 99. The administration of partnership estates.

The trustee in proceedings to have a firm declared bankrupt is appointed by the creditors of the partnership, as distinguished from the creditors of the individual partners.[63] The trustee administers both the partnership property and the property belonging to the individual partners. He is required to keep separate accounts of such properties.[64] The expenses are paid from the partnership property and the individual property in such proportions as the court may determine.[65]

When a person not in partnership with another is adjudged a bankrupt the whole of his property becomes divisible among all his creditors ratably. A different mode of distribution prevails as to bankrupt partners.

The statute enacts [64] that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. The court may

[61] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Amelia Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111.

[62] Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276.

[63] B. A. 1898, Sec. 5*b*; *In re* Eagles & Crisp, 99 Fed. Rep. 695, 2 N. B. N. 462.

[64] B. A. 1898, Sec. 5*d*.

[65] B. A. 1898, Sec. 5*e*.

permit the proof of the claim of the partnership estate against the individual estates, and *vice versa,* and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."[66]

This is substantially the rule stated at an early date by Lord Chancellor King in *ex parte* Cooke,[67] and subsequently confirmed by Lord Eldon[68] and others. It has been the subject of enactment in the English bankruptcy act of 1883,[69] and in the former bankruptcy laws of the United States.[70]

Where several persons are members of different firms and a joint adjudication is obtained against all of them, distinct accounts will be had of the estates of the respective firms as well as of the separate estate of each bankrupt, and each estate will be made to bear its own debts and its fair proportion of the expenses.[71] Where the same partners conduct business in two different places under different names, the two firms will be treated as one firm in the distribution of the assets, and no notice will be taken of the indebtedness of one firm to the other.[72] Where one partner has sold out to his copartner before bankruptcy, the property belonging to the firm at the time of the dissolution should be applied first to the payment of the firm creditors, the separate estate of the purchasing partner should be applied first to the payment of his separate debts, and any surplus in either fund should then be applied on the other.[73]

The general rule prescribed by the statute applies only when

[66] B. A. 1898, Sec. 5*f* and *g; In re* Blumer, 12 Fed. Rep. 489; *In re* Bates, 100 Fed. Rep. 263, 4 Am. B. R. 56.

[67] 2 P. W. 500.

[68] *Ex parte* Clay, 6 Ves. 813*a; Ex parte* Taitt, 16 Ves. 193.

[69] Sec. 40, subsec. 3, of the act of 1883, Eng. Bank. Rule, No. 293.

[70] R. S. Sec. 5121; the act of 1841, 5 Stat. at L., Sec. 14, p. 448.

[71] *In re* Hinds, No. 6516 Fed Cas., s. c. 3 N. B. R. 351; *In re* Dunkerson, No. 4156 Fed. Cas., s. c. 4 Biss. 227; *In re* Ellis, No. 4399 Fed. Cas., s. c. 5 Ben. 421; *Ex parte* Marlin, 2 Bro. C. C. 15; *In re* Stanton, No. 13295 Fed. Cas., s. c. 6 Cush. (Miss.) 447.

[72] *In re* Vetterlein, No. 16927 Fed. Cas., s. c. 5 Ben. 311; Buckner v. Calcote, 28 Miss. 432, and note on page 447; *In re* Lloyd, 22 Fed. Rep. 90; Ballin v. Ferst, 55 Ga. 546; *In re* Williams, No. 17707 Fed. Cas., s. c. 3 Woods 493; *In re* Savage, No. 12381 Fed. Cas., s. c. 16 N. B. R 368; *In re* Vetterlein, 44 Fed. Rep. 57.

[73] *In re* Denning, 114 Fed. Rep. 219, 8 Am. B. R. 133.

there are two funds to be administered—a joint fund and an individual fund. Where there are no "net proceeds" of the partnership estate for distribution the firm and individual creditors may share *pari passu* in the individual estate.[74] Any partnership assets, however small, which are available for distribution will defeat the right of firm creditors to receive dividends from the separate estate until after the individual debts are paid.[75] Where the firm assets are only sufficient to pay the expenses of the proceedings, the firm creditors may share in the individual estate, for the words "net proceeds" refer to the estate to be distributed among the creditors.[76] The weight of authority is to the effect that in order to exclude the firm creditors, an available joint fund must be affirmatively shown to exist. The burden of proving that there is such a fund rests upon the individual creditors.[77] Where there are no individual assets the separate creditors of the partners can not prove against the partnership fund,[78] except in the surplus after paying the firm debts.

[74] *In re* Conrader, 118 Fed. Rep. 676; *In re* Green, 116 Fed. Rep. 118, 8 Am. B. R. 553; *In re* West, 39 Fed. Rep. 203; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill 33; *In re* Jewett, No. 7304 Fed. Cas., s. c. 1 N. B. R. 491; *In re* Rice, No. 11750 Fed. Cas., s. c. 9 N. B. R. 373; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; *In re* Mills, No. 9611 Fed. Cas., s. c. 11 N. B. R. 74; *In re* Knight, No. 7880 Fed. Cas., s. c. 2 Biss. 518.

In re Wilcox, 94 Fed. Rep. 84, 2 Am. B. R. 117, Judge Lowell has reviewed the history of the practice in this country and in England in an elaborate opinion and held that this exception to the general rule did not apply under the present bankrupt act. The large number of cases reviewed by him shows, however, that this exception has generally been recognized both in equity and bankruptcy from very early times.

In re Mills, 95 Fed. Rep. 269, 2 Am. B. R. 667, Judge Baker refused to permit partnership creditors, who had received fifty-five per centum of their claims in a state proceeding, closing up a partnership, to prove the residue of their claims equally with the individual creditors in the distribution of the individual estate. There were no firm assets.

[75] *In re* Marwick, No. 9181 Fed. Cas., s. c. 2 Ware 233; *In re* Smith, No. 12987 Fed. Cas., s. c. 13 N. B. R. 500; *In re* Morse, No. 9854 Fed. Cas., s. c. 13 N. B. R. 376; *In re* Blumer, 12 Fed. Rep. 489; *In re* Letchfield, 5 Fed. Rep. 47.

[76] *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Letchfield, 5 Fed. Rep. 47.

[77] *In re* Jewett, No. 7304 Fed. Cas., s. c. 1 N. B. R. 491; *In re* West, 39 Fed. Rep. 203; *contra In re* Byrne, No. 2270 Fed. Cas., s. c. 1 N. B. R. 464.

[78] *In re* Kinkead, No. 7825 Fed. Cas., s. c. 3 Biss. 405.

It seems that the general rule may be waived by the partnership, as by giving a mortgage upon partnership property to secure an individual debt.[79]

In view of the general rule of distribution prescribed by the statute, it is important to ascertain, *first*, what property is to be treated as belonging to the firm and what property as belonging to the individual partners; and, *second*, what debts are properly firm debts and what are properly individual debts. These matters will be discussed in the next two sections.

§ 100. What is firm and individual property respectively.

It may be stated generally that the partnership property consists of all the property which forms the stock of the firm, and all debts owing to the partnership, and all of the real or personal property purchased with the firm money.[80] The presumption that it belongs to the firm will arise when real estate is purchased with firm money, although the conveyance is made to one partner alone, who in such case is considered a trustee for the firm;[81] so also when stock in a corporation is purchased with firm money and transferred in the name of one of the partners he will be deemed the trustee for the firm.[82] But where property is bought with firm money and taken in the name of one partner under an agreement that it shall be his separate property, it will be regarded as a loan to him from the partnership of the partnership money.[83] Property acquired by a surviving partner by means of his position as partner is deemed firm property.[84]

[79] *In re* Kahley, No. 7593 Fed. Cas., s. c. 2 Biss. 383; Thompson v. Spittle, 102 Mass. 207.

See also Fisher v. Syfers, 109 Ind. 514; Nat. Bank v. Sprague, 20 N. J. Eq. 13; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494; Purple v Farrington, 119 Ind. 164; Winslow v. Wallace, 116 Ind. 317; Jones Chat. Mort., Sec. 44.

[80] Hiscocks v. Jaycox, No. 6531 Fed. Cas., s. c. 12 N. B. R. 507; Marrett v. Murphy, No. 9103 Fed. Cas., s. c. 11 N. B. R. 131; Thrall v. Crampton, No. 14008 Fed. Cas., s. c. 9 Ben. 218; Buchan v. Sumner, 2 Barb. Ch. 165, and approved in Collumb v. Read, 24 N. Y. 505; Fereday v. Wightwick, 1 R. & M. 49.

But not so when the deed to real estate is taken to themselves jointly as tenants in common. Jones' Appeal, 70 Penn. 169.

[81] Smith v. Smith, 5 Ves. 193; *Ex parte* Hinds, 3 De G. & S. 613.

[82] *Ex parte* Connell, Deac. 201, s. c. 3 M. & A. 581.

[83] Smith v. Smith, 5 Ves. 193; Taylor v. Rasch, No. 13801 Fed. Cas., s. c. 5 N. B. R. 399.

[84] Featherstonhaugh v. Fenwick, 17 Ves. 308; Clements v Hall, 2 De G. & J. 172.

Premises used by persons for the purpose of carrying on their trade are *prima facie* a part of the partnership property, but this presumption may be rebutted.[85]

A sale by one partner to his copartner, when the firm is insolvent, which if held would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is considered fraudulent. Such a sale will be set aside and the property distributed as firm property.[86] But it is competent for solvent partners to make any arrangements which they think proper with respect to their joint property in the partnership, or the separate property of the partners, and to alter the character of the property so as to convert joint into separate property and *vice versa*. Such agreement, if made *bona fide*, will bind their creditors, and in the event of bankruptcy the property will be administered as firm or separate property, according to the character which the partners have placed upon it.[87] Where one partner sold his interest to another, with an agreement that the continuing partner should collect the firm assets and pay the firm debts, and he carried on the business and from time to time replenished the stock of goods, mingling the old and new together and sold from either indifferently so that it was impossible to tell which were the goods of the old firm and which were the goods of the continuing partner alone, it was held upon the bankruptcy of both partners of the old firm that the assets in the hands of the continuing partner were to be regarded as individual assets, to be applied to the payment of his individual debts before any portion could be used to pay the debts of the old firm.[88]

The assets of an individual partner consist of that property in which such partner is separately interested at the time of

[85] Osborn v. McBride, No. 10593 Fed. Cas., s. c. 3 Saw. 590; Featherstonhaugh v. Fenwick, 17 Ves. 308.

[86] *In re* Cooke, No. 3150 Fed. Cas., s. c. 3 Biss. 122; Collins v. Hood, No. 3015 Fed. Cas., s. c. 4 McLean 186; *In re* Byrne, No. 2270 Fed. Cas., s. c. 1 N. B. R. 464; Mattocks v. Rogers, 1 Hask. 547; *In re* Zug, No. 18222 Fed. Cas., s. c. 16 N. B. R. 280.

[87] *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141; *In re* Montgomery, No. 9727 Fed. Cas., s. c. 3 Ben. 565; *In re* Willey, No. 17656 Fed. Cas., s. c. 4 Biss. 214; *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Kahley, No. 7593 Fed. Cas., s. c. 2 Biss. 383.

[88] *In re* Montgomery, No. 9727 Fed. Cas., s. c. 3 Ben. 565.

the bankruptcy.[89] Where all the property of the firm belongs to one partner and the others have no interest in the gains and profits, such property is the individual property of the partner. Where the interest of each partner extends to the entire stock in trade, the excess of the interest of one partner over that of the other partners is not the former's separate estate.[90]

§ 101. What are firm and individual debts respectively.

Having regard to the rule prescribed by the statute for the administration of the estates of firms and partners, their debts may be divided into three classes, namely, *first,* joint or firm debts, that is, debts for which the partners are jointly liable; *second,* individual debts, that is, debts for which they are separately liable; and, *thirdly,* joint and separate debts, or debts for which the partners are separately as well as jointly liable.

First: Firm Debts.—A debt is considered a firm debt and may be proved against the joint or partnership fund when it is contracted or incurred by the partnership in the ordinary course of business. It is clearly so when all the partners act jointly. Thus it has been held to be joint debt where a joint and several note was given for money borrowed by a firm and signed in the firm name, with other names following,[91] or where a note was endorsed in the name of the firm.[92] Trust funds which have been invested by an executor in his partnership business with the knowledge and consent of his copartner

[89] *In re* Lowe, No. 8564 Fed. Cas., s. c. 11 N. B. R. 221; *In re* Clark, No. 2798 Fed. Cas., s. c. 4 Ben. 88.

In re Rudnick, 102 Fed. Rep. 750, 4 Am. B. R. 531, 2 N. B. R. 975, it was held that where one partner had, prior to bankruptcy, transferred all of his property and interests to the other partner, and it became in the hands of the other partner, who was also a bankrupt debtor, exempt under the laws of the state, he may lawfully sell or dispose of it, and the trustee takes no title therein. But see *In re* Rosenbaum, 1 N. B. N. 541.

[90] *In re* Lowe, No. 8564 Fed. Cas., s. c. 11 N. B. R. 221.

[91] *In re* Holbrook, No. 6588 Fed. Cas., s. c. 2 Low. 259; Bush v. Crawford, No. 2224 Fed. Cas., s. c. 7 N. B. R. 299. See McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 3 N. B. N. 505.

[92] Gauss v. Schrader, 48 Fed. Rep. 816; *In re* Norris, No. 10302 Fed. Cas., s. c. 2 Hask. 19; *In re* Morse, No. 9853 Fed. Cas., s. c. 11 N. B. R. 482; *Ex parte* Russell, No. 12148 Fed. Cas., s. c. 16 N. B. R. 476. But see *In re* Jones, 100 Fed. Rep. 781, 4 Am. B. R. 141, 2 N. B. N. 193.

may be proved against the partnership fund.[93] A judgment against partners and others jointly is a several claim as against the partners, and can not receive a dividend from the joint estate,[94] but a judgment on a firm note for a firm debt is provable against the firm.[95] A claim on a bond or notes signed by individual partners, but not for a firm obligation, is not entitled as against the firm creditors to be paid from the partnership assets.[96] When a note or bond is given for a firm debt the rule is otherwise.[97] A note given by a firm and endorsed by one partner is a firm debt.[98]

A debt is not always so manifestly a firm debt when it is contracted by one of the partners for the firm. In determining whether such a debt is a firm debt or an individual debt resort must be had to the general law of partnership.[99] The general rule is that every partner is the general agent of the firm to carry out its objects and transact its business in the usual and ordinary way; that he is not the agent of each partner individually and can not bind them severally or any number of them less than all. Unless his power is limited by the articles and the restriction is known, he represents all the powers of the firm within the scope of its ordinary business, but is confined to such acts as are necessary for carrying on the partnership business in the ordinary way, according to the usages of the particular business. The several instances in which a partner may contract a debt for the firm will be found in the works on partnership and need not be considered here.[99]

[93] *In re* Tesson, No. 13844 Fed. Cas., s. c. 9 N. B. R. 378.

[94] *In re* Herrick, No. 6420 Fed. Cas., s. c. 13 N. B. R. 312; *In re* Lewis, No. 8313 Fed. Cas., s. c. 8 N. B. R. 546.

[95] *In re* Berriam, No. 1351 Fed. Cas., s. c. 6 Ben. 297; *In re* Kitzinger, No. 7861 Fed. Cas., s. c. 19 N. B. R. 152.

[96] *In re* Webb, No. 17313 Fed. Cas., s. c. 2 N. B. R. 614; *In re* Roddin, No. 11989 Fed. Cas., s. c. 6 Biss. 377; *In re* Miller, No. 9556 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 180; *In re* Bucyrus Machine Co., No. 2100 Fed. Cas., s. c. 5 N. B. R. 303; Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276.

[97] *In re* Warren, No. 17191 Fed. Cas., s. c. 2 Ware 322.

[98] Lamoille County Nat. Bank v. Stevens, 107 Fed. Rep. 245, 6 Am. B. R. 164.

[99] See Bates on Partnership, Sec. 315, *et seq.*; Lindley on Partnership, p. 124; Taylor v. Rasch, No. 13800 Fed. Cas., s. c. 1 Flip. 385.

SECOND: INDIVIDUAL DEBTS.—Individual debts are such as are contracted by the individual partners for their own benefit or such liabilities as by law they are required to liquidate. Debts for individual clothing, furniture and the like are individual and not partnership debts.[100] Creditors holding individual obligations of the members of the firm, although given for a consideration moving to the firm, are entitled to a dividend out of the individual estates.[101] A solvent partner who has paid firm debts out of his separate estate is entitled to prove contribution against the separate estate of his bankrupt partners.[102] An administrator of a deceased partner, whose property has been converted by the surviving partner, has a provable claim against the separate estate of the surviving partner.[103] A firm may prove against the separate estate of a partner for moneys withdrawn by the latter from the firm.[104] A firm debt may be proved in proceedings instituted by a single partner on an individual petition.[105] The reason for this is, that each partner is liable for the debts of the firm and is released from such liability by his discharge.[106]

THIRD: JOINT AND SEPARATE DEBTS.—There are some debts of such a character that they may be proved both against the firm and the individual. In such cases, where a dividend has been paid on one estate, the amount should be deducted

[100] Taylor v. Rasch, No. 13800 Fed. Cas., s. c. 1 Flip. 385.

[101] *In re* Lehigh Lumber Co., 101 Fed. Rep. 216, 4 Am. B. R. 221, 2 N. B. N. 512; *In re* Stevens, 104 Fed. Rep. 323, 5 Am. B. R. 9; *In re* Jones, 116 Fed. Rep. 431; *In re* Bucyrus Machine Co., No. 2100 Fed. Cas., s. c. 5 N. B. R. 303; *In re* Miller, No. 9556 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 180.

[102] *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Swift, 106 Fed. Rep. 65; *In re* Dell, No. 3774 Fed. Cas., s. c. 5 Saw. 344. See *In re* Hamilton, 1 Fed. Rep. 800, where two firms were partners, and one firm tried to prove against the individual estate of a member of the other firm.

[103] *In re* Mills, No. 9611 Fed. Cas., s. c. 11 N. B. R. 74.

[104] *In re* May, No. 9328 Fed. Cas., s. c. 19 N. B. R. 101; *In re* McLean, No. 8879 Fed. Cas., s. c. 15 N. B. R. 333; Sec. 5*g* of the act of July 1, 1898, 30 Stat. at L.

See *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Smith, No. 12991 Fed. Cas., s. c. 16 N. B. R. 113.

[105] *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Frear, No. 5074 Fed. Cas., s. c. 2 Ben. 467.

[106] See Effect of Discharge, Sec. 102, *post*.

and a dividend only on the balance allowed from the other. But when the dividends on both estates are simultaneous the creditor is entitled to prove against both estates for the whole debt. In no case is he entitled to collect more than the amount of his debt from both estates.

Thus, a note made by a firm and endorsed by one of the partners individually may be proven, both against the estate of the firm and the individual estate of the endorser.[107] So also the beneficiaries of a trust fund, invested by the executor in his partnership business with the knowledge and consent of his copartner, may prove their claim against the partnership, although they have proved it against the estate of the executor.[108] Where a member of a firm which is general agent of a corporation misappropriated funds to the uses of the firm, which was known by the firm, it was held that proof might be made both against the firm and the individual estate.[109] Where a creditor holds different notes for partnership debts, some made by the individual partners and others in the name of the firm, he may prove the individual notes against the individual estates and the firm notes against the firm estates.[110]

Where a creditor of a partnership has a lien on both the partnership and individual assets of the members, he may resort to either fund for payment at his option, unless there are creditors having liens only on the individual fund. Then the equitable rule as to two funds will apply and the partnership creditor must first exhaust the partnership fund.[111] A partnership creditor who is secured by a pledge or mortgage upon the individual property of a partner may ordinarily prove for his whole claim against the partnership without first exhausting his security.[112]

[107] *In re* Farnum, No. 4674 Fed. Cas., s. c. 6 Law Rep. 21; Emery v. Canal National Bank, No. 4446 Fed. Cas., s. c. 3 Cliff. 507; Stephenson v. Jackson, No. 13374 Fed. Cas., s. c. 2 Hughes 204; *In re* Bradley, No. 1772 Fed. Cas., s. c. 2 Biss. 515; Mead v. National Bank, No. 9366 Fed. Cas., s. c. 6 Blatch. 180; *In re* Knight, No. 7880 Fed. Cas., s. c. 2 Biss. 518; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141; *In re* Adams, 29 Fed. Rep. 843.

[108] *In re* Tesson, No. 13844 Fed. Cas., s. c. 9 N. B. R. 378.

[109] *In re* Baxter, No. 1119 Fed. Cas., s. c. 18 N. B. R. 62.

[110] Mead v. National Bank, No. 9366 Fed. Cas., s. c. 6 Blatch. 180.

[111] *In re* Lewis, No. 8313 Fed. Cas., s. c. 2 Hughes 320.

[112] *In re* May, No. 9327 Fed. Cas.,

Another class of joint and separate debts arises upon the conversion of joint into separate debts and *vice versa*. Thus, when one of the partners takes the firm assets and agrees to pay the joint debts he becomes individually liable,[114] and the retiring partner will also continue liable as before the dissolution of the partnership.[116] The retiring partner may be released from such liability if the creditors agree to accept the continuing partner as their sole debtor. Precisely what amounts to such an acceptance it is impossible to state. It seems that mere dealing by the creditor with the continuing partner as his debtor, or the taking of a separate security from him not involving a merger of the original debt, is not conclusive evidence of an intention to abandon all claims against the retiring partner.[117] In order that the transaction should have this effect it must be shown that the security was intended to be taken in satisfaction of the original debt, or that a new was substituted for the old liability.[118]

In case there is no such acceptance the firm creditors may prove against the estate of the continuing partner and share *pari passu* with the separate creditors.[119] They may then pursue the individual partner for the balance.[120]

It may happen upon the formation of a partnership between two persons that it is agreed that the debts of one of them shall become the joint debts of the firm. Such an agreement will not make his separate creditors joint creditors of both partners unless the creditors assent to the arrangement. If

s. c. 17 N. B. R. 192. See also *In re* Norris, No. 10302 Fed. Cas., s. c. 2 Hask. 19.

[114] *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141.

[116] *In re* Pease, No. 10881 Fed. Cas., s. c. 13 N. B. R. 168; Dickenson v. Lockyer, 4 Ves. 36; Smith v. Jameson, 5 T. R. 601; Graham v. Whichelo, 1 Cr. & M. 186.

[117] Harris v. Farwell, 15 Beav. 31; David v. Ellice, 5 B. & C. 196; *Ex parte* Smith, 1 M. D. & D. 165; Heath v. Percival, 1 P. W. 682; Lodge v. Dicas, 3 B. & A. 611.

[118] See cases cited in last note above, and Bilborough v. Holmes, 5 Chan. Div. 255; *Ex parte* Butcher, 13 Chan. Div. 465.

[119] *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141.

[120] *In re* Pease, No. 10881 Fed. Cas., s. c. 13 N. B. R. 168.

the partnership is adjudged bankrupt before such assent is given, such creditors will not be entitled to prove their claims as joint creditors of the firm against the partnership estate.[121]

The character of a debt may be changed from joint to separate or *vice versa* by taking security of a higher nature or by obtaining a judgment. The theory upon which this rule rests is that the original debt is extinguished or merged, and the right to prove depends upon the nature of the substituted security whether it is joint or separate. Thus, a simple contract debt will merge in a bond and a bond in a judgment,[122] but a simple contract debt will not merge in a bill of exchange or a promissory note, for the quality is not changed.[123]

§ 102. The effect of a discharge.

Proceedings to obtain a discharge and in opposition thereto in cases in which partners are adjudged bankrupts are the same as in other cases.[124] It is, however, important to consider the effect of a discharge of bankrupt partners. Where the firm and some or all of the partners are declared bankrupts the discharge of a partner releases him from his individual and the partnership debts which are provable in bankruptcy.[125]

The effect of a discharge of a partner upon an individual petition and without any proceedings by or against the firm is not so clear. The authorities are conflicting upon this point. It has been held that where an individual member of a partnership files his petition in bankruptcy and obtains a discharge, that such discharge releases him from his individual debts and also from his partnership obligations.[126] This is also the rule

[121] *In re* Isaacs, No. 7093 Fed. Cas., s. c. 3 Saw. 35.

[122] Higgens's Case, 6 Coke 344; *Ex parte* Christy, 2 Dea. & Chit. 155; Price v. Moulton, 10 C. B. 561; *Ex parte* Davy Ridg. 289.

[123] *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Seddon, 2 Cox 49.

[124] See Discharges, Chap. XXVI.

[125] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 329; *In re* Amelia Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168.

[126] Jarecki Mfg. Co. v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; *In re* Abbe, No. 4 Fed. Cas., s. c. 2 N. B. R. 75; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168; *In re* Brick, 4 Fed. Rep. 805-6; *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326.

in England.[127] But it has been held that such a discharge does not release him from partnership obligations.[128]

"The cases holding that a discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that the trustee could not acquire possession of and administer the assets of the firm. In so holding it seems to have been overlooked that the bankruptcy of one member is *ipso facto* a dissolution of the firm, and that, while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets after the payment of the partnership debts. The separate estate of the bankrupt partner, and his beneficial interest in the firm after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner."[129]

Where an individual petition is filed by a partner of a firm without assets, the prevailing opinion at present is, that, if objection is made pending the bankruptcy proceeding, on the ground that the other partner has not been made a party, the court should order that to be done and upon failing to comply with such order, to dismiss the proceeding or refuse a discharge.[130] But if a discharge is granted without objection it will operate to release all debts provable in bankruptcy.

[127] *Ex parte* Yale, 3 P. W. 25, note a; *Ex parte* Hammond, 21 Wkly. Rep. 865; Thomson v. Harding, 3 C. B. (N. S.) 254.

[128] Hudgins v. Lane, No. 6827 Fed. Cas., s. c. 2 Hughes 361; *In re* Noonan, No. 10292 Fed. Cas., s. c. 10 N. B. R. 330; *In re* Little, No. 8390 Fed. Cas., s. c. 2 Ben. 186; *In re* Grady, No. 5654 Fed. Cas., s. c. 3 N. B. R. 227; *In re* Bidwell, No. 1392 Fed. Cas., s. c. 2 N. B. R. 229.

[129] Judge Baker in Jarecki Mfg. Co. v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751.

[130] *In re* Meyers, 96 Fed. Rep. 408, s. c. 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91, *In re* McFaun, 96 Fed. Rep.

It may be doubted if a firm will be released from partnership debts without each partner is declared to be bankrupt, unless it be shown in the bankruptcy proceeding that there is no individual estate of any partner. The reason for this is, that each individual estate is liable for partnership debts after paying the individual debts. A partner will not be granted a discharge unless he is individually adjudicated to be a bankrupt.[131]

When objections are filed to the discharge of partners who are bankrupts the trial may be joint, but the verdicts and judgments must be separate.[132]

592; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Laughlin, 96 Fed. Rep. 589; *In re* Hartman, 96 Fed. Rep. 593.

[131] Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276; *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Hale, 107 Fed. Rep. 432, 5 Am. B. R. 35.

[132] *In re* George, No. 5325 Fed. Cas., s. c. 1 Low. 409.

CHAPTER XII.

MEETINGS OF CREDITORS.

§ 103. Proceedings after a reference generally.

A copy of the order referring a case to a referee is immediately sent by mail to the referee, or delivered to him personally by the clerk or other officer of the court.[1] All the proceedings thereafter, except such as are required by the act or by the general orders to be had before the judge, are regularly had before the referee.[1] Proofs of claims and other papers filed subsequent to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.[2]

The first step usually taken by a referee after having notice of the reference is to call the first meeting of the creditors of the person adjudged to be bankrupt. The purpose of this meeting is to afford the creditors of the bankrupt an opportunity to prove their claims, to appoint a trustee, to examine the bankrupt and to transact such other business as properly may be transacted, relating to the administration of the estate of the bankrupt.

§ 104. The time and manner of calling the first meeting of creditors.

The first meeting of the creditors of a bankrupt should be held not less than ten nor more than thirty days after the adjudication at the county seat of the county in which the bankrupt has had his principal place of business, resided or had his domicile. If that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court fixes a place for the meeting which is the most convenient for parties in interest.[3] If such meeting should by any mischance not be

[1] Gen. Ord. 12.

[2] Gen. Ord. 2, 20; *In re* Oderkirk, 103 Fed. Rep. 779, 4 Am. B. R. 617.

[3] B. A. 1898, Sec. 55*a*. Compare R. S. Secs. 5034 and 5035.

held within such time, the court or the referee fixes the date as soon as may be thereafter when it shall be held.[4] The meeting must be held in strict accordance with the time and place specified.[5]

The creditors should have at least ten days' notice by mail to their respective addresses, as they appear in the list of creditors of the bankrupt of the first meeting.[6] The notice to creditors of the first meeting should also be published at least once and may be published such number of additional times as the court may direct.[8] The last publication must be at least one week prior to the date fixed for the meeting.[7] The paper in which the notice is published is designated by order of court.[8]

The form of notice is prescribed by the supreme court,[9] and is regularly given by the referee.[10] In mailing these notices the referee is entitled to use a government penalty envelope and need not pay postage.[11]

§ 105. Who are entitled to vote at the first creditors' meeting.

Only creditors of the bankrupt are entitled to vote at the first or any subsequent meeting of the creditors. Not all of his creditors, however, are entitled to vote. A creditor is defined by the statute to include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[12]

In order to vote a creditor must own an unsecured claim provable in bankruptcy and have actually proved it and had it allowed.[13] An attorney at law can not vote without producing a letter of attorney, duly appointing him an attorney in fact.[14] The same rule applies to an agent or a proxy.

[4] B. A. 1898, Sec. 55*a*, and Sec. 1, clause 7; Gen. Ord. 12, par. 2.

[5] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[6] B. A. 1898, Sec. 58*a*.

[7] B. A. 1898, Sec. 58*b*.

[8] B. A. 1898, Sec. 28.

[9] Form No. 18.

[10] B. A. 1898, Sec. 58*c*.

[11] This question has been ruled upon by the Post Office Department at Washington, page 98, note 3, *ante*.

[12] B. A. 1898, Sec. 1, clause 9.

[13] B. A. 1898, Sec. 56*a* and *b*; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[14] *In re* Blankfein, 97 Fed. Rep. 191, 3 Am. B. R. 165; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Richards, 103 Fed. Rep. 849;

Such letters of attorneys should be filed by the referee as a part his record.[15] Where a claim has been assigned after proof the real owner alone can vote, and if he holds several claims he can only cast one vote.[16] The managing officers of a bankrupt corporation, when *bona fide* creditors, have the same right to vote as any other creditor.[17] An individual creditor of one partner can not vote for a trustee for the partnership estate.[15] Where a power of attorney is mislaid and not produced until the meeting is over, the attorney is properly refused the right to participate.[15*] The creditors of the partnership appoint such trustee.[18] A joint or firm creditor, on the separate bankruptcy of one member of a firm, may vote at the creditors' meeting.[19] The reason for this distinction seems to be that each individual partner is liable for the firm debts and will be released from such liability by a discharge. A separate creditor can vote for the trustee in the separate bankruptcy of one of the partners although all the assets are joint.[20] It has been held that one of several joint creditors, who are not partners, can not vote without the consent of the others.[21]

Creditors holding claims which are secured or have priority are not in respect to such claims entitled to vote.[22] Such a

4 Am. B. R. 631; *In re* Lazoris, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re* Scully, 108 Fed. Rep. 372, 5 Am. B. R. 716.

As to what constitutes a sufficient form of power of attorney, see *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[15] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[15*] *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[16] *In re* Frank, No. 5050 Fed. Cas., s. c. 5 Ben. 164.

[17] *In re* Northern Iron Co., No. 10322 Fed. Cas., s. c. 14 N. B. R. 356.

[18] B. A. 1898, Sec. 5*b* of the act of July 1, 1898, 30 Stat. at L.

[19] *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; *In re* Abbe, No. 4 Fed. Cas., s. c. 2 N. B. R. 75; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168; *In re* Brick, 4 Fed. Rep. 805-6; *Ex parte* Yale, 3 P. W. 25, note a.

There is authority holding the opposite view. *In re* Purvis, No. 11476 Fed. Cas., s. c. 1 N. B. R. 163; Hudgins v. Lane, No. 6827 Fed. Cas., s. c. 2 Hughes 361; *In re* Noonan, No. 10292 Fed. Cas., s. c. 10 N. B. R. 330; *In re* Little, No. 8390 Fed. Cas., s. c. 1 N. B. R. 341.

[20] *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554.

[21] *In re* Purvis, No. 11476 Fed. Ca , s. c. 1 N. B. R. 163.

[22] B. A. 1898, Sec. 56*b*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B.

creditor may surrender his security or preference at the first meeting, when it is of such a nature as to be effectually destroyed by such surrender, and thereupon he is entitled to vote like any other creditor.[23] The holder of a lien which is made void by the act no longer has any security and therefore may vote.[24] Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.[25] Where the debt consists of several parts, one of which is secured, he may vote on the unsecured portion.[27] If the security is upon property of a third person,[28] or on property exempted to the bankrupt by law,[29] the creditor may prove the whole claim and vote. It was held under the former act that where a mortgage creditor had sold the mortgaged premises after the adjudication and had become himself the purchaser he could not vote on the deficiency as an unsecured creditor.[30] Where, under a general assignment made by a debtor more than a year before the commencement of proceedings in bankruptcy, a creditor therein preferred had received a partial payment of his claim, he is not required, before being admitted to prove his debt in the bankruptcy proceedings and vote in the election of a trustee, to refund to the estate of the bankrupt the amount so received.[31] The claim is provable for the balance remaining unpaid.

In order to entitle a creditor to vote at a creditor's meeting it is not only necessary that he prove his claim, but, as has

R. 733; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[23] *In re* Saunders, No. 12371 Fed. Cas., s. c. 2 Low. 444; B. A. 1898, Sec. 57*g*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[24] *In re* Scully, 108 Fed. Rep. 372, 5 Am. B. R. 716.

[25] B. A. 1898, Sec. 57*c*.

[27] B. A. 1898, Sec. 56*b*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R 733; *In re* Parkes, No. 10754 Fed. Cas., s. c. 10 N. B. R. 82; *In re* Hanna, No. 6027 Fed. Cas., s. c. 5 Ben. 5.

[28] *In re* Cram, No. 3343 Fed. Cas., s. c. 1 Hask. 89.

[29] *In re* Stillwell, No. 13448 Fed. Cas., s. c. 7 N. B. R. 226; *In re* Tertelling, No. 13842 Fed. Cas., s. c. 2 Dill. 339.

[30] *In re* Hunt, No. 6884 Fed. Cas., s. c. 17 N. B. R. 205.

[31] *In re* Folb, 91 Fed. Rep. 107.

already been stated, it must be allowed. The statute expressly provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."[32]

Where claims are presented to which objection is made or cause exists for continuing the consideration of the claim upon his own motion, how shall a referee proceed with reference to the voting? It is clear that so long as objections are pending against their claims creditors are not entitled to vote. Where such objections can be disposed of by the referee at once he should either sustain or overrule them, so as to permit the creditor to vote if he shall allow the claim. The bankrupt is regularly present at the first meeting of the creditors. Under section 7 it is his duty to examine the correctness of proofs of claims filed against his estate when ordered to do so by the referee or a judge, and to disclose the fact when any person tries to prove a false claim against his estate. It would therefore seem that with the assistance of the bankrupt and such evidence as may be introduced that the referee can ordinarily dispose of objections at the first meeting before a vote is taken. In case he can not conveniently do so, he has undoubted authority to continue the allowance of a particular claim. The act of 1867 expressly provided for continuing claims when the register entertained doubts of their validity or the right of the creditors to prove them or was of the opinion that the validity or right should be investigated by an assignee.[33] It would seem that a cause which would justify the postponement of the proof under the former act would not necessarily be sufficient to justify a postponement under the present act.

Where a claim is regularly and properly proved, the referee should allow it and permit the creditor to vote at the first meeting, unless a clear case is made in opposition to it.[34] A claim which has been allowed may be reconsidered and re-

[32] B. A. 1898, Sec. 57*d*.

[33] R. S. Sec. 5083; *In re* Bartusch, No. 1088 Fed. Cas., 9 N. B. R. 478; *In re* Jackson, No. 7123 Fed. Cas., s. c. 7 Biss. 280; *In re* Herrman, No. 6425 Fed. Cas., s. c. 4 Ben. 126; *In re* Orne, No. 10581 Fed. Cas., s. c. 1 Ben. 361.

[34] *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

allowed, or rejected in whole or in part, according to the equities of the case at any time before the estate has been closed.[35] The application for such re-examination may be made to the referee.[36] The judge may review the matter upon the question being certified to him.[37] The effect of allowing the claim or postponing the proof of it affects no right of a creditor except the right to vote at the creditor's meeting. If it is made to appear to a reasonable certainty that the result would be changed by such vote or votes, the referee or the judge may set aside the result of the vote and direct a new vote to be taken.[38] Where it appears that the exercise of the right to vote would have been barren of result the court will not delay proceedings in order to afford such creditors the opportunity to exercise such right.[39]

The referee and the bankrupt are required by law to attend the first meeting of the creditors, but neither of them are entitled to vote, because the business is transacted by the creditors alone.[40]

§ 106. How to conduct the first meeting of creditors.

The first meeting of creditors of a bankrupt should be held at the time and place specified in the notice for holding it[41] It is not proper to hold a meeting before that time. If any creditor desires to have a voice in the business for which the meeting is called he should attend personally or by a duly authorized agent or attorney.[42] Where no creditor is present or represented the meeting is considered as held as fully and effectually as if creditors had appeared or been represented and the referee is not authorized to wait for or require a "quorum."[43] The judge or referee is required by statute to be present.[44] The referee regularly attends. The bankrupt is

[35] B. A. 1898, Sec. 57*k*.

[36] Gen. Ord. 21, par. 6.

[37] Gen. Ord. 27.

[38] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[39] *In re* Northern Iron Co., No. 10322 Fed. Cas., s. c. 14 N. B. R. 356; *In re* Lake Superior Ship Canal R. R. & Iron Co., No. 7997 Fed. Cas., s. c. 7 N. B. R. 376; *In re* Jackson, No. 7123 Fed. Cas., s. c. 7 Biss. 280.

[40] B. A. 1898, Sec. 56, Sec. 7, clause 1, and Sec. 55*b*.

[41] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[42] See Official Forms Nos. 20 and 21, see Forms Nos. 39 and 40, *post*.

[43] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Cogswell, No. 2959 Fed. Cas., s. c. 1 Ben. 388.

[44] B. A. 1898, Sec. 55*b*.

also required to be present, provided the meeting is had at a place not more than one hundred and fifty miles from his home or principal place of business.[45]

If creditors attend, the meeting should be organized at the hour designated in the notice or as soon thereafter as practicable. The judge or referee presides.[46] The duties of the referee as presiding officer are of a judicial character. His actions, therefore, under all circumstances should be free from reproach and above all suspicion of interest or partisanship. It is especially incumbent upon him in no manner to interfere with or influence the choice of a trustee by the creditors. The policy of the bankrupt law is to give the creditors of a bankrupt a free, deliberate, unbiased choice in the first instance of the person who is to take the assets and manage them.[47] It is also incumbent upon the creditors to take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act.[48] The referee presides at this meeting exactly in the same manner and in the same sense that a judge presides over his court.

Before proceeding with the other business the referee regularly allows or disallows the claims of creditors there presented.[49] Although creditors may prove their claims at any time after the commencement of the proceedings in bankruptcy, they do not generally prove them until the first meeting. In practice, therefore, where the estate is large and the creditors numerous, it may require a whole day or several days to take the proofs, elect the trustee and transact the other business that may properly come before the creditors. In such cases the meeting may be adjourned from day to day so as to furnish proper opportunity for all creditors to prove their debts and to come to an agreement in regard to the selection of a trustee if possible. The several adjournments will constitute but one meeting. It will be the first meeting of the creditors within the contemplation of the statute, whether held on the day designated in the notice or on the

[45] B. A. 1898, Sec. 7; Official Forms Nos. 14 and 18, see Forms Nos. 31 and 35, *post; In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[46] B. A. 1898, Sec. 55*b*.

[47] *In re* Smith, No. 12971 Fed. Cas., s. c. 2 Ben. 113.

[48] B. A. 1898, Sec. 55*c*.

[49] B. A. 1898, Sec. 55*b*.

day to which the meeting assembled on that day has been adjourned.[50] What debts are provable[51] and the manner of making the proof[52] are considered in another place. The referee should include in his record a list of creditors who have proved their debts at the first meeting, together with their residences and the amount of each creditor's debt.[53]

The referee may publicly examine the bankrupt or cause him to be examined at the instance of a creditor before proceeding with the election of the trustee or with other business.[54] The examination should not be permitted at the instance of a creditor until after he has proved his claim. The proceedings relating to the examination of the bankrupt and other persons are treated under a separate head.[55] After the examination of the bankrupt an offer of composition may be made. It is not necessary to call a special meeting for this purpose.[55*]

The principal business to be transacted at the first creditors' meeting is the election of one trustee or three trustees.[56] The manner of conducting the election of the trustee is not prescribed by the statute, and is therefore left to be determined by the creditors themselves. They may either organize into a general meeting or vote in the same manner as at any other election. The preliminary ballots may be taken either *viva voce* or upon written slips. If on the first vote there is no choice made, a second, third, or any number of ballots may be had until the required concurrence is obtained. A creditor may change his vote at any time during the progress of such election.[57] Votes may be solicited for any particular trustee. The creditors should canvass and discuss the different candidates so that the choice of a trustee may be made with full knowledge of all the facts and their bearings. The solicitation of votes must be properly exercised. Improper means and undue influence will not be permitted. Where such means

[50] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Phelps, No. 11071 Fed. Cas., s. c. 1 N. B. R. 525; *In re* Norton, No. 10348 Fed. Cas., s. c. 6 N. B. R. 297.

[51] Chap. XIII.

[52] Chap. XIV.

[53] Official Form No. 19; see Form No. 38, *post*.

[54] B. A. 1898, Sec. 55*b*.

[55] See Examinations, Chap. XIX.

[55*] *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[56] B. A. 1898, Sec. 44.

[57] *In re* Pfromm, No. 11061 Fed. Cas., s. c. 8 N. B. R. 357.

are employed or where the voters had no right to vote the referee will reject the vote or disapprove the election.[58] The referee has power to reject improper votes [59] but has no power to set aside the election for such reasons, but can merely refuse to confirm it and report his disapproval to the judge who alone can remove the trustee elected.[60] The court will often reject a trustee elected through the influence of the bankrupt [61] but will not do so where all the general creditors have been paid in full.[62] The unanimous choice of creditors should not be disapproved on complaint of the bankrupt except in extreme cases.[63] When a final result is reached, it must be made a matter of record in the form prescribed.[64] The creditors who have appointed a trustee must sign the certificate, with their residences and amount of debts claimed and allowed. The reason for this requirement is, that if any dispute should arise in regard to the actual result of election there would be satisfactory evidence before the court to settle the controversy. After a creditor has signed this certificate he can not change his vote.[65] Where only one creditor appears at the first meeting of creditors and proves his debts he may appoint the trustee.[66]

If the creditors do not appoint the trustee the court should do so,[67] but only after the creditors have been given full op-

[58] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel (C. C. A. 2d Cir.), 109 Fed. Rep. 861, at 865; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908.

[59] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[60] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; Gen. Ord. 13.

[61] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel (C. C. A. 2d Cir.), 109 Fed. Rep. 861, at 865; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908.

[62] *In re* Morton, 118 Fed. Rep. 908.

[63] *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

[64] Official Form No. 22; see Form No. 41, *post.*

[65] *In re* Scheiffer, No. 12445 Fed. Cas., s. c. 2 N. B. R. 591.

[66] *In re* Haynes, No. 6269 Fed. Cas., s. c. 2 N. B. R. 227; Anon., No. 458 Fed. Cas., s. c. 1 N. B. R. 216.

[67] B. A. 1898, Sec. 44, and Sec. 1, clause 7; Official Form No. 23; see Form No. 42, *post; In re* Brooke, 100 Fed. Rep. 432; 4 Am. B. R. 50.

portunity;[68] thus where the creditors are unable to agree at their first meeting and a majority in number and amount request an adjournment for a reasonable time in order that they may come to some agreement the referee should grant such adjournment and should not himself appoint a trustee.[69] Where two days have been used up in unsuccessful attempts by creditors to choose a trustee and one is needed at once the referee should appoint him.[70] Where the majority in number vote for one person for trustee and the majority in amount for another the referee may appoint.[71]

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.[73] If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.[73]

The number of votes for an election or to carry any matter of business is prescribed by the statute. Creditors pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed, and are present, except as otherwise provided by statute.[74]

It will be observed that in order to pass a matter it is necessary to have a majority of the votes of all who have proved claims and are present, and not merely a majority of the votes cast.[75] The claims of creditors who are not present are not counted,[76] and a creditor is not considered as present who has sent a proxy which has been rejected.[77] The number and amount of debts proved upon the first day is determined from

[68] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

[69] *In re* Nice & Schreiber, 123 Fed. Rep. 987.

[70] *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162.

[71] *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631.

[73] Gen. Ord. 15.

[74] B. A. 1898, Sec. 56.

[75] *In re* Purvis, No. 11476 Fed. Cas., s. c. 1 N. B. R. 163; *In re* Scheiffer, No. 12445 Fed. Cas., s. c. 2 N. B. R. 591; B. A. 1898, Sec. 56.

[76] *In re* Henschel (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 7 Am. B. R. 662; *In re* Mackellar, 116 Fed Rep. 547.

[77] *In re* Henschel (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 7 Am. B.

the list required to be made by the referee.[78] It is also necessary that there be a majority in number and value of all the debts proved. By this mode of counting every debt upon which a vote has not been cast in favor of a question or person must be counted as a vote in the negative, if the creditor owing claim is present. A question is not carried which receives the majority of the debts proved unless the majority in number also constitutes a majority in the amount of claims proved. So, also, it is not carried where a majority in amount of debts proved is cast in favor of the question unless that majority in amount also constitutes a majority in number. The majority must be a joint majority of both the number and the value. The reason for this provision seems to be to prevent one large creditor from controlling the meeting to the detriment of other creditors, and at the same time to prevent several creditors having small claims from uniting to the injury of the large creditor, who may be the only one who has a real interest in the proceedings.

The creditors not only appoint the trustee or trustees, but they should fix the amount of the bond required.[80] They may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee the court must do so.[80]

§ 107. Notice to trustee.

The appointment of a trustee by the creditors is subject to be approved or disapproved by the referee or the judge.[81] Ordinarily the referee makes the order approving the appointment. He thereupon immediately notifies him in person or by mail of his appointment.[82] The notice should contain a statement of the penal sum of the trustee's bond.[82] The trustee is required forthwith to notify the referee of his acceptance or rejection of the trusteeship.[83] Where the trustee accepts the trust he should immediately qualify.[84] If he declines to accept the trust a vacancy occurs in the office of trustee. The creditors are then entitled to have another

R. 662; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Mackellar, 116 Fed. Rep. 547.

[78] Official Form No. 19; see Form No. 38, *post*.

[80] B. A. 1898, Sec. 50*c*.

[81] Gen. Ord. 13.

[82] Gen. Ord. 16; Official Form No. 24; see Form No. 43, *post*.

[83] Gen. Ord. 16.

[84] Trustees, Chap. XV.

meeting to elect a trustee.[85] The creditors may, of course, waive this privilege, in which case the judge or referee (usually the referee) appoints one or three trustees.[85]

§ 108. Other meetings of creditors.

Creditors may hold meetings other than the first one whenever it may be necessary to consider matters pertinent to the administration of the estate or other matters relating to the proceedings in bankruptcy. Where the schedule of a voluntary bankruct discloses no assets, and no creditor appears at the first meeting, the court may direct that no trustee be appointed, and no meeting of the creditors other than the first meeting be called.[86]

A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.[87] Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.[88] The judge or referee is required to call a meeting of creditors whenever one fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.[89]

Creditors who have proved their claims at the first meeting or have proved them subsequently are entitled to vote at these meetings subject to the restrictions contained in section 56. Creditors, whether they have proved their claims or not, are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of all such

[85] B. A. 1898, Sec. 44.
[86] Gen. Ord. 15.
[87] B. A. 1898, Sec. 55*d*.
[88] Gen. Ord. 25.
[89] B. A. 1898, Sec. 55*e*, and Sec. 1, clause 7.

meetings of creditors.[90] The referee regularly gives this notice.[91]

The referee is not required to be present or preside at these meetings, but in practice he usually does so. The bankrupt is not required to attend such meetings unless specially ordered to do so. There is no form prescribed for conducting the business or taking the votes except that the creditors can only pass upon matters submitted to them at such meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present.[92] Such meetings are properly guided by the rules and usages of parliamentary bodies.[93]

Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.[94]

[90] B. A. 1898, Sec. 58*a*. See *In re* Mills, No. 9610 Fed. Cas., s. c. 7 Ben. 452; Anon., No. 457 Fed. Cas., s. c. 1 N. B. R. 122.

[91] B. A. 1898, Sec. 39, clause 4, and Sec. 58*c*.

[92] B. A. 1898, Sec. 56*a*.

[93] *In re* Merchants' Ins. Co., No. 9442 Fed. Cas., s. c. 6 Biss. 252.

[94] B. A. 1898, Sec. 55*f*.

CHAPTER XIII.

WHAT DEBTS ARE PROVABLE.

§ 109. Provable debts defined.

Debts of the bankrupt may be proved and allowed against his estate,[1]

First, which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

Second, debts due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

Third, debts founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt.

Fourth, debts founded upon an open account, or upon a contract express or implied.

Fifth, debts founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

The five classes of debts quoted above are contained in Sec. 63*a* and include every class of debt provable in bankruptcy. If a claim does not fall within one of these classes it is not provable.

In order that a debt, demand or claim may be proved against the estate of a bankrupt it must be liquidated.[2]

[1] B. A. 1898, Sec. 63. Compare R. S. Secs. 5067 to 5072.

[2] *In re* Silverman, 101 Fed. Rep. 219, 2 N. B. N. 760, 4 Am. B. R. 83; *In re* Big Meadow Gas Co., 113 Fed. Rep. 974, 7 Am. B. R.

In Section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct and may thereafter be proved and allowed against his estate. Par. *b* of Sec. 63 adds nothing to the class of debts which may be proved under par. *a* of the same section.[2]* Its purpose is to permit an unliquidated claim, coming within the provisions of Sec. 63*a* to be liquidated as the court may direct.

Unliquidated claims which may be liquidated and proved under this provision are numerous and varied. Familiar examples are damages for breach of executory contracts, damage for breach of covenants in a contract and stockholder's liability.[3] Notes and contracts to deliver specific articles of merchandise may be liquidated.[3]*

The rights of creditors to prove debts and share in the distribution of the estate of the bankrupt are fixed by the status of their claims at the time of filing the petition in bankruptcy.[4]

697. But see *In re* Manhattan Ice Co. (C. C. A. 2nd Cir.), 116 Fed. Rep. 604, 8 Am. B. R. 569.

[2]* See observation of Mr. Justice Peckham in Dunbar v. Dunbar, 190 U. S. 340, 350. *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

[3] Fourth National Bk. v. Francklyn, 120 U. S. 747; Garrett v. Sayles, 1 Fed. Rep. 371; James v. Atlantic Delaine Co., No. 7179 Fed. Cas., s. c. 11 N. B. R. 390, Gibson v. Lewis, No. 5398 Fed. Cas., s. c. 11 N. B. R. 247.

In re Rouse, 40 Law Bul. (Ohio) 220, the referee held that a stockholder's statutory liability in an insolvent Ohio corporation is not only a liability created by statute, but is also a claim founded upon an implied contract, and as such is a provable debt against the estate of the bankrupt stockholder, whenever the circumstances are such that a stockholder's liability suit would lie.

It is an unliquidated claim, and upon application to the court the court will direct the manner of its liquidation.

But the court will not proceed to direct the manner of liquidation unless application is made to it therefor.

In cases of stockholder's double liability the court may direct that a stockholder's liability suit be instituted by the creditor making the application, or that an already pending suit in the state court be maintained for the purpose of liquidating the claim; or, if the facts are simple and undisputed, may itself undertake to determine the amount provable as the bankrupt's stockholder's liability, and to whom the same is payable.

[3]* Chandler v. Windship, 6 Mass. 310; McMullen v. Bank of Penn., 2 Penn. St. 243.

[4] Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; Phillips v. Dreher Shoe Co., 112 Fed. Rep. 404, 7 Am. B. R. 326; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 374; *In re* Graff, 8 Am. B. R. 744.

A debt contracted by the bankrupt subsequent to the filing of the petition can not be proved in bankruptcy.[4]* The payment of such debts may be sought out of property acquired after the adjudication of bankruptcy at any time. The bankrupt is not released from such debts by discharge in bankruptcy.

Debts secured by a mortgage lien or other kind of security are not provable under this section until the secured creditor surrenders such preferences, except for the amount each claim exceeds the value of its security.[5] This section relates to debts, demands and claims only which are not preferred or secured, and which have no priority over any other debts. They are the debts, demands and claims of the general creditors against the general assets of the bankrupt at the time the petition was filed.

§ 110. What is "a debt."

It is to be observed that debts only are provable under the first paragraph of section 63 — the first five clauses above. To ascertain, therefore, what is provable under these provisions it is necessary to inquire at the outset what is included in the word "debts."

A debt, as defined by the act itself, includes "any debt, demand or claim provable in bankruptcy."[6] This definition does not throw much light on its meaning in this connection, although it fully defines it wherever it is used in any other part of the act.

The word "debt" seems to have been used in other bankrupt acts[7] as defined by Mr. Justice Blackstone. He said:

[4]* *In re* Merrell, 19 Fed. Rep. 874; *In re* Ward, 12 Fed. Rep. 325; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12; *In re* Pennewell (C. C A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602.

But see Spalding v. Dixon, 21 Vt. 45, where it was held under the act of 1841, that a debt arising after the petition filed and before the adjudication was provable, and therefore barred by a discharge in bankruptcy.

[5] B. A. 1898, Sec. 57*e*, *f* and *g*. See Rights of a Secured Creditor, Sec. 203, *post*.

[6] B. A. 1898, Sec. 1, clause 11.

[7] *In re* Sutherland, No. 13639 Fed. Cas., s. c. Deady, 416; *In re* Lachemeyer, No. 7966 Fed. Cas., s. c. 18 N. B. R. 270; *In re* Foye, No. 5021 Fed. Cas., s. c. 2 Low. 399; Sigsby v. Willis, No. 12849 Fed. Cas., s. c. 3 Ben. 371.

"The legal acceptation of debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum; a bill or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it." [8] That this is the sense in which debt is used in this section is fairly to be inferred from the context. It appears to be in contra-distinction to "unliquidated claims" employed in the last paragraph. A sum of money due is deemed fixed and certain when it can be ascertained from fixed data by mere computation.

If this is the meaning of debts in this section it is clear that a judgment for a fine or penalty,[9] or a claim for alimony,[10] or any other claim or due not founded upon an agreement or contract, however just or lawful in itself, is not provable in bankruptcy. A claim against a father to pay for the support of his minor children which at common law he is bound to support is not such a debt as may be proved in bankruptcy.[11] Such claims might be enforced at law or in equity.[12]

In construing state laws relating to insolvents a broader meaning has been given to the word "debt." Thus it has been said that "the word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." [13]

[8] Blackstone's Com. 154. See also Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829.

[9] *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590; *In re* Sutherland, No. 13639 Fed. Cas., s. c. Deady, 416; Spalding v. New York, 4 How. 21, affirming 7 Hill (N. Y.) 301; s. c. 10 Paige (N. Y.) 284; Wilson v. Nat. Bank, 3 Fed. Rep. 391; Macey v. Jordan, 2 Den. (N. Y.) 570.

As to penalties due the United States, a state or municipality, see P. A. 1898, Sec. 57*j*.

[10] Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340.

[11] Dunbar v. Dunbar, 190 U. S. 340; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528.

[12] Stockwell v. U. S. 13 Wall. 531.

That judgments to enforce a moral or natural duty, as for seduction or the support of a bastard, are not discharged — not being debts in the sense that word is used in bankruptcy, see *In re* Cotton, No. 3269 Fed. Cas., s. c. 2 N. Y. Leg. Obs. 370; Comm. v. Erisman, 21 Pitts. L. Jour. 69; Nassau v. Parker, 2 Penn. L. Jour. 298.

[13] Gray v. Bennett, 3 Met. (Mass.) 526. This view was approved by

§ 111. Equitable debts.— Assignee's expenses, etc.

It has been repeatedly held in England that an equitable as well as a legal debt may be proved in bankruptcy.[14] And the same rule would appear to be established in this country under the former bankrupt acts.[15]

Thus, a solvent partner upon winding up the partnership is entitled to prove against bankrupt partners the share of the loss which each partner should have borne as a debt against his separate estate.[16] The reason for this is that the solvent partners having paid all of the joint debts of the firm are regarded as standing in the light of sureties or persons liable for him, and therefore entitled to come in and prove in respect to the bankrupt's share of the copartnership debts.[17] So also where a trustee demanded wagons of the bankrupt which were in the possession of a bailee it was held that the bailee was entitled to an equitable compensation for storage.[18] So also charges against the estate for expenses incurred in the administration of it, as wages, rent, etc., are provable debts in bankruptcy.[19]

An assignee for the benefit of creditors and his attorney may prove for services, rendered both prior and subsequent to

Mr. Justice Story in Carver v. Mf. Co., No. 2485 Fed. Cas., s. c. 2 Story 432. But neither of the cases arose under a bankrupt statute.

[14] *Ex parte* Yonge, 3 Ves. & B. 31; Jeffs v. Wood, 2 P. Williams 128; Murphy's Case, 1 Schoacls 8 L. 44; *Ex parte* Watson, 4 Madd. 477.

[15] *In re* Kelly, 18 Fed. Rep. 528; *In re* Fortune, No. 4955 Fed. Cas., s c. 1 Low. 306; *In re* Secor, 18 Fed. Rep. 319; *In re* Wells, 4 Fed. Rep. 68; Butcher v. Forman, 6 Hill (N. Y.) 583.

[16] *Ex parte* Watson, 4 Madd. 477; Sigsby v. Willis, No. 12849 Fed. Cas., s. c. 3 Ben. 371; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815.

[17] *Ex parte* Yonge, 3 Ves. & B. 31; Aflalo v. Fourdrinier, 6 Bing. 306; Sigsby v. Willis, No. 12849 Fed. Cas., s. c. 3 Ben. 371.

[18] *In re* Kelly, 18 Fed. Rep. 528.

[19] *In re* Wells, 4 Fed. Rep. 68; *In re* Secor, 18 Fed. Rep. 319; *In re* Fortune, No. 4955 Fed. Cas., s. c. 1 Low. 306; *In re* Hufnagel, No. 6837 Fed. Cas., s. c. 12 N. B. R. 554; *In re* Dunham, No. 4145 Fed. Cas., s. c. 27 Leg. Int. 404; Buckner v. Jewell, No. 3060 Fed. Cas., s. c. 2 Woods 220; *In re* Walton, No. 17131 Fed. Cas., s. c. 1 N. B. R. 557; *In re* Appold, No. 499 Fed. Cas., s. c. 1 N. B. R. 621; *In re* Hamburger, No. 5975 Fed. Cas., s. c. 12 N. B. R. 277; *In re* Ives, No. 7116 Fed. Cas., s. c. 18 N. B. R. 28; *In re* Yeaton, No. 18133 Fed. Cas., s. c. 1 Low. 420; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

the filing of the petition in bankruptcy, which were beneficial to the estate.[20] An attorney may prove for services rendered the bankrupt in preparing a deed of assignment, which was afterwards set aside by bankruptcy proceedings.[21]

§ 112. Contingent demands and liabilities not debts.

A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened.[22] *Non constat* the contingency will not happen.

Thus, under the trustee laws of Massachusetts, it has been held that the wages of a sailor, being contingent on the arrival of the ship, are not a debt until the ship has arrived, and, therefore, until then not attachable.[23] So of a covenant to pay rent quarterly. It creates no debt until it becomes due, for before that time the lessee may quit, with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor, in either of which cases he will be discharged from his covenant.[24] So a contract between the shippers of a cargo and the owners of the ship, that the latter shall receive a share of the profits, does not create a debt from the former to the latter until the termination of the voyage.[25]

So a claim for damages upon a bond conditioned upon the faithful performance of certain duties is not a debt until the contingency has happened and the damage has been assessed.[26] Before the day at which rent is covenanted to be paid it is in no sense a debt. It is neither *debitum* nor *solvendum*.[27]

A contract by a husband to pay his wife a certain sum an-

[20] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1, overruling *In re* Peter Paul Book Co., 104 Fed. Rep. 786; Stearns v. Flick, 103 Fed. Rep. 919.

[21] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[22] Dunbar v. Dunbar, 190 U. S. 340; Godding v. Roscenthal, 180 Mass. 43; Morgan v. Wordell, 178 Mass. 350; Insley v. Garside (C. C. A. 9th Cir.), 10 Am. B. R. 52.

[23] Wentworth v. Whittemore, 1 Mass. 471.

[24] Wood v. Partridge, 11 Mass. 488. See also Riggin v. Magwire, 15 Wall. 549.

[25] Davis v. Ham, 3 Mass. 33; Frothingham v. Haley, 3 Mass. 68.

[26] Ellis v. Ham, 28 Me. 385; Woodard v. Herbert, 24 Me. 358; Godding v. Roscenthal, 180 Mass. 43.

[27] Deane v. Caldwell, 127 Mass. 244.

nually during her lifetime or widowhood is not provable in bankruptcy.[28]

It has been held that the bond of the bankrupt to secure payment to the obligee of an annuity for life may be proved under Sec. 63*a*, clause 1,[29] and that the creditor might prove under Sec. 63*a*, clause 4, against the estate of the bankrupt after the liability had become fixed, where the contingency was that the bankrupt was the endorser of commercial paper not due at the time of filing the petition.[30]

It was held under the act of 1841, which provided for proving uncertain and contingent demands, that so long as the demand remained wholly uncertain whether a contract or engagement would ever give rise to an actual debt or liability and there was no means of removing the uncertainty by calculation, such contract or engagement was unprovable under the act.[31]

§ 113. Debts which are a fixed liability provable.

Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.[32]

In order to be a debt provable under this provision two things must concur. *First*, it must be a debt with a fixed liability absolutely owing at the time of the filing of the petition; and, *second*, the debt must be evidenced by a judgment or an instrument in writing.

Under this provision debts may be proved which are due at the time of filing the petition in bankruptcy on judgments, bonds for a determinate sum, some debts arising under contract, notes, bills of exchange, checks, etc. It should be ob-

[28] Dunbar v. Dunbar, 190 U. S. 340.

[29] Cobb v. Overman (C. C. A., 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324.

[30] Mock v. National Bank (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[31] Riggen v. Magwire, 15 Wall. 549.

[32] B. A. 1898, Sec. 63*a*.

served that many debts may be proved under this clause and also under clause 4 of the same section which is broader in its terms and includes debts which cannot be proved under this section. What constitutes a fixed liability absolutely owing and what are debts evidenced by a judgment, or an instrument in writing is further considered in the next three paragraphs.

§ 114. What constitutes a fixed liability absolutely owing.

A fixed liability absolutely owing means that the obligation to pay exists at the time of filing the petition and is sufficiently definite in amount to permit of computation. It has been held that the bond of a bankrupt to secure the payment to the obligee of an annuity for life may be proved under this section.[33] A judgment note waiving exemptions is a provable debt.[34]

Contingent debts or liabilities or demands, the valuation or estimation of which it is substantially impossible to prove are not provable debts under this clause.[35] The liability of a bankrupt as surety on the bond of an administrator is not a fixed liability absolutely owing where no final decree has been rendered in the state court adjudging the liability of the principal,[36] nor a claim for a breach of a covenant in a lease where no breach is shown prior to bankruptcy,[37] or an attorney's fee stipulated in a judgment note where the note has not been placed in the hands of an attorney for collection prior to the filing of the petition in bankruptcy,[38] or for the breach of a contract of lease where the lessor has re-entered and taken possession of the leased property.[39] The liability of a bankrupt as surety becomes a fixed liability by maturity notice and non-

[33] Cobb v. Overman (C. C. A., 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324, overruling Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788.

[34] Claster v. Soble (Super. Ct. Penna.), 22 Pa. Super. Ct. 631, 10 Am. B. R. 446.

[35] Dunbar v. Dunbar, 190 U. S. 340.

[36] *In re* Wiseman, 123 Fed. Rep. 185, 10 Am. B. R. 545.

[37] *In re* Pennewell, 119 Fed. Rep. 139, 9 Am. B. R. 489.

[38] *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602.

But see Merchants' Bank v. Thomas (C. C. A., 5th Cir.), 121 Fed. Rep. 306, 10 Am. B. R. 299.

[39] Lamson Consol. Store Service v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639.

payment of the debt,[40] but may be proved under clause 4 as a contract of endorsement.[41]

The word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. Whether the debt is owing or not is in no respect determined by a reference to the time of payment. A sum of money, which is certainly and in all events payable, is a debt absolutely owing without regard to the fact whether it be payable now or at a future time. The provision requires the debt to be absolutely owing, and expressly includes both classes of debts; namely, those debts which are payable at the date of the commencement of bankruptcy and those debts which are payable at a subsequent date. It is sufficient if the debt is a fixed liability absolutely owing when the petition in bankruptcy is filed.[42]

It is the actual value of the debt owing at the commencement of bankruptcy proceedings that is provable.[43] This provision establishes that date as the time at which the liability is to be ascertained and determined. Accrued interest at that date is as much a part of the indebtedness as the principal.[44] But interest accruing thereafter is not provable. The question of interest is further considered elsewhere.[45]

§ 115. Judgment debts provable.

It may be stated as a general rule that judgment debts are provable in bankruptcy. The statute recognizes two classes of judgment debts which may be proved. *First*, a debt evidenced by a judgment obtained prior to the commencement of bankruptcy proceedings;[46] and, *second*, a debt founded upon

[40] *In re* Schaefer, 104 Fed. Rep. 973, 5 Am. B. R. 92*n*; *In re* Gerson, 105 Fed. Rep. 891, 5 Am. B. R. 89, affirmed (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[41] *In re* Gerson (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[42] B. A. 1898, Sec. 63, clause 1.

[43] *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re* Pennewell (C. C. A., 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 489; Merchants' Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. Rep. 306; *In re* Wiseman, 123 Fed. Rep. 185, 10 Am. B. R. 545.

[44] Sloan v. Lewis, 22 Wall. 150; *In re* Bartenbach, No. 1068, Fed. Cas., s. c. 11 N. B. R. 61; *In re* Haake, No. 5883, Fed. Cas., s. c. 2 Saw. 231; *In re* New Brunswick Carpet Co., 4 Fed. Rep. 514.

[45] Sec. 117.

[46] B. A. 1898, Sec. 63, clause 1; *In re* McCauley, 101 Fed. Rep. 223,

a provable debt reduced to judgment pending bankruptcy proceedings.[47]

Judgment Debts Prior to Bankruptcy.—In order to constitute a judgment debt provable under the first clause of section 63 a judgment must have been actually rendered.[48] A mere verdict in an action is not sufficient. A certified copy of the judgment is evidence of the debt.[49] A judgment carries also costs and interest to the date of the filing of the petition, where it would do so under the laws of the state in which it was rendered. Such costs and interest form a part of the provable debt in such cases.[50] A judgment for costs is regularly a provable debt.[51] A judgment for breach of promise of marriage is a provable debt.[52]

It should be observed that only a judgment which is an evidence of debt is provable. If the nature of the liability, the original cause of action, is not debt, it cannot be proved under this clause. Thus it is not a provable debt where the judgment is for a fine or penalty imposed for punishment under the state law,[53] or for alimony whether in arrear at the time of adjudication in bankruptcy or for alimony accruing since that adjudication,[54] because a judgment for alimony or an

4 Am. B. R. 122; *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544, 3 N. B. N. 189.

[47] B. A. 1898, Sec. 63, clause 5; *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258.

[48] Black v. McClelland, No. 1462, Fed. Cas., s. c. 12 N. B. R. 481; Crouch v. Gridley, 6 Hill (N. Y.) 250; *Ex parte* Columbian Ins. Co., No. 3037, Fed. Cas., s. c. 2 Low. 5.

[49] *Ex parte* Anderson, 14 Q. B. D. 606.

[50] *Ex parte* O'Neil, No. 10527, Fed. Cas., s. c. 1 Low. 163.

[51] Graham v. Pierson, 6 Hill (N. Y.) 247.

[52] *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258; *In re* McCauley, 101 Fed. Rep. 223, 4 Am. B. R. 122; Finnegan v. Hall (N. Y. Sup. Ct.), 6 Am. B. R. 648.

[53] *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590.

But see *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

[54] Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340; Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

But see Arlington v. Arlington (Sup. Ct. N. E.), 10 Am. B. R. 103, where it was held that a final judgment for alimony entered in another state upon a decree for absolute divorce is a provable and dischargeable debt.

In England alimony is neither discharged nor provable in bankruptcy. Linton v. Linton (1885), 15 Q. B. D. 239; Hawkins v. Hawkins (1894), 1 Q. B. D. 25; Watkins v. Watkins (1896), Prob. 222; Kerr v. Kerr (1897), 2 Q. B. 439.

allowance in the nature of alimony is not a debt within the meaning of that word as used in Sec. 63 of the bankrupt act, but is a penalty imposed for failure to perform a duty, or for the support of minor children,[55] or a judgment for seduction, or for the commission of an immoral act or for the failure to perform a natural duty.[56]

A judgment, if not outlawed, obtained at any time prior to the filing of the petition, even within four months, is provable.[58] It should be observed that while a judgment lien may be invalid as a preference for the reason that it was obtained within four months, the judgment is not for this reason invalid as an evidence of the debt. The creditor may not be entitled to a preference, but still be entitled to prove his debt as a general creditor.[59] But where the judgment no longer exists it is not evidence of the debt, and the proof of the claim will not be allowed.[60] Where a writ of error has been prosecuted the judgment debt may still be proved,[61] subject to having the dividends withheld until the appellate court disposes of the writ of error.

How far a court of bankruptcy, at the instance of a trustee or creditors, may go behind a judgment offered for proof is not free from doubt. The American cases under the act of 1867 incline strongly to the opinion that a judgment valid against the debtor and not in fraud of creditors, can not be attacked in a court of bankruptcy.[62] But where the judgment is void for fraud or want of jurisdiction in the court rendering it, it may be examined into by a court of bankruptcy in which it is offered for proof. If there be an intermediate case in which it would be discretionary with the court which ren-

[55] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; Dunbar v. Dunbar, 190 U. S. 340; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528; *In re* Baker, 96 Fed. Rep. 954.

[56] Consult Colwell v. Tinker (N. Y. Sup. Ct.), 6 Am. B. R. 434; Distler v. McCauley (N. Y. Sup. Ct.), 6 Am. B. R. 491; *In re* Maples, 5 Am. B. R. 426; Burnham v. Pidcock (N. Y. Sup. Ct. App. Div.), 5 Am. B. R. 590.

[58] *In re* Farmer, 116 Fed. Rep. 763, 9 Am. B. R. 19.

[59] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506.

[60] *In re* Bruce, No. 2044, Fed. Cas., s. c. 6 Ben. 515; *In re* Lipman, 94 Fed. Rep. 353, 2 Am. B. R. 46.

[61] *In re* Sheehan, No. 12737, Fed. Cas., s. c. 8 N. B. R. 345.

See *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

[62] *In re* Burns, No. 2182, Fed. Cas., s. c. 1 N. B. R. 174; Camp-

dered the judgment to vacate it upon the ground of mistake, a court of bankruptcy usually will leave the trustee to that remedy, postponing the proof in the meantime.[62]

The English rule seems to be somewhat broader. A judgment is there deemed *prima facie* evidence of a provable debt, but if there are circumstances which cast suspicion upon the judgment or on the debt on which it was founded, the court has the right to call upon the claimant to prove the consideration for the debt.[63]

It has been held under the present act that "the court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action." [64]

Debts Reduced to Judgment Pending Bankruptcy.—Another class of judgment debts which may be proved in bankruptcy are those "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." [65]

Two elements are necessary to make a judgment debt of this character provable. *First,* it must be founded upon a provable debt; and, *second,* it must be reduced to judgment pending bankruptcy proceedings before the bankrupt's application for a discharge is considered by the court. In this class all debts are on the same basis in respect to interest as other claims.[66] The actual value of the debt at the date of the filing of the petition is what is provable after costs have been deducted.

There was much conflict of opinion with reference to whether this class of debts was provable under the former bankrupt acts. Under these acts, as under the present stat-

bell's Case, No. 2349, Fed. Rep., s. c. 1 Abb. U. S. 185; *Ex parte* O Neil, No. 10527, Fed. Rep., s. c. 1 Low. 163; McKensey v. Harding, No. 8866, Fed. Cas., s. c. 4 N. B. R. 38.

[63] *Ex parte* Anderson, 14 Q. B. D. 606; *Ex parte* Lennox, 16 Q. B. D. 315; *Ex parte* Revell, 13 Q. B. D. 720; *Ex parte* Seaton, 8 Mor. 97.

[64] Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

[65] B. A. 1898, Sec. 63, clause 5; *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258.

[66] See Sec. 117.

ute, debts created during bankruptcy were not provable. The division of opinion grew out of the application of the doctrine of merger. Some judges conceived the debt existing at the time of filing the petition to be merged in the judgment obtained thereafter and to become a new debt, as of the date of the judgment, and hence not provable.[67] Others held the view that the judgment retained the character of the indebtedness out of which it arose, and was not to be regarded as a new debt arising subsequently to the filing of the petition.[68] The latter view was taken by the supreme court when the matter came before it, for the first time, about eight years after the bankrupt law had been repealed.[69] No such conflict of opinion can arise under the present statute, which expressly declares such judgments to be provable debts.

§ 116. Debts evidenced by an instrument in writing.

A debt which is a fixed liability as evidenced by an instrument in writing and absolutely owing at the time of the filing of the petition is provable.[70] A debt created by oral agreement or upon an open account is provable under another provision of the 63d section but not under the first clause.[71] An instrument in writing, as used in this connection, is a written

[67] *In re* Williams, No. 17705, Fed. Cas., s. c. 2 N. B. R. 229; *In re* Mansfield, No. 9049, Fed. Cas., s. c. 6 N. B. R. 388; *In re* Gallison, No. 5203, Fed. Cas., s. c. 2 Low. 72; Sanford v. Sanford, 58 N. Y. 67; Bradford v. Rice, 102 Mass. 472; Cutter v. Evans, 115 Mass. 27; Woodbury v. Perkins, 5 Cush. 86; Ellis v. Ham, 28 Me. 385; Uran v. Houdlette, 36 Me. 15; Pike v. McDonald, 32 Me. 418; Kellogg v. Schuyler, 2 Denio (N. Y.) 73; Roden v. Jaco, 17 Ala. 344; McCarthy v. Goodwin, 8 Mo. App. 380.

[68] *In re* Crawford, No. 3363, Fed. Cas., s. c. 3 N. B. R. 698; *In re* Brown, No. 1975, Fed. Cas., s. c. 5 Ben. 1; Barnes v. United States, No. 1023, Fed. Cas., s. c. 12 N. B. R. 526; *In re* Vickery, No. 16930, Fed. Cas., s. c. 3 N. B. R. 696; Fox v. Woodruff, 9 Barb. 498; Dresser v. Brooks, 3 Barb. 429; Johnson v. Fitzhugh, 3 Barb. Ch. 360; Clark v. Rowling, 3 N. Y. 216; Stockwell v. Woodward, 52 Vt. 234; Harrington v. McNaughton, 20 Vt. 293; Blanford v. Foote, 1 Cowp. 138; Rogers v. Ins. Co., 1 La. Ann. 161; Imlay v. Carpentier, 14 Cal. 173; Stratton v. Perry, 2 Tenn. Ch. 633; Raymond v. Merchant, 3 Cow. 147; Dick v. Powell, 2 Swan. 632; McDonald v. Ingraham, 30 Miss. 389; Anderson v. Anderson, 65 Ga. 518; Betts v. Bagley, 12 Pick. 572; Dawson v. Hartsfield, 79 N. C. 334; Dinsdale v. Eames, 4 Moore, 350; 2 Brod. & B. 8.

[69] Boynton v. Ball, 121 U. S. 457, 466.

[70] B. A. 1898, Sec. 63, clause 1.

[71] B. A. 1898, Sec. 63, clause 4.

document which is the legal evidence of a fixed liability to pay a debt, such as bonds for a determinate sum, notes, bills of exchange, checks, etc. Checks, however, are not evidence of a debt accruing to a bank by reason of an overdraft.[72]

Where the bankrupt is the maker, or the one primarily bound by the written instrument, the debt evidenced by the written instrument is clearly provable. But it is the debt due in equity which is provable and not the penalty.[73] It has been held that where a person previous to becoming a bankrupt was liable on a bond, by the terms of which he became a continuing guarantor of notes discounted by a certain bank for a company of which he was the president, and at the time of his bankruptcy the bank held a note so discounted indorsed by him, the fact that a renewal note was given after the filing of his petition did not prevent the debt from being proved as a claim against his estate.[74]

THE LIABILITIES OF BANKRUPTS AS SURETIES, ENDORSERS, ETC.—A provable debt may arise with reference to an endorser or surety, *first,* where the bankrupt is the endorser or the surety; *second,* where another person is the surety or an endorser for the bankrupt.

In case the bankrupt is the person secondarily liable as an endorser or a surety, it is necessary that the liability has become absolute and fixed, as by maturity notice and nonpayment of the debt prior to bankruptcy proceedings, to be provable under the first clause of Sec. 63,[75] but the contract of en-

[72] *In re* New Brunswick Carpet Co., 4 Fed. Rep. 515; Fletcher v. Manning, 12 M. & W. 571.

[73] *Ex parte* Fidgeon, 4 Dea. 217; *Ex parte* Maclean, 2 Mont. D. & D. 564, s. c. 6 Jur. 609. See also Wilson v. Nat. Bank, 3 Fed. Rep. 391.

In *ex parte* Capper, 4 Chan. D. 724 it was held that where a building contract provided that in case the contract should not be in all things duly performed by the contractors they should pay to the employer 1000*l* as and for liquidated damages, yet that the 1000*l* was in the nature of a penalty, and proof could only be had for the actual damage sustained.

[74] *In re* Letchworth, 19 Fed. Rep. 873. But see *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

[75] *In re* Schaefer, 104 Fed. Rep. 973, 3 N. B. N. 261, 5 Am. B. R. 92*n*; *In re* Gerson, 105 Fed. Rep. 891, 5 Am. B. R. 89, 3 N. B. N. 249, affirmed (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Loder, No. 8457, Fed Cas., s. c 4 Ben. 305; *In re* Bruce, No. 2044, Fed. Cas., s. c. 6 Ben. 515.

In McNeil v. Knott, 11 Ga. 142, Segur and Crawford made a note for $100, payable Christmas next

dorsement may be proved under clause 4 of the same section.[76]

It has been held that where a city treasurer defaulted and the city council passed a resolution that the sureties might give their individual bonds for their *pro rata* of the balance due, but that the old bonds should be retained and remain in full force, that the estates of the bankrupt's sureties who did not give such bonds were liable, and that the city might prove against their estate for the whole debt.[77]

Where the holder has forfeited his right, or the debt has been discharged by payment, no provable debt exists against the estate of the bankrupt. Thus, where the note is barred by the statute of limitations, or where a note payable on demand is not presented for payment, and no demand made within a reasonable time, the endorser is released.[78] Where the maker has paid a part of the note to the holder, the holder can prove against the bankrupt's estate only for the balance not paid.[79] So also where a settlement has been, with leave of court, made with the makers of a note at forty cents on the dollar, the creditor is only entitled to prove for sixty percent against the estate of the bankrupt sureties.[80]

It may be observed in this connection that the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt, is not altered by the discharge of such bankrupt.[81]

Where the Endorser, Surety, etc., is a person other than the Bankrupt.—A person who is secondarily liable for a debt of the bankrupt, as endorser or surety, has a prov-

thereafter to Henry Kunkle or bearer. Kunkle, the payee, transferred the note by delivery to Knott, who endorsed it "to be liable in the second instance" to McNeil. Segur paid off and discharged the note to Kunkle while the note was in his possession. McNeil then sued Knott who, pending the action, had been discharged under the bankrupt act of 1841. Knott pleaded discharge in bankruptcy. The court held the debt to be a provable debt in bankruptcy and the plea of discharge in bankruptcy a good defense.

See R. S. Sec. 5069.

[76] *In re* Gerson (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11, affirming 105 Fed. Rep. 891, 5 Am. B. R. 89.

[77] *In re* Blumer, 13 Fed. Rep. 623.

[78] *In re* Crawford, No. 3364, Fed. Cas., s. c. 5 M. B. R. 301.

[79] *In re* Pulsifer, 14 Fed. Rep. 247.

[80] *In re* Howard, No. 6750, Fed. Cas., s. c. 4 N. B. R. 571; *In re* Burchell, 4 Fed. Rep. 406.

[81] B. A. 1898, Sec. 16.

able claim against the estate, provided the principal creditor fails to prove his debt.[82]

The statute provides that "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."[83] The surety has no provable claim unless he has paid the debt.[84]

This provision is intended to protect the surety or endorser. The creditor may prove his debt under section 63 of the act, but he is not compelled to do so. He has the double security of the bankrupt's liability and that of the surety. He may prefer not to prove his debt against the bankrupt's estate, but rely wholly upon the endorser or surety. In such case, were it not for this provision, the surety clearly would be without protection, for it is evident that the debt to be proved by the surety is not the indebtedness of the bankrupt to him. He therefore would have no provable claim against his estate. This clause of the act, however, expressly gives him this right. If the creditor proves his debt, and receives his proportionate share of the bankrupt's estate with other creditors, the surety or endorser has no provable claim. For, were he also permitted to prove the debt, it would be to allow the same debt to be proved, in part at least, twice. Whatever the creditor receives in div-

[82] B. A. 1898, Sec. 57*i*.

See also Mace v. Wells, 7 How. 272; *In re* Hollister, 3 Fed. Rep. 452; Kyle & Gunter v. Bostick & Sherrod, 10 Ala. 589; Liscomb v. Grace, 26 Ark. 231; Liddell v. Wiswell, 59 Vt. 365; Post, Administrator, v. Losey, et al., 111 Ind. 74; Fulwood v. Bushfield, 14 Penn. St. 90; Tubbs v. Williams, 9 N. C. 1; Morse v. Hovey, 7 N. Y. Chan. Rep. (1 Sandf.) 186; *In re* Ellerhorst, No. 4381, Fed. Cas., s. c. 5 N. B. R. 144.

[83] B. A. 1898, Sec. 57*i*. Compare R. S. Sec. 5070.

In re Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513; Livingston v. Heineman (C. C. A., 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A., 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Insley v. Garside (C. C. A., 9th Cir.), 121 Fed. Rep. 699, 10 Am. B. R. 52; Swarts v. Fourth Nat. Bank (C. C. A., 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel (C. C. A., 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[84] Phillips v. Dreher Co., 112 Fed. Rep. 404, 7 Am. B. R. 326.

idends diminishes *pro tanto* the surety's liability, and is equivalent to a payment made on his account and for his benefit.

Where the surety has paid a part of the debt to the creditor, such creditor may prove for the full amount owing by the bankrupt upon the obligation and after receiving in dividends satisfaction of the balance due him, will hold as trustee for the surety any dividends received by him in excess.[85] In case the creditor does not so receive the full amount of his debt the surety can not complain if called upon to pay the balance. Where the creditor has insisted upon the double liability he had secured, the surety has no right to intercept any sums which the creditor can collect from the bankrupt's estate, or to diminish the funds to which he has a right to look for satisfaction. It is only when the holder is fully satisfied that the surety can urge any claims to dividends payable on the original debt of the bankrupt.

Where a judgment recovered against a maker and payee of a note is satisfied by the payee, the latter's claim against the maker is provable under Sec. 57*i* and barred by discharge.[86]

In case the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor to the extent he shall have actually discharged it and no further. It is not necessary to make the claim provable that the surety has paid the debt for which he is liable.[87] He may prove his claim although he does not pay the note or other liability until after the commencement of proceedings in bankruptcy,[88] or although the debt does not fall due until after the petition is filed.[89] A joint maker who takes up the note by giving his own indi-

[85] Swarts v. Fourth Nat. Bank (C. C. A., 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re* Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651.

[86] Smith v. Wheeler, 55 N. Y. App. Div. 170.

[87] Mace v. Wells, 7 How. 272; s. c 17 Vt. 503; Morse v. Hovey, 1 Sandf. Ch. (N. Y.) 186, s. c. 1 Barb. Ch. 404; Kyle v. Bostick, 10 Ala. 589; Tubbs v. Williams, 9 Ired. 1; Fulwood v. Bushfield, 14 Penn. 90.

Contra, Cake v. Lewis, 8 Penn. 493; McMullin v. Bank, 2 Penn. 343.

[88] Hardy v. Carter, 8 Humph. (Tenn.) 153; Tunno v. Bethune, 2 Dessau. (S. C.) 285.

[89] Crafts v. Mott, 5 Barb. (N. Y.) 305, affirmed in 4 N. Y. 606.

vidual note is entitled to prove his debt.[90] But an endorser or a surety is authorized to prove a debt in case only that the principal creditor could prove it and fails to do so.[91] He can not participate in the distribution of the estate until he has surrendered preferences received by the creditor.[92] He acquires no higher or better rights than the prior holder.

A creditor or a surety or endorser is entitled regularly to prove the whole debt against the estate of a bankrupt maker, irrespective of whether payments have been made by the surety to the creditor or not.[93] It is evident that the estate of the bankrupt is indebted to the creditor for the whole debt. This debt is not affected by dealings between the surety and the principal. It is immaterial whether the payment of this indebtedness is made to the creditor directly or to an endorser or surety who has been subrogated to the rights of the creditor by actual payments made by him.

WHERE PRINCIPAL AND SURETY ARE BOTH BANKRUPTS.—It is well settled that if a mortgage, pledge or other lien is given by a principal debtor to secure his endorser and other surety, and both become bankrupts, the holders of the notes or other debts for which the surety is bound have an equity to apply the property to the discharge of their debts specifically.[94] A distinction has been sometimes taken between a security for the indemnity of the surety and one conditioned for the payment of the debt. But it seems well settled by the authorities that the creditor has an equitable claim to the

[90] *In re* Morrow, No. 9821, Fed. Cas., s. c. 2 Saw. 356.

[91] B. A. 1898, Sec. 57*i*; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513; Sigsby v. Willis, No. 12849, Fed. Cas., s. c. 3 Ben. 371; Ellis v. Ham, 28 Me. 385; Crafts v. Mott, 4 N. Y. 606.

[92] Livingston v. Heineman (C. C. A., 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A., 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Swarts v. Siegel (C. C. A., 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[93] *In re* Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651; *In re* Swift, 106 Fed. Rep. 65; Swartz v. Fourth Nat. Bank (C. C. A., 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re* Ellerhorst, No. 4381, Fed. Cas., s. c. 5 N. B. R. 144; Downing v. Traders Bank, No. 4046, Fed. Cas., s. c. 2 Dill. 136; as explained *In re* Hollister, 3 Fed. Rep. 452; *Ex parte* Talcott, No. 13184, Fed. Cas., s. c. 9 B. R. 502.

[94] *Ex parte* Morris, No. 9823, Fed. Cas., s. c. 2 Low. 424; Matthews v Abbott, No. 9275, Fed. Cas., s. c. 2 Hask. 289.

security as well when a mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt.[95]

It is quite immaterial whether the surety has or has not actually paid the debt. If he has become absolutely bound for its payment, as was said by Lord Eldon,[96] "It is true these bills were not paid, but, inasmuch as the estate of the debtor could not be withdrawn until the debts were paid . . . and inasmuch as the estate of the creditor holding the security was in a condition that he was not able to make payment of the bills in money's worth, the only way was to dispose of the security and pay the bills. . . . The bill holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security can not be taken away until all liability upon the bills is at an end."

Where a maker and endorser whose liability is fixed are both adjudged bankrupts the whole debt, it seems, may be proved against either or both estates.[97] The reason is that each of them is liable for the full amount. The debt only can be collected once. If the estate of the endorser discharges a part of the debt it would seem that the trustee of the endorser might prove such claim against the estate of the maker.[98]

§ 117. Interest.

In ascertaining the amount of a debt actually owing at the time the petition in bankruptcy is filed, the question of interest becomes important. Debts which are provable under the first clause of section 63 are allowable "with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

By this provision, interest which has accrued and would have been recoverable at the date of filing the petition is to

[95] New Bedford Institution v. Fair Haven Bank, 9 Allen (Mass.) 178; approved in Matthews v. Abbott, No. 9275, Fed. Cas., s. c. 2 Hask. 289.

[96] In *ex parte* Waring, 19 Ves. 345.

[97] Wollaston v. Porter, 122 Mass. 308.

[98] B. A. 1898, Sec. 57*m*. See Wollaston v. Porter, 122 Mass. 308.

be added to and become a part of the principal debt.[99] The interest which is to be so added is clearly that which could have been recovered under the state law,[100] or, in the absence of state law, under the laws of the United States.[101] Hence, if the interest is usurious, so much of the debt and interest is provable as could be recovered under the local law.[102] It is obvious that interest which accrues subsequently is not a debt absolutely owing at the time of the filing of the petition in bankruptcy. Where a debt, bearing interest at specified intervals, becomes due and payable before proceedings in bankruptcy are commenced, the creditor is entitled to prove for such interest, and also for interest from the date of maturity.[103]

Where the debt is payable at a future date the present value of the debt only is provable. If such debts bear interest all interest subsequent to the filing of the petition is rebated. Where such debts do not bear interest and are payable at a future date, the present value of the debt is ascertained by deducting from the amount of the debt the amount of interest on it, from the date of the filing of the petition until the time it becomes payable.[104] The remainder only is provable.

It is manifest that both classes of creditors, namely, those whose debt has matured and those whose debt is payable at a future date, are to be on an equal footing. The date of the filing of the petition is established as the time at which the liability is to be ascertained and determined. It may also be observed that where, as in most of the states of the Union, interest is regulated by law, and all the debts of the

[99] Sloan v. Lewis, 22 Wall. 150; *In re* Haake, No. 5883, Fed. Cas., s. c. 2 Saw. 231; *In re* Bartenbach, 1068, Fed. Cas., s. c. 11 N. B. R. 61; *In re* Orne, No. 10581, Fed. Cas., s. c. 1 Ben. 161.

[100] *In re* Prescott, No. 11389, Fed. Cas., s. c. 5 Biss. 523; *In re* Conrad, No. 3126, Fed. Cas., s. c. 6 A. M. Law Rev. 385; Providence County Sav. Bank v. Frost, No. 11453, Fed. Cas., s. c. 8 Ben. 293; *In re* Pittock, No. 11189. Fed. Cas., s. c. 2 Saw. 416; Nat. Exchange Bank v. Moore, No. 10041, Fed. Cas., s. c. 2 Bond 170.

[101] *In re* Wild, No. 17645, Fed. Cas., s. c. 11 Blatch. 243; Nat. Exchange Bank v. Moore, No. 10041, Fed. Cas., 2 Bond 170.

[102] See cases cited in last two notes above.

[103] *In re* Bartenbach, No. 1068, Fed. Cas., s. c. 11 N. B. R. 61.

[104] *In re* Orne, No. 10581, Fed. Cas., s. c. 1 Ben. 361.

bankrupt bear the same or nearly the same rate of interest, it is immaterial to the creditor at what time the interest stops on his debts, provided interest on all the debts stops simultaneously with his own. For his proportionate share of the assets will be the same if the same period is fixed for the stoppage of interest on all the debts.

Preferred creditors, however, are entitled to interest upon their claims to the date of the actual payment.[105]

§ 118. Costs.

Where costs are incident to a judgment obtained prior to bankruptcy proceedings[106] it is regularly a provable debt under section 63. The reason for this is that it is a fixed liability evidenced by a judgment.

The former acts contained no provision for costs in pending cases, or where the judgment was obtained pending bankruptcy proceedings.[107] But the present act expressly provides that costs are provable in such cases. Among the debts of the bankrupt which may be proved and allowed against his estate are debts "due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice";[108] and debts "founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt."[109] Costs to be provable must fall within one of these provisions.[110]

§ 119. Debts founded upon contract.

Debts founded upon an open account, or upon a contract express or implied, are provable in bankruptcy.[111] It is not necessary to be provable under this provision that the debt

[105] *In re* Strachen, No. 13519, Fed. Cas., s. c. 3 Biss. 181.

[106] *Ex parte* O'Neil, No. 10527, Fed. Cas., s. c. 1 Low. 163; Graham v. Pierson, 6 Hill (N. Y.) 247.

[107] *In re* Fortune, No. 4955, Fed. Cas., s. c. 1 Low. 306; Sandford v. Sandford, 58 N. Y. 66.

[108] B. A. 1898, Sec. 63, cl. 2.

[109] B. A. 1898, Sec. 63, cl. 3; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51.

But see *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

[110] *In re* Marcus, 104 Fed. Rep. 331, 5 Am. B. R. 19, affirmed (C. C. A., 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

[111] B. A. 1898, Sec. 63, cl. 4.

exist or be owing at the time of the filing of the petition. It must, however, arise within one year after the adjudication.[112] It need not be evidenced by a writing, but may be founded upon an oral agreement.[113]

It would seem, however, that the contract must have been made prior to the commencement of bankruptcy proceedings. The reasons for this are, *First,* the aim of the bankrupt act is to distribute the assets of the bankrupt of that date equally among those to whom the debtor has become liable. *Second,* contracts made subsequent to the filing of the petition are presumed to be made upon the credit of after-acquired property. *Third,* if debts arising upon contracts made subsequent to bankruptcy proceedings were allowed to be proved, it would open a wide door for fraud on the part of the bankrupt. The statute, however, does not expressly restrict contracts to those made prior to the bankruptcy proceedings.

Under this clause debts arising upon open accounts or the usual contracts of bargain and sale, although for future delivery, are provable. Where a loss upon a policy of insurance has been duly and regularly adjusted in good faith before the company is adjudicated a bankrupt, the claim can be proved like any other debt arising upon a contract.[114] Where a bankrupt has received property in trust, and has appropriated it in violation thereof, the debt thus created is provable.[115] So also a claim founded upon a covenant to repay a part of a premium, paid upon a policy of insurance upon the cancellation of the policy, is provable in the absence of provisions in the state laws, the charter or by-laws of the company which would make it void.[116]

A stockholder's statutory liability in an insolvent corpora-

[112] B. A. 1898, Sec. 57*n*; *In re* Rhodes, 105 Fed. Rep. 231, 5 Am. B. R. 197, 3 N. B. N. 112; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Leibowitz, 108 Fed. Rep. 617, 6 Am. B. R. 268; *In re* Moebius, 116 Fed. Rep. 47, 8 Am. B. R. 590.

[113] Capelle v. M. E. Church, No. 2392, Fed. Cas., s. c. 11 N. B. R. 536.

[114] *In re* Firemen's Ins. Co., No. 4796, Fed. Cas., s. c. 3 Biss. 462.

[115] *In re* Jordan, 2 Fed. Rep. 319; *In re* Upson, 123 Fed. Rep. 807; *In re* Rundle, No. 12138, Fed. Cas., s. c. 2 N. B. R. 113; Ungewitter v. Von Sachs, No. 14343, Fed. Cas., s. c. 4 Ben. 167.

[116] *In re* Independent Ins. Co., No. 7019, Fed. Cas., s. c. 2 Low. 187.

tion,[117] and unpaid subscriptions for stock in a corporation may be proved against the estate of a bankrupt stockholder.

A claim arising *ex delicto* and also of such a character as to constitute a claim on the theory of a quasi contract is provable under Sec. 63, clause 4.[118]

It has been held that a county may prove a claim for money due for the hire of convict labor.[119] A claim for damages for breach of contract of employment is provable when it can be liquidated,[120] but a general manager of a trading corporation has been refused under the circumstances of the case the right to prove a claim for the unpaid balance of his salary.[121] A debt has been held provable against the estate of a corporation in bankruptcy, where it was contracted by the company and amounted to more than one-half the sum of its available assets, but did not exceed one-half the amount of the stock paid up and actually issued to stockholders and held by them, where the articles of association limited the amount of indebtedness which it might contract to one-half the amount of the paid up capital stock.[122] The value of an annuity based upon the expectancy of life, has been held to be a provable debt.[123] A claim for margins against a bankrupt broker has been allowed.[124]

It would seem as if a contingent debt founded in contract might be proved in case the contingency happened and a debt was thereby created, although the contingency happened pending bankruptcy proceedings.[125] Where the liability of an en-

[117] *In re* Rouse, 40 Law Bul. (Ohio) 220.

[118] *In re* Filer, 125 Fed. Rep. 262; *In re* Hildebrant, 10 Am. B. R. 184; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

[119] *In re* Wright, 95 Fed. Rep. 807, 2 Am. B. R. 592, affirmed on appeal *sub nom; In re* Worcester County, 102 Fed. Rep. 808, 4 Am. B. R. 496.

[120] *In re* Silverman, 101 Fed. Rep. 219, 4 Am. B. R. 83, 2 N. B. N. 760.

[121] *In re* Grubbs-Wiley Grocery Co., 96 Fed. Rep. 183, 2 Am. B. R. 442; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154, 2 N. B. N. 23.

[122] Cunningham v. German Insurance Bank (C. C. A., 6th Cir.), 101 Fed. Rep. 977, 4 Am. B. R. 363.

[123] Cobb v. Overman (C. C. A., 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324, overruling Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788. See also Dunbar v. Dunbar, 190 U. S. 340.

[124] *In re* Swift, 105 Fed. Rep. 493, 5 Am. B. R. 398; *In re* Graff, 8 Am. B. R. 744.

But see *In re* Knott, 109 Fed. Rep. 626, 6 Am. B. R. 749.

[125] *In re* Gerson (C. C. A., 2d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11. See Dunbar v. Dunbar, 190 U. S. 340.

dorser becomes fixed after bankruptcy but within the time limited for proving claims he may prove under this clause, although he has not a provable claim under Sec. 63*a*, clause 1.[126]

Damages for breach of an executory contract may be proved when they can be liquidated.[127] Where a creditor proves for goods sold and delivered he is not entitled to prove for damages sustained by fraudulent representations in making the contract.[128]

An annual corporation fee required by state law solely as a condition of its continued existence without regard to the value of its property and franchises is not provable as a debt upon contract express or implied,[129] or damages for breach of a covenant for quiet enjoyment of a lease where the breach had not occurred at the time of bankruptcy,[130] or where a lessor has re-entered and taken possession of the property.[131]

A contract by a husband to pay a wife a certain sum at stated periods during her life or widowhood,[132] or for the support of his minor children is not provable against his estate in bankruptcy.[133]

A debt is not provable when founded upon an illegal consideration,[134] as where money is loaned a debtor for the purpose of committing an act of bankruptcy,[135] or where an overdraft has been made by a collusion with the cashier.[136]

§ 120. Rent.

Rent due by the bankrupt is regularly provable in bank-

[126] *In re* Gerson (C. C. A., 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[127] *In re* Manhattan Ice Co. (C. C. A., 2d Cir.), 116 Fed. Rep. 604, 8 Am. B. R. 569, affirming 114 Fed. Rep. 399, 7 Am. B. R. 408, *In re* Swift (C. C. A., 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 374.

[128] *In re* Hildebrant, 10 Am. B. R. 184.

[129] *In re* Danville Rolling Mill Co., 10 Am. B. R. 327.

[130] *In re* Pennewell (C. C. A., 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490.

[131] *In re* Shaffer, 124 Fed. Rep. 111; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; Lamson Consol. Store Service Co. v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639. See Sec. 120, *post*.

[132] Dunbar v. Dunbar, 190 U. S. 340.

[133] Dunbar v. Dunbar, 190 U. S. 340.

[134] Forsyth v. Woods, 11 Wall. 484.

[135] *In re* Hatje, No. 6215, Fed. Cas., s. c. 6 Biss. 436.

[136] *In re* Eureka Ins. Co., No. 4550, Fed. Cas., s. c. 1 Low. 500.

ruptcy. Under the act of 1867 rents ceased at the time of the bankruptcy.[137]

Under the present act there is no such provision. The courts have uniformly permitted to be proved against the estate of the bankrupt lessee rent due prior to the adjudication,[138] and rent for the occupation and use of leased premises after bankruptcy where such premises were actually used by a receiver or trustee.[139] Where bankruptcy occurs between rent days it may be doubted if the landlord can prove rent beyond the last rent day. The general rule is, that rent can not be apportioned as to time.[140]

A contract of lease is not *ipso facto* terminated by the bankruptcy of the lessee.[141] Whether rent under a lease accruing after bankruptcy may be proved against the tenant's estate in bankruptcy depends upon the terms of the lease, and the election of the trustee to take or reject the contract of lease.

It is entirely competent to contract that the consequences of a default of rent for the use of property, or the bankruptcy of the lessee, shall be the precipitancy of the maturity of future installments for the rental of the property in respect to which default has been made.[142] Such terms in a lease make future rent provable. But the trustee may reject the contract of lease and render such claim not provable.

In the opinions of the referees and of the judges there is a marked unanimity to the extent that rent to accrue in the future is not a provable debt under the leases which have been

[137] R. S. Sec. 5017.

[138] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246.

[139] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

[140] Hoagland v. Crum, 113 Ill. 365; Zule v. Zule, 24 Wend. (N. Y.) 74; The Mayor v. Ketchum, 67 How. Prac., N. Y. 161; Perry v. Aldrich, 13 N. H. 343; Randall v. Rich, 11 Mass. 494.

[141] *In re* Pennewell (C. C. A., 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson Consol. Store Service Co. v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; Atkins v. Wilcox (C. C. A., 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313.

But see *In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; *In re* Hays, Foster & Ward Co., 117 Fed. Rep. 879, 9 Am. B. R. 144; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788.

[142] Lamson Consol. Store Service Co. v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639; Platt v. Johnson, 168 Pa. 47.

considered. There is a great diversity of view as to the ground on which this ruling is placed.[143] Where by the terms of the lease future installments of rent are made immediately due and payable, the landlord may, acting under another clause of the lease, terminate it by re-entry,[144] or by accepting a surrender of a part of the lease,[145] and thereafter be estopped from proving for future rents after bankruptcy.

It has been held that a tenant could not prove for damages for a breach of covenant for quiet enjoyment of premises under a lease to begin after the date of bankruptcy,[146] or a landlord for breach of a covenant that the lessee should be liable for loss and damage sustained by the lessor on account of the premises remaining unleased or relet for less rent after the termination of the lease by re-entry.[147] The landlord cannot prove for damages occasioned by restoring alterations made by the lessee when in possession.[148] Where a landlord claims full rental under his lease, it may be shown that he agreed to reduce the rent, had accepted several installments at the reduced rates, and had been moved to make the reduction by considerations advantageous to himself, his claim for rent against the tenant's estate in bankruptcy must be reduced by the amount received from reletting the premises.[149]

The trustee in bankruptcy may elect to take the lease as an asset of the bankrupt tenant's estate. In such case the rent for

[143] *In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; *In re* Hays, Foster & Ward Co., 117 Fed. Rep. 879, 9 Am. B. R. 144; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; Wilson v. Penn Trust Co., 114 Fed. Rep. 742, 8 Am. B. R. 169; Atkins v. Wilcox (C. C. A., 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313; Lamson Consol. Store Service Co. v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639.

[144] *In re* Pennewell (C. C. A., 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson Consol. Store Service Co. v. Boland (C. C. A., 6th Cir.), 114 Fed. Rep. 639; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564.

[145] Wilson v. Penn. Trust Co., 114 Fed. Rep. 742, 8 Am. B. R. 169. But see Evans v. Lincoln Co., 204 Pa. St. 448, 10 Am. B. R. 401.

[146] *In re* Pennewell (C. C. A., 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490.

[147] *In re* Shaffer, 124 Fed. Rep. 111, 11 Am. B. R. —; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564.

[148] *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246.

[149] Evans v. Lincoln Co., 204 Pa. St. 448, 10 Am. B. R. 401.

the entire residue of the term would be provable as an unpreferred debt and the landlord would be entitled to a *pro rata* dividend. The unexpired portion of the term would become an asset of the bankrupt's estate to be disposed of by the trustee in bankruptcy for the benefit of the estate.

If the trustee elects to reject the contract of lease, as he has a right to do, it is a nullity so far as the bankruptcy proceedings are concerned. In such cases future rent although made due and payable at once by the terms of the lease, is not a provable debt. The landlord may prove for rent due prior to bankruptcy for the use and occupation of the premises either as "a fixed liability due and owing" or as a "debt arising in contract." For the same reason he may prove for subsequent use and occupancy of the premises by the trustee or receiver.[150]

Where the state law entitles the landlord to a lien upon the goods of his tenant for rent the court of bankruptcy will enforce such lien as against the proceeds of such goods when sold by the trustee.[151]

§ 121. Mutual debts and credits.

The present bankrupt statute provides that "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."[152]

Similar provisions are contained in the former United States bankrupt acts and in the English acts.[153] The opinions of the

[150] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

[151] *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324; Wilson v. Penn. Trust Co. (C. C. A., 3d Cir.), 114 Fed. Rep. 742, 8 Am. B. R. 169.

[152] Sec. 68 of the act of July 1, 1898, 30 Stat. at L.

[153] Act of 1867: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and

courts construing these provisions are valuable in determining the true meaning of the present section.

The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter is given by the statutes of set-off and counter claim to prevent cross actions. But under the bankrupt statutes the mutual credit clause has not been so construed. The object of this clause is not to avoid cross actions, for none would lie against trustees in bankruptcy, and one against the bankrupt would be unavailing, but to do substantial justice between the parties where a debt is really due from the bankrupt to a debtor to his estate.[154]

the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition."— R. S. Sec. 5073; Act of March 2, 1867, 14 Stat. at L. 526, Sec. 20.

Act of 1841: "In all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off."—Act of August 19, 1841, 5 Stat. at L. 445, Sec. 5.

Act of 1800: *"And be it further enacted*, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt, and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set-off, and no more, shall be claimed or paid on either side respectively."—Act of April 4, 1800, 2 Stat. at L. 33, Sec. 42.

English Act of 1883: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."— 46 and 47 Vic., Chap. 52, Sec. 38. This is in substance a re-enactment of the prior English statutes, beginning with the temporary act of IV and V Anne, Chap. 17. Each act differs slightly from the others.

[154] Forster v. Wilson, 12 M. & W. 203.

It may be doubted whether this mutual credit clause applies except between a creditor and trustee.[155]

§ 122. What are "mutual debts" and "mutual credits."

The words "mutual debts" and "mutual credits" appear in all of the bankrupt acts. The word "debt" includes any debt, demand or claim provable in bankruptcy in the present act.[156]

Prior to the leading case of Rose v. Hart,[157] decided in 1818, the words "mutual credit" generally received a very wide interpretation, much more extensive than the words "mutual debt."[158] In that case this phrase was defined in the following words: "Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shows that the legislature meant such *credits* only as must in their nature terminate in *debts,* as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore, it is not a credit within the meaning of the statute."[159] The rule established in this case as to the nature of the credits

[155] Consult New Quebrada Co. v. Carr, 4 L. R. C. P. 651; Turner v. Thomas, 6 L. R. C. P. 610; *In re* Fort Wayne Electric Corp., 95 Fed. Rep. 264, 2 Am. B. R. 503.

[156] B. A. 1898, Sec. 1, clause 11.

[157] 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part 1, 308, where the doctrine of set-off in bankruptcy is considered at length and the English and American cases on the subject collated and reviewed in a note at the end of the opinion.

[158] *Ex parte* Deeze, 1 Atk. 228; Murray v. Riggs, 15 John. (N. Y.) 571.

[159] Rose v. Hart, 8 Taunt. 506, s. c. 2 Smith's Leading Cases, Part I, 308, and note.

which can be subject of set-off has been declared in other cases.[160]

In the case of Libby *v.* Hopkins,[161] speaking of the act of 1867, which is almost identical with the present statute in this respect, the supreme court said: "In our act the terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of this section or its contents for extending the terms so as to include trusts." Having in mind the definition of debts as used in the bankrupt law, this language would not seem to limit the rule laid down in Rose *v.* Hart.[162] But "mutual debts" and "mutual credits" would include debts, demands or claims provable in bankruptcy which must in their nature terminate in debts. In Rose *v.* Hart, the word debt is evidently used with its technical legal meaning.

A claim for unliquidated damages provable under the act can not be set off against the debt of a creditor or a bankrupt until it has been put into the shape of a debt.[163]

In order that a debt or credit may be set off it is necessary that four things concur. *First.* The debts or credits must be mutual. *Second.* They must be in the same right. *Third.* They must be debts or credits provable in bankruptcy. *Fourth.* They must be debts or credits which were not purchased by or transferred to the debtor of the bankrupt after the filing of the petition, or within four months before such filing for the purpose of setting them off, and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. If any one of these elements is wanting the debt or credit can not be used as a set-off. These elements will be considered separately.

[160] Libby v. Hopkins, 104 U. S. 307; *In re* Caylus, No. 2534, Fed. Cas., s. c. 1 Low. 550; Catlin v. Foster, No. 2519 Fed. Cas., s. c. 1 Saw. 37; Easum v. Cato, 5 B. & Ald. 861; Young v. Bank, 1 Moore, P. C. 150; Palmer v. Day (1895), 2 Q. B. 618; Smith v. Hodson, 4 T. R. 212; Goodrich v. Dobson, 43 Conn. 576.

[161] 104 U. S. 309.

[162] 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part I, 308.

[163] *In re* Orne, No. 10581, Fed. Cas., s. c. 1 Ben. 361; Brown v. Cuming, 2 Caines (N. Y.) 33; Booth v. Hutchinson, 15 L. R. Eq. 30; Palmer v. Day, 2 Q. B. 618.

§ 123. **What mutuality is necessary.**

The debts and credits which are to be set off one against the other must be mutual.[164] In order to constitute that mutuality of debts or credits which is required by the statute it is necessary that the debt or credit which is set off, and the debt or credit against which it is set off, should be between the same parties. Thus ordinarily a joint debt can not be set off against a separate debt, nor a separate debt against a joint debt, nor debt due from three persons against a debt due to two of them, or the like.[165] Where the joint debt may be collected from the property of either of the joint debtors, and is provable in bankruptcy against the estate of him who has been adjudged a bankrupt, it may be set off against any claim which the bankrupt has against the creditor.[166] A debt of one of two partners to the other partner may be set off against a balance in his hands arising upon the settlement of the partnership accounts.[167]

The question whether a debt payable *in futuro* could be set off against a debt payable *in praesenti* was one of the earliest which arose under the English bankrupt act. It was decided in the affirmative on the ground that, though there might not be debts mutually payable between the parties, there were mutual credits, and that the case came within the equity of the statute.[168] The same question has received a similar answer in the United States in cases arising under the former bankrupt acts.[169]

[164] Libby v. Hopkins, 104 U. S. 369; Gray v. Rollo, 18 Wall. 632; Sawyer v. Hoag, 17 Wall. 622; Scovill v. Thayer, 105 U. S. 143; Wilson v. Nat. Bank, 3 Fed. Rep. 391.

[165] Gray v. Rollo, 18 Wall. 629; Forsyth v. Woods, 11 Wall. 484; Clark v. Sparhawk, No. 2836, Fed. Cas., s. c. 2 Weekly Notes, Cas. 115; *In re* Crystal Spring Bottling Co., 100 Fed. Rep. 265, 4 Am. B. R. 55, 3 N. B. N. 179; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223. *Ex parte* Twogood, 11 Ves. 517; *Ex parte* Ross Buck, 125; Staniforth v. Fellowes, 1 Marsh, 184.

[166] Tucker v. Oxley, 5 Cranch 34, as explained in Gray v. Rollo, 18 Wall. 633; Cosgrove v. Cosby, 86 Ind. 511.

[167] *In re* Voetter, 4 Fed. Rep. 632; Clark v. Sparhawk, No. 2836, Fed. Cas., s. c. 2 Weekly Notes, Cas. 115.

[168] *Ex parte* Prescott, 1 Atk. 230; Alsagar v. Currie, 12 M. & W. 751; *Ex parte* Wagstaff, 13 Ves. 65; Sheldon v. Rothschild, 8 Taunt. 156; Atkinson v. Elliott, 7 T. R. 378.

[169] Marks v. Barker, No. 9096, Fed. Cas., s. c. 1 Wash. C. C. 178; Catlin v. Foster, No. 2519 Fed. Cas., s. c. 1 Saw. 37; Fort v. Mc-

In order to render debts and credits mutual, it is not necessary that the creditor and the bankrupt should have had any intention to create cross demands.[170]

It is not necessary that the demand should be of the same nature. They may be different in their nature. Thus, one may be founded on deed and the other on simple contract. A loss upon a policy of insurance may be set off against an indebtedness for money borrowed from an insurance company,[171] or for money deposited with the holder as a banker.[172] A person may set off a credit on deposit in a bankrupt bank against his indebtedness on notes or as the endorser upon a note held by the bank which has been protested.[173] A check issued by a bankrupt may be set off against a note due the bankrupt's estate.[174]

Where bills, money or chattels are deposited with the creditor for a specific purpose, he can not claim to set off a debt owing to him from the bankrupt against the trustee claiming such bills or goods.[175] Such a case exists where goods are de-

Cully, 59 Barb. (N. Y.) 87; *In re* City Bank, No. 2742, Fed. Cas., s. c. 6 N. B. R. 71; Drake v. Rollo, No. 4066, Fed. Cas., s. c. 3 Biss. 273.

[170] Hankey v. Smith, 3 T. R. 507; Edmeads v. Newman, 1 B. & C. 418.

But see observation of Mr. Justice Bradley in Gray v. Rollo, 18 Wall. 632. He said: "Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any referance to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the bankrupt law."

[171] Scammon v. Kimball, 92 U. S. 362; Drake v. Rollo, No. 4066, Fed. Cas., s. c. 3 Biss. 273; Commonwealth v. Shoe Insurance Co., 112 Mass. 131.

[172] *In re* Fornsworth, No. 4673, Fed. Cas., s. c. 5 Bis. 223; Scammon v. Kimball, No. 12435, Fed. Cas., s. c. 5 Biss. 431; *In re* Petrie, No. 11040, Fed. Cas., s. c. 5 Ben. 110; Bank v. Massey, 192 U. S. 138.

[173] Marks v. Barker, No. 9096, Fed. Cas., s. c. 1 Wash. C. C. 178; Winslow v. Bliss, 3 Lans. (N. Y.) 220; In re Meyers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Henry L. Meyer, 5 Am. B. R. 593, 106 Fed. Rep. 828. But see Henry L. Meyer, 5 Am. B. R. 596.

[174] Ogden v. Cowley, 2 Johns. (N. Y.) 274.

[175] Libby v. Hopkins, 104 U. S. 303; Sawyer v. Hoag, 17 Wall. 610; Rose v. Hart, 8 Taunt. 499; Jenkins

posited with a bailee for the purpose of having work done upon them,[176] or where money is deposited for a specific purpose.[177] So where a trustee seeks to set aside a preference the defendant can not set off notes of the bankrupt.[178] But if a mutual debt or credit within the meaning of this section is once established a temporary suspension of it has been held not to destroy the right to set off where the mutual debt or credit afterwards revives.[179]

Where there is a debt on one side and on the other a delivery of property with power to turn it into money, he may turn it into money and the two debts may be set off one against the other. The test is whether the credit given by the delivery of the property must in its nature terminate in a debt. Thus a creditor, who at the time of the bankruptcy has in his hands goods or chattels of the bankrupt with a power of sale or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him, and this although the power to sell or to collect were revocable by the bankrupt before his bankruptcy.[180]

§ 124. The debts and credits must be in the same right.

In order that debts and credits may be set off they must be due respectively in the same right.[181] This rule is subject to a few exceptions to be mentioned presently. It is evident that there is a distinction between debts being mutual and debts being held in the same right. Debts may be mutual and held in different rights.

Thus it has been held that a debt due to an executor, as

v. Armour, No. 7260, Fed. Cas., s. c. 6 Biss. 312; Goodrich v. Dobson, 43 Conn. 576; *In re* Lane, No. 8043, Fed. Cas., s. c. 2 Low. 305.

[176] Rose v. Hart, 8 Taunt. 499.

[177] Libby v. Hopkins, 104 U. S. 303.

[178] Fleming v. Andrews, 3 Fed. Rep. 632.

[179] Collins v. Jones, 10 B. & C. 777; Bolland v. Nash, 8 B. & C. 105.

[180] *Ex parte* Whiting, No. 17573, Fed. Cas., s. c. 2 Low. 472; Rose v Hart, 8 Taunt. 506, s. c. 2 Smith Leading Cases, Part 1, 330, and notes thereto; Goodrich v. Dobson, 43 Conn. 576; *In re* McVay, 13 Fed. Rep. 443.

But see Brown v. New Bedford Savings Inst., 137 Mass. 262.

[181] Sawyer v. Hoag, 17 Wall. 622; Libby v. Hopkins, 104 U. S. 303; Wright v. Rogers, No. 18090, Fed. Cas., s. c. 3 McLean, 229; West v. Pryce, 2 Bing. 455.

executor, can not be set off against a debt due from him in his own right.[182] But where a person as executor and residuary legatee had a balance in the hands of bankers he has been allowed to set off, in an action by the trustee of the bankers for a debt due from him to them, the balance due him as executor and residuary legatee, it appearing that he had in his hands more than sufficient assets to pay all the testator's debts and legacies remaining unpaid.[183] It has also been held that a debt due for stock in a corporation could not be set off against a debt due from the corporation.[184] The reason for this is, that the debt which the appellant owed for his stock is a trust fund held by the corporation for the benefit of all creditors of the company, and, therefore, not in the same right as a debt between the company and the debtor. Where a creditor of a bankrupt knowing him to be in failing circumstances agrees to open a new account irrespective of the old indebtedness he can not set off the amount due by him on the new account against the amount due to him on the old account.[185]

A judgment for a penalty incurred by the violation of a statute against usury is not a proper set-off against a claim of the judgment debtor against the bankrupt's estate.[186] It has also been held that a debt owing to a wife when sole can not be set off against a debt from her husband,[187] nor a debt owing by the bankrupt's wife before marriage against a debt owing to him [188] unless after marriage he makes the wife's debt his own.[189] A debt due to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate can not be set off against a debt due from or to the bankrupt before the bankruptcy.[190]

[182] Bishop v. Church, 3 Atk. 691.

[183] Bailey v. Finch, 7 L. R. Q. B. 34. See observations on this case in *ex parte* Morier, 12 Chan. Div. 491.

[184] Sawyer v. Hoag, 17 Wall. 610; Scovill v. Thayer, 105 U. S. 143; Scammon v. Kimble, 92 U. S. 362; Sanger v. Upton, 91 U. S. 56; Morgan v. Allen, 103 U. S. 498; *In re* Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

[185] *In re* Troy Woolen Co., No. 14203, Fed. Cas., s. c. 8 N. B. R. 412.

[186] Wilson v. National Bank, 3 Fed. Rep. 391.

[187] *Ex parte* Blagden, 19 Ves. 465.

[188] Yates v. Sherrington, 11 M. & W. 42; s. c. 12 M. & W. 855.

[189] Wood v. Akers, 2 Esp. 594.

[190] Alloway v. Steere, 10 Q. B. D. 22; West v. Pryce, 2 Bing. 455.

For the same reasons the separate debt of one partner can not be set off against a partnership debt or *vice versa*.[191] But the rule excluding a set-off as between joint and separate debts does not apply to a surviving partner, as the right to sue for partnership debts survives to him alone.[192] Neither does it apply where the joint debt is in fact a security for the separate debt, as where one partner joins in a bond merely as surety for another.[193] In such case the debt on the joint security is in reality the debt of the principal debtor only, who may set off a debt owing to him by the obligee. It has been thought that the mutual credit clause does not apply to partnership debts unless all the members of the firm are bankrupt; for it was intended to operate only in respect of demands by and against bankrupts. Hence it would not apply if there was a solvent partner.[194] If it should be held to apply in such cases it is manifest that it would not release the liability of the solvent partner.[195]

There are a few exceptions to the general rule. Thus, in the case of a factor selling goods as his own without disclosing his principal the debtor may set off against the principal any debt which he could have set off against the factor.[196] So also it seems that by special agreement debts in separate rights may be set off, one against the other.[197]

§ 125. Set-offs must be provable debts.

The statute expressly provides that a set-off, or counterclaim, in favor of any debtor of the bankrupt must be provable against the estate.[198] It would seem that any debt provable in

[191] Forsyth v. Woods, 11 Wall. 484; Gray v. Rollo, 18 Wall. 629; Clark v. Sparhawk, No. 2836, Fed. Cas., s. c. 2 Weekly Notes, Cas. 115; *Ex parte* Twogood, 11 Ves. 517; Lanesborough v. Jones, 1 P. W. 326; *Ex parte* Ross Buck, 125; Abbott v. Hicks, 5 Bing., N. C. 578.

[192] Tucker v. Oxley, 5 Cranch, 34; as explained in Gray v. Rollo, 18 Wall. 633; Cosgrove v. Crosby, 86 Ind. 511; French v. Andrade, 6 T. R. 582; Slipper v. Stidstone, 5 T. R. 493.

[193] *Ex parte* Hanson, 12 Ves. 346; s. c. 18 Ves. 232; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

[194] See Vulliany v. Noble, 3 Mer. 621; *Ex parte* Stephens, 11 Ves. 24.

[195] B. A. 1898, Sec. 16.

[196] George v. Clagett, 7 T. R. 359.

[197] Cuxon v. Chadley, 1 C. & P. 174.

[198] B. A. 1898, Sec. 68*b*; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513.

bankruptcy might be set off against any mutual debt held in the same right, provided it was not purchased for this purpose within the time limited in the act. What constitutes a provable debt is the subject of this chapter, and does not require further explanation at this point.

It was held formerly that the liability of an endorser or surety could not be made a subject of set-off unless he had actually paid the debt.[199] Where, under section 57*i*, such claim is provable it would seem that it may be set off against any claim of the principal debtor against the surety to the extent that the endorser or surety can prove his claim. So also costs provable under the act may be the subject of set-off.[200] Under the former acts untaxed costs were not provable, and, therefore, could not be used as set-offs, but under the present act they are provable, and consequently can be the subject of set-off.[201]

§ 126. Debts acquired by purchase as set-offs.

There is nothing unlawful in purchasing a debt, though it be for the purpose of using it as a set-off.[202] Such debts may be the subject of set-off, provided they were not purchased by or transferred to such person after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.[203]

It would therefore seem that a claim or debt purchased more than four months prior to the filing of the petition might be used as a set-off, irrespective of whether the person purchasing or receiving it had knowledge or notice that the bankrupt was insolvent or not.[204]

[199] Abbott v. Hicks, 5 Bing., N. C. 578.

[200] See Staniforth v. Fellowes, 1 Marsh, 184; Thomason v. Frere, 10 East, 418.

But see Robarts v. Brèe, 8 Cha. Div. 198.

[201] See Costs, Sec. 118, *ante*.

[202] Mattocks v. Lovering, 3 Fed. Rep. 212; Lloyd v. Turner, No. 8436, Fed. Cas., s. c. 5 Saw. 463; Hovey v. Home Insurance Co., No. 6743, Fed. Cas., s. c. 10 N. B. R. 224; Humphreys v. Blight, No. 6870, Fed. Cas., s. c. 4 Dall. 370; *In re* City Bank, No. 2742, Fed. Cas., s. c. 6 N. B. R. 71.

[203] B. A. 1898, Sec. 68*b*. Compare R. S. Sec. 5073; McIver v. Wilson, No. 8833, Fed. Cas., s. c. 1 Cranch C. C. 423; Smith v. Brinkerhoff, 2 Selden (N. Y.) 305.

[204] Mattocks v. Lovering, 3 Fed. Rep. 212; Lloyd v. Turner, No. 8436, Fed. Cas., s. c. 5 Saw. 463; Hovey v. Home Insurance Co., No.

In computing the four months the first day is excluded and the last day included unless the last day falls on a Sunday or holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.[205] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[206]

§ 127. Rights of preferred creditor to set-offs.

Under the mutual credit clause [207] a creditor having a preference can not set off an individual debt in a suit by the trustee to set aside such preference. The reason is, that the debts are not mutual nor in the same right. The preference which is being avoided is a debt between the preferred creditor and the general creditors — not the bankrupt. The individual debt is between the preferred creditor and the bankrupt. The trustee holds one of the debts as the representative of the general creditors and the other as the representative of the bankrupt.

But the act expressly provides for set-offs in such cases, as follows: "If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.[208]

Waiver of Off-set.—If a claim for set-off, or counterclaim, is not set up at the time of proving the claim in bankruptcy it will be deemed as waiver. It has been held that

6743, Fed. Cas., s. c. 10 N. B. R. 224; Humphreys v. Blight, No. 6870, Fed. Cas., s. c. 4 Dall. 370. But see Hitchcock v. Rollo, No. 6535, Fed. Cas., s. c. 3 Biss. 276; Rollins v. Twitchell, No. 12027, Fed. Cas., s. c. 2 Hask. 66; Smith v. Hill, 8 Gray 572.

[205] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553; *In re* Lang, No. 8056, Fed Cas., s. c. 2 N. B. R. 480.

[206] B. A. 1898, Sec. 1, clause 14.

[207] B. A. 1898, Sec. 68.

[208] B. A. 1898, Sec. 60*c*; *In re* Seckler, 106 Fed. Rep. 484; *In re* Christensen, 101 Fed. Rep. 802, 4 Am. B. R. 202.

the creditor could not maintain a suit upon such a debt thereafter.[209]

§ 128. Torts.

Under the former bankruptcy acts unliquidated damages for torts, such as assault, slander, deceit or personal injury, were not provable in bankruptcy.[210]

The bankruptcy act of 1898 does not authorize proving any claim arising *ex delicto*.[211] The courts have frequently refused to allow proof of unliquidated claims for tort.[212] Where damages for torts have been liquidated and reduced to judgment prior to bankruptcy, such judgment is not a provable claim, for the reason that it is not a debt, within the meaning of the bankruptcy statute, evidenced by judgment. It has been held that the court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action, to determine whether it is a debt within the meaning of the statute that is evidenced by the judgment.[213] It has been claimed that such judgment is a provable debt because Sec. 17 excepts some judgments of this nature from debts released by discharge. The same section as amended releases claims for alimony which the supreme court had held prior to the amendment not to be provable in bankruptcy.[214] It does not follow, therefore, that all debts and claims, included in the exception to those released by a discharge, are provable claims against the estate of the bankrupt.

In England a distinction is made where a demand may arise upon contract or upon tort, as in actions for negligence against carriers, or in actions against bailees to recover the pledge after the determination of the bailment, which may

[209] Brown v. Farmers' Bank, 6 Bush. (Ky.) 198; Russell v. Owen, 61 Mo. 185. See also *In re* State Ins. Co., 16 Fed. Rep. 756.

[210] Zimmer v. Schleehauf, 115 Mass. 52; *In re* Hennocksburgh, No. 6367, Fed. Cas., s. c. 6 Ben. 150; *In re* Schuchardt, No. 12483, Fed. Cas., s. c. 8 Ben. 585.

[211] B. A. 1898, Sec. 63*a*; *In re* Hirschman, 104 Fed. Rep. 69; 4 Am. B. R. 715.

[212] *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425; *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Heinsfurter, 97 Fed. Rep. 198, 3 Am. B. R. 113.

[213] Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

[214] Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340.

be either in trover or assumpsit.[215] That is, if a person has his election of two remedies, and may bring either trover or any other action, the possibility of his not electing to bring trover does not prevent his proving his debt if he will waive the tort. Thus, a patentee was there held entitled to prove for the amount of profits made by an infringement of his patent as money had and received.[216] But under the act of 1867 the same rule was applied with reference to patents in *in re* Boston & Fair Haven Iron Works.[217] But this case was reversed on appeal to the circuit court.[218]

Under the act of 1898 it is well settled that where a claim arises *ex delicto,* but is also of such a character as to constitute a claim on the theory of a quasi contract the debt is provable in bankruptcy under Sec. 63, clause 4.[219]

§ 129. Debts barred by the statutes of limitations.

The courts of the United States recognize generally the statutes of limitations of the several states.[220] Courts of bankruptcy recognize such statutes of limitations. A debt otherwise provable may be barred by a state statute of limitations so that the debt is not allowable, but is such a debt as will be released by a discharge.[221]

In order to be barred in bankruptcy a debt must be barred by the statute of the state in which the petition in bankruptcy is filed.[222] The reason for this is, that a statute of limitation

[215] Johnson v. Spiller, 1 Douglass, 168; Parker v. Norton, 6 T. R. 695. See also *In re* Schwartz, No. 12502, Fed. Cas., s. c. 14 Blatch. 196.

[216] Watson v. Holiday, 20 L. R. Chan. D. 780.

[217] 29 Fed. Rep. 783.

[218] 23 Fed. Rep. 880.

[219] *In re* Filer, 125 Fed. Rep. 262; *In re* Hildebrant, 10 Am. B. R. 184; *In re* Hirschmann, 104 Fed. Rep. 69; 4 Am. B. R. 715.

[220] Bauserman v. Blunt, 147 U. S. 652, and cases there collated.

[221] Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232.

[222] *In re* Resler, 95 Fed. Rep. 804, 2 Am. B. R. 602; *In re* Lipman, 2 Am. B. R. 46, 94 Fed. Rep. 353; Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232; *In re* Hardin, No. 6048, Fed. Cas., s. c. 1 Hask. 163; *In re* Kingsley, No. 7819, Fed. Cas., s. c. 1 Low. 216; *In re* Reed, No. 11635, Fed. Cas., s. c. 6 Biss. 250; *In re* Doty, No. 4017, Fed. Cas., s. c. 16 N. B. R. 202; *In re* Cornwall, No. 3250, Fed. Cas., s. c. 9 Blatch. 114; *In re* Noesen, No. 10288, Fed. Cas., s. c. 6 Biss. 443.

In re Ray, No. 11589, Fed. Cas., s. c. 2 Ben. 53, it was held that the

affects the remedy and not the right. If the debt is not barred at the time the petition is filed it is a provable debt, because bankruptcy stops the running of the statute.[223]

It may be observed, however, that a claim may be barred by limitations contained in the bankrupt act, which provides that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment.[224]

The failure of a lien claimant to present his claim or lien for recognition or enforcement within the period limited by this provision bars such claim as effectually as an omission to prove any other debt, provided such lien is determined to be incomplete or invalid.[225] In such case the debt may be proved in bankruptcy if presented within the time limited by this provision.

debt must be barred throughout the limits of the United States.

[223] *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* McKinney, 15 Fed. Rep. 912; *In re* Waties & Co., 39 Fed. Rep. 264; Trustees v. Bosseiux, 3 Fed. Rep. 817; *In re* Eldridge, No. 4331, Fed. Cas., s. c. 2 Hughes, 256; *In re* Wright, No. 18068, Fed. Cas., s. c. 6 Biss. 317; *In re* Graves, 9 Fed. Rep. 816. But see *contra, In re* Shepard, No. 12753, Fed. Cas., s. c. 1 N. B. R. 439; Nicholas v. Murray, No. 10223, Fed. Cas., s. c. 5 Saw. 320.

[224] B. A. 1898, Sec. 57*n; In re* Rhodes, 105 Fed. Rep. 231, 5 Am. B. R. 197, 3 N. B. N. 112; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Leibowitz, 108 Fed. Rep. 617; *In re* Moebius, 116 Fed. Rep. 47, 8 Am. B. R. 590.

As to the effect of amendment of proof of claim after one year, see Hutchinson v. Otis, 190 U. S. 552, 10 Am. B. R. 135.

[225] *In re* Brunquest, No. 2055, Fed. Cas., s. c. 7 Biss. 208.

CHAPTER XIV.

HOW TO PROVE DEBTS.

§ 130. Necessity of proof.

No creditor is entitled to participate in the distribution of a bankrupt's estate or to obtain a dividend upon any claim until such claim or debt has been proved and allowed. The proof must be made in the manner prescribed by the statute and general orders.[1] It is immaterial what may be its form, whether it consists of a contract, account, promissory note, bond or judgment. Secured and unsecured creditors stand upon the same footing as regards proof of their debts.[2]

The fact that the debts are contained in the debtor's schedule is not proof sufficient to entitle a party to participate in the distribution of the estate. It may be stated fraudulently, or it may not exist, or there may be payments, or counterclaims, or set-offs. The reason for requiring proof is not merely to give the creditors a standing in court, but to protect the estate against fraudulent and excessive claims. Even the claims of petitioners in involuntary proceedings must be proven and allowed like other claims.[3] The trustee and the

[1] B. A. 1898, Sec. 57; Gen. Ord. 21; Official Forms Nos. 31 to 37, see Forms 54 to 60, *post*.

[2] Davis v. Anderson, No. 3623, Fed. Cas., s. c. 6 N. B. R. 145, approved *In re* Anderson, 23 Fed. Rep. 500; *In re* Davis, No. 3618, Fed. Cas., s. c. 2 N. B. R. 391. But see Rights of Secured Creditors, Sec. 202.

[3] *In re* Cleveland Ins. Co., 22 Fed. Rep. 204, Mr. Justice Matthews observes: "It can not be admitted that the finding that the petitioning creditors has a valid provable claim to the amount of $250, which is all that is necessary as a predicate for the adjudication upon the alleged act of bankruptcy, is conclusive upon the assignee and creditors, so as to dispense with proof of the debt of the petitioning creditor upon the distribution of the estate. It is conclusive so far as necessary to uphold the adjudication of bankruptcy, but no further. It may still be questioned, in part or in whole, upon the proof subsequently required and taken, so that it might consistently happen that a claim which has been found to exist, for the purpose of adjudging bankruptcy against the defendant, might afterwards be held not to exist for the purpose of participating in the distribution of the estate. The as-

other creditors have a right to question the debt in part or in whole upon proof subsequently required to be taken. They therefore have the right to demand that all the statements required by the statute shall be full and complete in making out a *prima facie* case of the validity of the claim and the good faith of the claimant.

§ 131. **Who may make the proof.**

The proof of a debt against a bankrupt's estate should be made, if possible, by the creditor testifying of his own knowledge.[1] The statute and the general orders prescribed by the supreme court contemplate proof by an agent or attorney of the creditor.[2] When the proof is made by an agent or attorney the reason the deposition is not made by the claimant in person must be stated.[3] What reason is sufficient to excuse the creditor and to entitle an agent or attorney to make the proof is not stated in the act or general orders. The act of 1867 provided for proof by an agent in two cases only, *first*, when the claimant was absent from the United States, and, *second*, when he was prevented by some good reason from testifying.[4]

A debt due a partnership may be proved by one of the partners, but it must appear on oath that the deponent is a member of the partnership.[5] A debt due a corporation may be proved by the treasurer or by the officer whose duties correspond most nearly to those of the treasurer.[6] This rule applies to municipal and political corporations.[7]

signee and the creditors cannot be bound as to their own interests by the acts or default of the bankrupt, resulting in a judgment to which they were not and could not be parties, except so far as that judgment determines the *status* of the bankrupt. But in the present case, the claim of the Globe Insurance Company, as presented to the register for allowance, was not set forth in the petition nor passed on by the court."

But see Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425.

[1] B. A. 1898, Sec. 57*a*.

[2] B. A. 1898, Sec. 1, clause 9; Gen. Ord. 21.

[3] Gen. Ord. 21; Official Form No. 35, Form No. 58, *post*.

[4] R. S. Sec. 5078; *In re* Whyte, No. 17606 Fed. Cas., s. c. 9 N. B. R. 267; *In re* Watrous, No. 17270 Fed. Cas., s. c. 14 N. B. R. 258.

[5] Gen. Ord. 21; Official Form No. 34, Form No. 57, *post*.

[6] Gen. Ord. 21; Official Form No. 33, Form No. 56, *post*.

[7] Corn Exchange Bank, No. 3243 Fed. Cas., s. c. 15 N. B. R. 216.

A father who has a debt may prove against the estate of his son.[8] Where a wife can contract debts under the laws of a state, she may prove against her husband's estate.[9] Judgment creditors whose liens are invalidated by bankruptcy proceedings are entitled to prove their claims as other creditors.[10] An assignee for the benefit of creditors is entitled to prove for services rendered in the state proceedings prior to and after bankruptcy so far as they were beneficial to the estate.[11] Where a creditor has recovered judgment against two co-defendants and has levied upon the property of one of them, and the other has been adjudged bankrupt, the judgment creditor may prove his whole claim against the bankrupt as an unsecured claim.[12] A creditor of a corporation, who is also a subscriber for its corporate stock, may prove his claim against the estate of the corporation in bankruptcy.[13] A customer of a stock broker, between whom and the broker there is a running account, may prove his claims against the broker's estate as any other creditor.[14] A person who is secondarily liable for a debt of a bankrupt, as endorser or surety may prove provided the principal creditor fails to prove his debt.[15] He is subrogated to no greater right to prove than his principal has.[16] A secured creditor may prove for balance due on a secured claim after the security has been exhausted, although he may have previously proved unsecured claims against the same estate.[17]

The trustee of one bankrupt estate may prove claims of the estate which is being administered in bankruptcy against

[8] *In re* Rider, 96 Fed. Rep. 811, 3 Am. B. R. 192.

[9] *In re* Neiman, 109 Fed. Rep. 113, 6 Am. B. R. 329; *In re* Chapman, 105 Fed. Rep. 901, 5 Am. B. R 570.

[10] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506.

[11] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1, overruling *In re* Peter Paul Book Co., 104 Fed. Rep. 786; Stearn v. Flick, 103 Fed. Rep. 919, 4 Am. B. R. 723.

[12] *In re* Headley, 97 Fed. Rep. 765, 3 Am. B. R. 272.

[13] *In re* Weiner & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

[14] *In re* Gaylord, 113 Fed. Rep. 131, 7 Am. B. R. 577.

[15] B. A. 1898, Sec. 57*i*; see Sec. 116, *ante*.

[16] Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[17] *In re* Ball, 123 Fed. Rep. 164.

any like estate in the same manner and upon the like terms as the claims of other creditors.[18] Administrators, executors, receivers and other persons who are assignees by mere operation of law may prove in the same manner as the parties whom they represent could have done.[19]

Where a claim has been assigned in good faith and for a valuable consideration the assignee may prove it whether the assignment was made before or after the petition is filed. When the assignment was made before the commencement of the proceedings the proof is made by the assignee, and need not be supported or accompanied by the affidavit of the assignor.[20] Claims which have been assigned after the petition is filed and before proof must be supported by a deposition of the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or, if secured, what the security is as required in proving secured claims.[21] Where a person has procured an assignment of claims by fraud he will not be allowed to prove them.[22] An assignee will not be entitled to have a claim allowed which could not be proved and allowed in favor of his assignor.[23]

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable.[24]

Creditors who have received preferences may prove claims, but are not entitled to have them allowed, unless such creditors shall surrender their preferences.[25]

The United States may prove their debts in the same

[18] B. A. 1898, Sec. 57*m*.

[19] *In re* Republic Ins. Co., No. 11705 Fed. Cas., s. c. 8 N. B. R. 197; *Ex parte* Norwood, No. 10364 Fed. Cas., s. c. 3 Biss. 504.

[20] Gen. Ord. 21; par. 3; *In re* Murdock, No. 9939 Fed. Cas., s. c. 1 Low. 362; *In re* Frank, No. 5050 Fed. Cas., s. c. 5 Ben. 164; *In re* Strachan, No. 13519 Fed. Cas., s. c. 3 Biss. 181; *Ex parte* Davenport, No. 3586 Fed. Cas., s. c. 1 Low. 384.

[21] Gen. Ord. 21, par. 3.

[22] *In re* State Ins. Co., 16 Fed. Rep. 756.

[23] *In re* Wiener & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

[24] Gen. Ord. 21.

[25] B. A. 1898, Sec. 57*g*, as amended Fed. 5, 1903, 32 Stat. at L. 797. See also Sec. 135, *post*.

manner as other creditors.[26] But the United States are not required to prove their claims in bankruptcy.[27] A state or municipality is not required to prove its claim for taxes as an ordinary creditor must do.[28]

§ 132. The time within which debts may be proved.

Proof of claims may be filed at any time after the commencement of bankrupt proceedings. A claim may be filed and proved prior to the first creditors' meeting.[29] In practice no claims are generally proved until the first creditors' meeting. Proof of claims may be made subsequent to the first creditors' meeting at any time within one year after the adjudication.[30] But claims can not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided,* that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.[30]

It has uniformly been held that the language of section 57*n*, "that claims shall not be proven against a bankrupt estate subsequent to one year after the adjudication," is more than a limitation, that it is prohibitory and that the court has no power or discretion to extend it.[31] If the proof of a claim, made with-

[26] *In re* Bousfield & Poole Manufacturing Co., No. 1704 Fed. Cas., s. c. 17 N. B. R. 153.

[27] Lewis v. United States, 92 U. S. 618, affirming No. 15595 Fed. Cas., s. c. 13 N. B. R. 33; U. S. v. Herron, 20 Wall. 251; Harrison v. Sterry, 5 Cranch. 289; R. S. Sec. 3466; *In re* Vetterlein, 20 Fed. Rep. 109; U. S. v. Murphy, 15 Fed. Rep. 589, and note.

[28] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567.

[29] *In re* Patterson, No. 10814 Fed. Cas., s. c. 1 Ben. 448.

[30] B. A. 1898, Sec. 57*n*.

Where the amount of the bankrupt's debt is not in controversy, the fact that litigation ensues between the creditor and the surety of the bankrupt to determine the surety's liability, does not make the claim of the surety against the bankrupt estate one "liquidated by litigation" within the meaning of this exception. *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581.

[31] Bray v. Cobb, 3 Am. B. R. 788, 100 Fed. 270; *In re* Shaffer, 4 Am. B. R. 728, 104 Fed. 982; *In re* Rhodes, 5 Am. B. R. 197, 105 Fed. 231; *In re* Leibowitz, 6 Am. B. R. 268, 108 Fed. Rep. 617; *In re* Moebius, 8 Am. B. R. 590, 116 Fed. 47.

in the year, is defective, it may be amended after the expiration of the year,[32] but where the proof of claim is withdrawn and a like claim for a different amount filed it can not be treated as an amendment.[33] Where a creditor has been prevented from proving his claim within the year by the fraud of the debtor he may prove after the expiration, but all creditors who have duly proved their claims are to be paid in full before he can receive anything.[34]

Where a composition has been effected a creditor can not prove a claim more than one year after the date of adjudication.[35]

§ 133. The manner of making the proof.

A claim or debt is proved by a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.[36]

This statement is referred to in the general orders and forms as a deposition.[37] It seems to be in the nature of an affidavit. The word "deposition" was used in the statute of 1867.[37*] In construing this word it was said that "a deposition by a creditor proving his claim against the estate of a bankrupt is neither an affidavit nor a deposition, as known in the ordinary practice of law. It is the result of an examination of the creditor made by the officer of the law authorized to make it. . . . In no other court of justice is such testimony required for due proof of debt, but it is evident that congress intended that the court and its officers should, by a careful examination of the creditor (which examination is frequently in the absence of the debtor), purge his conscience and ascertain the real nature of his claim, and that no fraud or combi-

[32] Hutchinson v. Otis, 190 U. S. 552; 10 Am. B. R. 135.

[33] *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806.

[34] *In re* Towne, 10 Am. B. R. 284.

[35] *In re* Brown, 10 Am. B. R. 588.

[36] B. A. 1898, Sec. 57*a;* compare R. S. Sec. 5077.

[37] Gen. Ord. 21; Official Forms Nos. 31 to 36, see Forms Nos. 54 to 59, *post.*

[37*] R. S. Sec. 5077.

nation, either for or against the bankrupt, existed."[38] The statement required by the present act is little more than such a verification as is required by the laws of many states to the claim of a creditor of an estate of a decedent or of a person who has made a voluntary assignment for the benefit of his creditors.

The supreme court has prescribed a form of proof of an unsecured debt,[39] of proof of a secured debt,[40] of proof of a debt due a corporation,[41] of proof of a debt by a partnership,[42] of proof of a debt by an agent or attorney,[43] of proof of a secured debt by an agent.[44] These forms should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[45]

A deposition to prove a claim against a bankrupt estate must be correctly entitled in the court and in the cause.[46] It should set forth the name and residence of the deponent. It should give one full Christian name of the creditor, as well as his surname.[47] It should state the amount of the debt, which should not include the interest, but sufficient data so that the computation of interest may be made;[48] that the debt was due at the time of filing the petition and is still due; that no part of it has been paid, or if payments have been made such fact should appear; and that there are no set-offs or counterclaims, or, if any, such as there are should be stated.

The statement or deposition must set forth the consideration of the debt or claim.[49] Neither the statute nor the general orders and forms prescribe any form of stating the consideration. The principal object of this requirement is undoubtedly

[38] *In re* Strauss, No. 13532 Fed. Cas., s. c. 2 N. B. R. 48; see also *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; but see *In re* Merrick, No. 9463 Fed. Cas., s. c. 7 N. B. R. 459.

[39] Official Form No. 31, see Form No. 54, *post*.

[40] Official Form No. 32, see Form No. 55, *post*.

[41] Official Form No. 33, see Form No. 56, *post*.

[42] Official Form No. 34, see Form No. 57, *post*.

[43] Official Form No. 35, see Form No. 58, *post*.

[44] Official Form No. 36, see Form No. 59, *post*.

[45] Gen. Ord. 38.

[46] Gen. Ord. 21; *In re* Walther, No. 17126 Fed. Cas., s. c. 14 N. B. R. 273.

[47] *In re* Valentine, No. 16812 Fed. Cas., s. c. 4 Biss. 317.

[48] *In re* Port Huron Dry Dock Co., No. 11293 Fed. Cas., s. c. 14 N. B. R. 253.

[49] B. A. 1898, Sec. 57*a*; *In re*

to prevent, or at least check, the proof of fraudulent and fictitious claims, as well as to show that the claim is founded upon a legal consideration which will support the demand, and to afford means for comparing the books of the bankrupt with the proof. The deponent should therefore give such a particular and definite statement of the consideration as will enable other creditors to trace out, discover and expose any fraud or illegality of the claim, if any exist. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiries as to the fairness and legality of the claim it does not fulfill the object for which it is required, and should be held insufficient. A judgment duly rendered in a state court can not be impeached collaterally, nor can the consideration upon which it is founded be inquired into in the absence of fraud.[50] A promissory note is *prima facie* evidence of a consideration, and an instrument under seal always imports a consideration. It would therefore seem that a reference to a judgment, promissory note or an instrument under seal, when these writings are attached to the proof as exhibits, would be a sufficient statement of consideration. The creditors are entitled to show that there was no consideration of a promissory note,[51] and the decisions intimate that the creditor ought to state the consideration of a note in his proof of the debt.[51] Where the consideration of a debt is goods, wares and merchandise sold and delivered, a general statement is not sufficient. The kind of goods, the quantity, the price and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be stated. This is frequently done by an itemized statement of such goods, wares

Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

In re Scott, 93 Fed. Rep. 418: "For legal services" was held an insufficient statement.

[50] *Ex parte* O'Neil, No. 10527 Fed. Cas., s. c. 1 Low. 163; McKinsey v. Harding, No. 8866 Fed. Cas., s. c. 4 N. B. R. 38; see also discussion of this question in proving judgment debts, Sec. —.

[51] *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* DeMetz, No. 3781 Fed. Cas.; *In re* Elder, No. 4326 Fed. Cas., s. c. 1 Saw. 73; *In re* Loder, No. 8456 Fed. Cas., s. c. 4 Ben. 125, it was held that an omission to state the consideration of a note and whether any payments had been made on it rendered the proof defective.

and merchandise attached as an exhibit to the proof of claim, proper reference being made in the statement of the consideration to such exhibit. Where the claim is for contribution by a partner, the amount paid by him for the debt on account of which a claim is made must be set forth.[52]

The assignee of a chose in action must state the consideration that passed between the original parties.[53] But the holder of a promissory note, or other negotiable paper, who took it for value in good faith before the maturity thereof, need not state the consideration which he gave for it.[53]

In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account must be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid.[54]

Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon.[55] It should be observed that the forms prescribed by the supreme court do not contain a clause that no note has been received for such account, nor any judgment rendered thereon. This should be added in cases where it is required by this rule.

The deposition should also state that no security has been received for the debt if such is the fact. If there have been securities received they should be described, and it should appear that there are no other securities than those mentioned. Where the debt is proved by an agent or attorney it must appear in the deposition that he is authorized to make it.

The proof against a firm should state the firm, describing it by the firm name and the individuals that compose it, and should definitely show whether the demand is a firm debt or

[52] *In re* Stephens, No. 13365 Fed. Cas., s. c. 3 Biss. 187; see also B. A. 1898, Sec. 57*i*.

[53] *In re* Lake Superior Ship Canal, R. R. & Iron Co., No. 7998 Fed. Cas., s. c. 10 N. B. R. 76.

[54] B. A. 1898, Sec. 68*a*.

[55] Gen. Ord. 21, par. 1.

a joint debt against individual partners.[56] Where a claim has been assigned the proof should set forth the date and facts of the transfer and the name of the original creditor.[57] Two distinct debts against different estates can not be included in one proof or statement.[58]

The statement should be signed by the claimant or his duly appointed agent. The statement must be made upon oath.[59] The oath may be administered by a referee, any officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, or a diplomatic or consular officer of the United States in any foreign country.[60] Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.[60]

Whenever a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, must be filed with the proof of claim.[61] If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction must be filed under oath with the claim.[62] After the claim is allowed or disallowed such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[63] The exhibits attached to the proof of debt form one paper and are a part of the deposition. When a party applies for leave to withdraw such exhibits he must show what interest he has in it and the purpose for which he desires to use it.[64]

[56] *In re* Walton, No. 17129 Fed. Cas., s. c. Deady 510.

[57] *In re* Fortune, No. 3586 Fed. Cas., s. c. 1 Low. 384.

[58] *In re* Walton, No. 17129 Fed. Cas., s. c. Deady 510.

[59] B. A. 1898, Sec. 57*a*.

[60] B. A. 1898, Sec. 20; *In re* Kimball, 100 Fed. Rep. 777, 4 Am. B. R. 144, 2 N. B. N. 46, the attorney of the creditor acted as notary public.

[61] B. A. 1898, Sec. 57*b*; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[62] B. A. 1898, Sec. 57*b*; Official Form No. 37, see Form No. 60, *post*.

[63] B. A. 1898, Sec. 57*b*; *In re* Emison, No. 4459 Fed. Cas., s. c. 2 N. B. R. 595.

[64] *In re* McNair, No. 8908 Fed. Cas., s. c. 2 N. B. R. 343.

§ 134. **Proof by a secured creditor.**

A secured creditor can resort to one of three remedies. *First,* he may rely upon his security; *second,* he may surrender it and prove the whole debt as unsecured; and, *third,* he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security.[65] In the first case he makes no proof before the referee. In the second case, after abandoning his security, he becomes a general or unsecured creditor, and proves his claim in the same manner as any unsecured creditor.

It is, therefore, the third remedy of a secured creditor that requires consideration. A deposition according to Form No. 32 is proof of such a claim. In such deposition proof is made of the whole debt as in the case of an unsecured claim. To this proof is added a statement of all the securities held by the deponent for the debt. In describing these securities it is proper, but not essential, to state their estimated value. This would seem to be especially desirable when the proof is to be filed for the purpose of enabling the creditor 'to participate in the proceedings at the first creditors' meeting.[66] Such estimates do not determine the value of these securities.

The value of securities held by secured creditors are determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.[67] Where a claim is secured by a mortgage or lien on property exempt under a state statute the secured creditor can prove only for the balance of his debt not secured and can not receive a dividend on his entire debt and then resort to his security to satisfy the unpaid balance.[68]

The proof of a secured debt according to Form No. 32 does not invalidate the right of the creditor to the securities

[65] See Rights of Secured Creditors, Sec. 202, *post.*

[66] B. A. 1898, Sec. 57*e*.

[67] B. A. 1898, Sec. 57*h*; *In re* Lantzenheimer, 124 Fed. Rep. 716; *In re* Ball, 10 Am. B. R. 564.

[68] *In re* Lantzenheimer, 124 Fed. Rep. 716.

which he is found to hold.[69] One owing a debt secured by an insurance policy on the life of the bankrupt is entitled to prove the amount of the debt less the surrender value of the policy.[70] Where the security is the property of the bankrupt held by an endorser, or a person secondarily liable, it has been held not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the endorser.[71]

Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he is subrogated to that extent to the rights of the creditor.[72]

§ 135. Proof by creditors who have received preferences.

The statute provides that "The claims of creditors who have received preferences, voidable under section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances." [73]

Prior to the amendment of Feb. 5, 1903,[74] a preference received by a creditor must have been surrendered, whether it could have been avoided or not, before the claim could be allowed.[75] The effect of the amendment is to require a surrender of a preference, conveyance, transfer or incumbrance only

[69] *In re* Bigelow, No. 1396 Fed. Cas., s. c. 2 Ben. 480; King v. Bowman, 24 La. Ann. 506; *In re* Snedaker, 3 N. B. R. 629.

[70] *In re* Newland, No. 10170 Fed. Cas., s. c. 6 Ben. 342; Consult *In re* Sauthoff, No. 12379 Fed. Cas., s. c. 7 Biss. 167.

[71] Merchants' Bank v. Comstock, 55 N. Y. 24.

[72] B. A. 1898, Sec. 57*i*; Gen. Ord. 21, par. 4.

[73] B. A. 1898, Sec. 57*g*, *as* amended Feb. 5, 1903, 32 Stat. at L. 797.

[74] Act of Feb. 5, 1903, 32 Stat. at L. 797.

[75] Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 5 Am. B. R. 814; *In re* Abraham Steers Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; McKey v. Lee (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 5 Am. B. R. 267.

That there was no four months' limit to preferences, which must be surrendered prior to the amendment of Feb. 5, 1903, see *In re* Busby, 124 Fed. Rep. 469.

when it may be avoided by the trustee, in order to entitle the creditor to an allowance of his claim. The test now is can the trustee avoid such preference, conveyance, transfer or incumbrance, if so, it must be surrendered; if not the creditor may retain what he has received and have his claim allowed for the balance of the debt. What constitutes a preference or lien, which may be avoided by a trustee, is considered in another place and need not be repeated here.[76] The amendment does not effect the surrender of preferences in proceedings begun prior to Feb. 5, 1903.[77]

Where a creditor has two separate and distinct debts, a preferential payment on one of them must be surrendered before the other can be allowed.[78] But where the payment extinguishes a debt it need not be surrendered as a condition precedent to the allowance of a subsequent independent debt.[79] Payments made on a running account, where new sales succeed payments and the net result is to increase the value of the estate, do not constitute preferences which must be surrendered before a claim for the balance due on the account may be allowed.[80]

A creditor having a claim, on which he has received a preferential payment, should regularly prove his claim against the estate and the court will then determine the amount of his preference, if any, and require it to be surrendered before allowing his claim.[81] The "proof" of a claim must not be con-

[76] See Chapter XVIII.

[77] *In re* Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. 584.

[78] *In re* Meyer, 115 Fed. Rep. 997, 8 Am. B. R. 598; Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; *In re* Delling, 124 Fed. Rep. 852.

[79] *In re* Abraham Steers Lumber Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332, affirming 110 Fed. Rep. 738, 6 Am. B. R. 315; *In re* Seay, 113 Fed. Rep. 969, 7 Am. B. R. 700; *In re* Bullock, 116 Fed. Rep. 667, 8 Am. B. R. 646; *In re* Wolf & Levy, 122 Fed. Rep. 127, 10 Am. B. R. 153.

[80] Jaquith v. Alden, 189 U. S. 78, 9 Am. B. R. 773; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Sagor & Bro. (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenbaum (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

[81] *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308.

fused with the "allowance" of the claim. Those are two distinct acts or proceedings, and the allowance, absolute or conditional, may or may not result from and follow the proof of the claim.[82] This distinction has been lost sight of in many of the cases reported. Section 57*g* does not prohibit the proof of a claim by a preferred creditor but merely the allowance of it before the creditor surrenders a recoverable preference.

§ 136. What is a surrender of a security or preference?

A secured creditor can not prove his secured claims until he has surrendered his security.[83] A creditor who has received a preference can not have his claims allowed until he has surrendered his preference.[84] The question, therefore, will be

[82] In Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225, the court said: "Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it."

In re Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308, Judge Ray uses this language: "It will be noted that the proof of a claim is one thing, and the allowance of such claim is quite another thing. Claims may be proved, but not allowed. They may be provable, but not allowable. They may be provable, and then allowed in part only, or on condition only. The statute does not say that the claims of creditors who have received preferences shall not be proved; but it does say that such claims shall not be allowed, unless or until the creditor surrenders his preference. By plain implication the proof of the claim is permitted. The claim of a creditor who has received a preference may be proved; but it cannot be allowed, unless he shall surrender the preference. Strange, indeed, is that construction of this law, in the face of those provisions, which will prevent a creditor from coming into court and proving his claim, having the amount of the preference received by him, if any (and that may be a serious and necessary question for determination, both as to the fact of preference and its amount), determined by the court, and then having his proved claim allowed on surrendering the preference. Any creditor has the right to come into court for that very purpose. To hold otherwise will logically prevent a creditor who has in fact received a preference, by way of lien or otherwise, for only a small part of his claim, coming into court and proving his claim, and then having it allowed on surrendering the preference — a mode of procedure the statute expressly permits."

[83] See Proof by Secured Creditor, Sec. 134, *ante*, and Rights of Secured Creditors, Sec. 202, ***post.***

[84] B. A. 1898, Sec. 57*g*.

frequently presented, what constitutes a surrender and how is it to be made?

There can be no question of the intention of a creditor who files in the court or with the referee a written statement expressly surrendering his securities or preferences.

Where a creditor in proving his debt fails to mention his security he will, as a general rule, be deemed to have elected to prove as an unsecured creditor and to have surrendered his security.[85] The courts have frequently permitted such a creditor to amend his proof to change it from unsecured to secured.[86] It would therefore seem, unless mention is made of the security in the proof as originally filed or amended, that proving as an unsecured creditor operates as a surrender of the security. It has been held that proving without mentioning the security does not operate to discharge a mortgage security; that while a creditor is prevented from setting up the same against the trustee, no one but the trustee can avail himself of the fact.[87]

The preferred creditor regularly surrenders his preference to the trustee. Property fraudulently transferred belongs to the bankrupt's estate. Preferential security is also to be released for the benefit of the creditors of the bankrupt. The trustee holds the title to all the bankrupt's property.

The statute does not determine the manner in which the surrender should be made. It is usually done by a formal transfer of property or release of security, either voluntarily or upon a judgment of recovery obtained by the trustee. An

[85] *In re* Bloss, No. 1562 Fed. Cas., s. c. 4 N. B. R. 147; *In re* Brand, No. 1809 Fed. Cas., s. c. 2 Hughes 334; *In re* Granger, No. 5684 Fed. Cas., s. c. 8 N. B. R. 30; Heard v. Jones, 15 N. B. R. 402; Hatch v. Seely, 13 N. B. R. 383; *Ex parte* Downs, 1 Rose 96.

[86] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761*n*.

In re Cathcart (southern district of Ohio) mechanics' lienholders proved their claims as unsecured creditors and voted for and elected a trustee, who reduced the estate to money. Thereafter these lienholders perfected their liens and were permitted to amend their proof of claims and assert their security and were awarded priority over mortgagees under a mortgage subordinate to the mechanic's lien. Judge Thompson affirmed this ruling of the referee August 21, 1900 (not reported).

[87] Cook v. Farrington, 104 Mass. 212.

agreement that other creditors may share in the proceeds of a sale of property which constitutes a preference may be treated as a surrender.[88]

It has been held that the surrender must be voluntary, and that if the trustee is compelled to proceed to a judgment the creditor has not made a surrender, and is therefore not entitled to have his claim allowed.[89] But a surrender may be made voluntarily at any time before judgment is entered.[90] This rule of construction was applied under the act of 1867 prior to the amendment of 1874.[91] By this amendment a creditor, who had received a preference could not, "in cases of actual fraud on his part," be allowed to prove for more than a moiety of his debt."[92] This, it was held, by implication permitted the creditor to prove for the full amount of his debt in the absence of actual fraud. Thereafter it was held that a creditor could prove his claim after his preference was set aside by a judgment for constructive fraud in the absence of actual fraud.[93]

Having in mind the construction given the act of 1867 prior to the amendment of 1874 it is contended with much force that congress, by omitting any clause similar to that contained in the amendment of 1874, must have intended the same construction to be given the surrender clause in the act of 1898. It may be observed that neither the supreme court nor a circuit court of appeals has passed upon this question either under the act of 1867 or the present statute, and that the de-

[88] *In re* Detert, No. 3829 Fed. Cas., s. c. 11 N. B. R. 293.

[89] *In re* Greth, 112 Fed. Rep. 978, 7 Am. B. R. 598; *In re* Owings, 109 Fed. Rep. 623, 6 Am. B. R. 454.

See also *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; *In re* Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334.

[90] *In re* Riordan, No. 11852 Fed. Cas., s. c. 14 N. B. R. 332; Burr v. Hopkins, No. 2192 Fed. Cas., s. c. 6 Biss. 345.

[91] *In re* Lee, No. 8179 Fed. Cas., s. c. 14 N. B. R. 89; *In re* Richter's Estate, No. 11803 Fed. Cas., s. c. 1 Dill. 544; *In re* Leland, No. 8230 Fed. Cas., s. c. 7 Ben. 156; *In re* Stephens, No. 13365 Fed. Cas., s. c. 3 Biss. 137; *In re* Graves, 9 Fed. Rep. 816; *In re* Drummond, No. 4094 Fed. Cas., s. c. 4 Biss. 149.

[92] Sec. 12 of the act of 1874, 18 Stat. at L. 181.

[93] *In re* Cadwell, 17 Fed. Rep. 693; *In re* Reed, 3 Fed. Rep. 798; *In re* Black, No. 1459 Fed. Cas., s. c. 17 N. B. R. 599; Burr v. Hopkins, No. 2192 Fed. Cas., s. c. 6 Biss. 345; *In re* Newcomer, No. 10148 Fed. Cas., s. c. 18 N. B. R. 85.

cisions of the bankruptcy courts were not uniform in their construction of the former legislation. This precise question is now pending in the supreme court and cannot be considered settled until its decision is announced.[94]

It should be noted that the word "surrender" does not in itself imply a voluntary giving up. A general surrenders when he has to do so. A creditor may honestly believe that he has received no preferences, which he is required by the act to surrender as a condition precedent to the allowance of his claim. If he takes the judgment of a court on the point is it possible that congress intended him to be debarred forever from participating in the distribution of the estate? This seems a harsh rule in case the creditor has acted in good faith, without actual fraud on his part. The only fraud which can be charged against him, is a constructive fraud depending upon the construction of the bankruptcy statute, which he can not ask a court to construe to determine his rights without danger of losing the very right which he is attempting to establish. This certainly is a harsh rule to enforce.

§ 137. Filing proofs of debts.

Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.[95] They are regularly filed with the referee after a reference. Proofs of debt received by any trustee must be delivered to the referee to whom the cause is referred.[96]

The debt will not be deemed proved and can not be allowed where the creditor retains possession of his deposition and does not file it with the referee or clerk.[96*] It is the duty of a referee to receive a proof which appears on its face to have been taken by a proper officer and to be correct in form and substance.[97] Upon receipt of such proof the clerk or referee must endorse thereon the day and hour of filing and a brief

[94] In Keppel v. Tiffin Savings Bank on question certified by the circuit court of appeals for the sixth circuit.

[95] B. A. 1898, Sec. 57*c*; Gen. Ord. 20.

[96] Gen. Ord. 20, par. 1.

[96*] *In re* Shepard, No. 12753 Fed. Cas. s. c. 1 N. B. R. 439.

[97] B. A. 1898, Sec. 57*d*; *In re* Merrick, No. 9463 Fed. Cas., s. c. 7 N. B. R. 459.

statement of its character.[98] No notice to the other creditors is required. Where a claim has been duly proved it should be allowed upon receipt by or upon presentation to the judge or referee, unless objection to its allowance shall be made by the parties in interest or its consideration be continued for cause by the court upon its own motion.[99]

The referee is entitled to a fee of 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration.[100]

§ 138. Amendments and withdrawal of proof.

The judge or referee has power, in his discretion, to allow proofs of debt to be amended or withdrawn.[101] In cases of mistake or ignorance, whether of act or of law, the judge or referee will exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in if the error had not occurred, and where justice seems to demand that it should be done.[101] There are cases, however, which hold that neither the debt nor the deposition can be withdrawn, but the party ought to be allowed and required to amend his proof,[102] but the better authority seems to be as stated above. Where the proceeding is in any manner tainted with fraud, or where a creditor has gained any permanent advantage by the omission, or the estate has been permanently injured thereby, the creditor guilty of such omission will be left where his own act has placed him.[103]

The referee may require an amendment,[104] or the party may apply for leave to correct or withdraw his proof. A creditor may be permitted to amend his proof to correct a clerical

[98] Gen. Ord. 2.

[99] B. A. 1898, Sec. 57*d*.

[100] B. A. 1898, Sec. 40, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[101] Hutchinson v. Otis, 190 U. S. 552, 10 Am. B. R. 135; *In re* Scott, 93 Fed. Rep. 418; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* Myers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761, note.

[102] *In re* Lowree, No. 8577 Fed. Cas., s. c. 1 Ben. 406; *In re* Emison, No. 4459 Fed. Cas., s. c. 2 N. B. R. 595; *In re* McIntosh, No. 8826 Fed. Cas., s. c. 2 N. B. R. 506.

[103] Stewart v. Isidor, 5 Abb. Pr. (N. S.) (N. Y.) 68; *In re* Jaycox, No. 7242 Fed. Cas., s. c. 8 N. B. R. 241; *In re* Parkes, No. 10754 Fed. Cas., s. c. 10 N. B. R. 82.

[104] *In re* Elder, No. 4326 Fed. Cas., s. c. 1 Saw. 73.

omission or formal defect,[105] or to change his proof in form from unsecured to secured,[106] or to enlarge or diminish the amount of the debt,[107] or withdraw his proof for the purpose of proceeding against a dormant partner of the bankrupt.[108] The power to permit amendments extends to all matters contained in the proof. After the claim is allowed or disallowed a written instrument attached to the proof as an exhibit may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[109]

An amendment may be permitted after the expiration of the year within which claims may be proved.[110] Where in other respects a creditor would be entitled to amend his proofs, the mere prior receipt of dividends is no objection, as they can be restored to the trustee.[111] Amendments have been frequently allowed on terms of repayment of dividends already received.[112]

Where a creditor by proof of his debt has taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he has been held precluded from any subsequent change in his proof.[113] But the simple fact that he

[105] *In re* Myrick, No. 10000 Fed. Cas., s. c. 3 N. B. R. 156; Hutchinson v. Otis, 190 U. S. 552, 10 Am. B. R. 135.

[106] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761*n*.

In re Cathcart (southern district of Ohio) mechanics' lienholders proved their claims as unsecured creditors and voted for and elected a trustee, who reduced the estate to money. Thereafter these lienholders perfected their liens and were permitted to amend their proof of claims to assert their security and were awarded priority over mortgagees under a mortgage subordinate to the mechanics' lien. Judge Thompson affirmed this ruling of the referee August 21, 1900 (not reported).

[107] *In re* Montgomery, No. 7929 Fed. Cas., s. c. 3 Ben. 566.

[108] *In re* Hubbard, No. 6813 Fed. Cas., s. c. 1 Low. 190.

[109] B. A. 1898, Sec. 57*b*. See also *In re* McNair, No. 8908 Fed. Cas., s. c. 2 N. B. R. 343; *In re* Emison, No. 4459 Fed. Cas., s. c. 3 N. B. R. 595.

[110] Hutchinson v. Otis, 190 U. S. 552, 10 Am. B. R. 135.

[111] *Ex parte* Baxter, 12 Fed. Rep. 72; *In re* Parkes, No. 10754 Fed. Cas., s. c. 10 N. B. R. 82.

[112] *In re* Parkes, No. 10754 Fed. Cas., s. c. 10 N. B. R. 82; *In re* Baxter, 12 Fed. Rep. 72; *Ex parte* Capot, 1 Atk. 218; *Ex parte* Bielby, 13 Ves. 70; *Ex parte* Waring, 19 Ves. 345, quoted in full in Powles v. Hargreaves, 3 DeGex, A. M. & G. 445; *Ex parte* Bolton, 2 Rose 389; *In re* Barned's Banking Co., 10 L. R. Chan. Ap. 198, s. c. 5 H. L. 157.

[113] New Bedford, etc., v. Fairham, etc., 9 Allen (Mass.) 175, 180; *Ex parte* Solomon, 1 Glyn. & J.

participated in the election of the trustee, when there is no evidence that he gained any advantage thereby, or that the other creditors have been in any wise prejudiced in consequence of it, or that he was influenced by any fraudulent intent, will not preclude a claimant from making his proof of debt.[114]

Mere formal amendment may be made in the original proofs. Where a change is made by adding a statement of new matter or facts the proof must be resworn after such change.[115] Where the amendment sought to be made relates to a new and different claim from any of those embraced in the existing proof of debt the proper course is for the creditor to prove his newly discovered debt independently.[116]

§ 139. Allowance of claims.

The formal proof of the debt makes out a *prima facie* case whch entitles the claimant to have his claim allowed.[117] The statute provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."[118] A trustee is a party in interest.[119]

If the proof of claim is defective the referee should not allow the claim. He may permit it to be filed with leave to amend. Where an objection is interposed at a creditors' meeting by parties in interest it is the duty of the referee to determine the controversy at once, if possible, and if not, as soon as he conveniently can do so.[120] Where the referee has a substantial doubt, resulting from judicial consideration of the

25; Stewart v. Isidor, 5 Abb. Pr. (N. S.) (N. Y.) 68, s. c. 1 N. B. R. 485; *In re* Bloss, No. 1562 Fed. Cas., s. c. 4 N. B. R. 147.

[114] *In re* McConnell, No. 8712 Fed. Cas., s. c. 9 N. B. R. 387; King v. Bowman, 24 La. Ann. 506; *In re* Cathcart, reported in note 106, *ante*.

[115] *In re* Walther, No. 17126 Fed. Cas., s. c. 14 N. B. R. 273.

[116] *In re* Montgomery, No. 9731 Fed. Cas., s. c. 3 N. B. R. 430.

[117] *In re* Shaw, 109 Fed. Rep. 780, 6 Am. B. R. 499.

[118] B. A. 1898, Sec. 57*d*.

[119] Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 3 N. B. N. 497.

[120] B. A. 1898, Sec. 57*f*.

inquiry as to the validity of the claim or to the creditor's right to prove it, he may continue the allowance upon his own motion.[121]

If a party in interest objects to the allowance of a claim the burden of proof is on the creditor to establish his claim.[122] Witnesses may be examined orally or by depositon and the hearing may be postponed for the purpose of obtaining evidence in relation to the claim.[123] Where a respondent denied the alleged indebtedness to a petitioning creditor and evidence is offered and the court finds the allegations of the petition true and makes an adjudication the same question cannot be tried upon the petitioning creditor making proof of his claim.[124]

The allowance or disallowance of a claim is largely in the discretion of the referee and his decision on the question of fact will not be reversed by a judge unless manifestly contrary to the weight of the evidence.[125]

In practice objections are not frequently made at the time of filing the proof. The statute and general orders provide for a reexamination of a claim, which has already been allowed.[126] It is under these provisions that objections to creditors being allowed to participate in the distribution of the bankrupt's estate are usually filed.[127]

A claim to which no objection is made and no cause appears for postponing the allowance is regularly allowed when it is filed with the referee. He should endorse upon the claim "filed and allowed," together with the date and hour of the filing.[128] At the close of the first creditors' meeting he should file in his record a list of creditors who have proved

[121] *In re* Northern Iron Co., No. 10322 Fed. Cas., s. c. 14 N. B. R. 356; *In re* Jackson, No. 7123 Fed. Cas., s. c. 7 Biss. 280; see also discussion of this question at pages 108-9, *ante*.

[122] *In re* Wooten, 118 Fed. Rep. 670, 9 Am. B. R. 247; *In re* Kaldenberg, 105 Fed. Rep. 232, 5 Am. B. R. 6; but see *In re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681.

[123] *In re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681; *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146; *In re* Kaldenberg, 105 Fed. Rep. 232, 5 Am. B. R. 6.

[124] *In re* Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425.

[125] *In re* Rider, 96 Fed. Rep. 811; 3 Am. B. R. 192, 3 N. B. N. 187.

[126] B. A. 1898, Sec. 57*k* and Sec. 2, clause 2; Gen. Ord. 21, par. 6.

[127] See Reexamination of Claims, Sec. 140, *post*.

[128] Gen. Ord. 2.

their debts at the first meeting, together with their residences and the amount of each creditor's debt.[129] A similar list is subsequently made upon which to base dividends.[130]

§ 140. **Reexamination of claims.**

Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.[131]

When the trustee or any creditor shall desire the reexamination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such examination.[132] Where a trustee has been appointed he must file the petition for reexamination of a creditor's claim and not another creditor.[133] Where no trustee has been appointed the bankrupt may move for a reexamination and expunction of a claim proved and allowed against his estate.[134] The referee thereupon makes an order fixing a time for hearing the petition, of which due notice must be given by mail addressed to the creditor.[135] If the creditor is unable to attend at that time he should take steps to procure a postponement. Where he fails to appear the claim may be expunged or diminished by default.[136] In case it shall be made to appear that any creditor whose debt is contested can not personally attend to be examined in the district where the proceedings are pending without hardship to him, owing to the distance of his residence, or other similar reason, the court will

[129] Official Form No. 19, see Form No. 38, *post.*

[130] Official Form No. 40, see Form No. 98, *post.*

[131] B. A. 1898, Sec. 57*k*.

[132] Gen. Ord. 21, par. 6; *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566.

[133] *In re* Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 538, 9 Am. B. R. 368.

[134] *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72, 2 N. B. N. 249.

[135] Gen. Ord. 21, par. 6; *In re* Stoever, 105 Fed. Rep. 355, 5 Am. B. R. 250.

[136] *In re* Lount, No. 8543 Fed. Cas., s. c. 11 N. B. R. 315.

In re Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. 584, the court said: "The petition is not before me and I am, therefore, unable to say whether its averments on the subject of insolvency are sufficiently precise and definite to be taken as true, or whether they require proof to be offered by the petitioner. This matter can be determined by the referee and his ruling reviewed, if necessary."

provide by order for the taking of his examination before a referee of the district in which he resides.[137]

A trustee has been held to be barred by laches to petition for a reexamination of a claim once allowed.[138]

The referee may, upon application of the trustee or any creditor, require any designated person who is a competent witness under the laws of the state in which the proceedings are pending to appear before him to be examined.[139] But no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.[140] The creditor is not entitled to witness fees for attendance.[141] Witnesses are summoned by a subpœna issued out of court under the seal thereof and tested by the clerk.[142] Blanks, with the signature of the clerk and seal of the court may be furnished to referees.[142] The subpœna may be served upon a witness living without the district but within one hundred miles of place of testifying.[143] A person who disobeys the subpœna may be punished for contempt.[144]

At the time appointed the hearing is had for the purpose of examining the creditor and any witnesses that may be called by either party.[145] The testimony before a referee is usually taken orally. The examination of witnesses may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law.[146] A witness is not

[137] *In re* Kyler, No. 7956 Fed. Cas., s. c. 2 Ben. 414; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[138] *In re* Hinckel Brew. Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

[139] B. A. 1898, Sec. 21 and Sec. 41*a*.

[140] B. A. 1898, Sec. 41*a*. As to who must advance such fees, see Gen. Ord. 10.

[141] *In re* Paddock, No. 10658 Fed. Cas., s. c. 6 N. B. R. 396.

[142] Gen. Ord. 3; Official Form No. 30, see Form No. 49, *post*.

[143] R. S. Sec. 876; B. A. 1898, Sec. 41*a*; *In re* Woodward, No. 18000 Fed. Cas., s. c. 8 Ben. 112.

[144] B. A. 1898, Sec. 41 and Sec. 2, clause 16. See Contempt, Chap. XXII.

[145] Gen. Ord. 21, par. 6.

[146] Gen. Ord. 22.

entitled to be attended or represented by counsel during his examination.[147]

The referee is required, upon application of any party in interest, to preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance.[148]

The evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narrative, unless he determines the examination shall be taken by question and answer.[149] Upon the application of the trustee the referee may authorize the employment of a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.[150] When a deposition is completed it should be read over to the witness and signed by him in the presence of the referee.[151] The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.[152]

Depositions may be taken when witnesses are beyond the reach of process. The right to take depositions is determined and enjoyed according to the United States laws relating to the taking of depositions, except as otherwise provided by the statute. Notice of taking depositions must be filed with the referee and also served upon the claimant.[153]

Where a creditor appears he need only offer himself for examination, for the burden of proof is upon the trustee or the other creditors who are contesting his proof.[154] The claimant is entitled to call witnesses and produce counter proofs in support of his claim.

Upon consideration of the evidence the referee makes his

[147] *In re* Comstock, No. 3080 Fed. Cas., s. c. 3 Saw. 517.

[148] B. A. 1898, Sec. 39, clause 9.

[149] Gen. Ord. 22.

[150] B. A. 1898, Sec. 38, clause 5.

[151] Gen. Ord. 22.

[152] B. A. 1898, Sec. 21*b*; R. S. Secs. 863 to 867; *Ex parte* Fisk, 113 U. S. 713.

[153] B. A. 1898, Sec. 21*c*.

As to right of referee to limit time for taking depositions, see Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[154] *In re* Robinson, No. 11938 Fed. Cas., s. c. 8 Ben. 406; *In re* Lount, No. 8543 Fed. Cas., s. c. 11 N. B. R. 315.

order. The claim may be re-allowed or rejected in whole or in part and the referee may order the claim to stand allowed or to be expunged or diminished accordingly.[155]

It has been held that the provision relating to the examination of claims does not apply to claims for expenses of administration such as charges and expenses of a receiver.[156] The burden of proof is upon the creditor asking the reexamination to establish the facts which he alleges.[157] An objection to a petition for reexamination on the ground that it lacks particularity should be raised by a motion to make more definite and certain.[158] An inequitable claim has been expunged.[159]

Where the creditor by collusion with the bankrupt has fraudulently enlarged his claim, both the true and fictitious claims should be disallowed because fraud vitiates the whole debt.[160] A claim which has been purchased with the bankrupt's money will be expunged,[161] but a friend of the bankrupt may purchase with his own money in good faith all the claims against the bankrupt with the intention of putting an end to bankruptcy proceedings. If he fails in such attempt he may prove the debt so purchased and assigned to him.[162] The claims of creditors who have received preferences should be disallowed where such creditors have not surrendered their preferences.[163] Where a secured creditor's debt is expunged he does not surrender his security.[164] Whenever a claim shall

[155] B. A. 1898, Sec. 57*k*; Gen. Ord. 21, par. 6. Official Forms Nos. 38 and 39, see Forms Nos. 70 and 71, *post*.

[156] *In re* Reliance Storage and Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

[157] *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

[158] *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72, 2 N. B. N. 148.

[159] *In re* Knox, 98 Fed. Rep. 585, 3 Am. B. R. 371; see also *In re* Flick, 105 Fed. Rep. 503, 5 Am. B. R. 465.

[160] *In re* Elder, No. 4326 Fed. Cas., s. c. 1 Saw. 73; Marrett v. Atterbury, No. 9102 Fed. Cas., s. c. 3 Dill. 444; *In re* State Ins. Co., 16 Fed. Rep. 756; *In re* Stephens, No. 13365 Fed. Cas., s. c. 3 Biss. 187.

[161] *In re* Lathrop, No. 8103 Fed. Cas., s. c. 3 Ben. 490.

[162] *In re* Pease, No. 10880 Fed. Cas., s. c. 6 N. B. R. 173; *In re* Strachan, No. 13519 Fed. Cas., s. c. 3 Biss. 181.

[163] B. A. 1898, Sec. 57*g*; Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 5 Am. B. R. 814; *In re* Busby, 124 Fed. Rep. 469; McKey v. Lee (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 5 Am. B. R. 267.

[164] Dallas v. Flues, No. 3544 Fed. Cas., s. c. 19 Pitts. Leg. J. 173.

have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.[165]

§ 141. How to review the final allowance or rejection of a claim

If the trustee or the creditor is dissatisfied with the ruling of the referee he should take proper steps to have it reviewed by the judge.

Any creditor whose claim is rejected in whole or in part, or a trustee who is dissatisfied with the allowance of a claim, may file with the referee a petition that the order may be reviewed by the judge.[166] The petition should be entitled in the cause and set forth the error complained of.[166] It is the duty of the referee forthwith to certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[167] When completed the certificate is signed by the referee and transmitted to the court.

If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him or refer the cause to the referee for further proofs. He may hear arguments of counsel upon the question certified. The practice is for him to give his opinion upon the point and direct an order or judgment to be entered upon the journal of the court. If the question is certified improperly the court may decline to give an opinion.[168]

The judgment of the court allowing or rejecting a debt or claim of five hundred dollars or over may be reviewed in an appellate court upon an appeal taken as in equity cases.[169] Such appeal must be taken within ten days after the judg-

[165] B. A. 1898, Sec. 57*l*.

[166] Gen. Ord. 27.

As to the practice on petition to review an order or ruling of a referee, see Sec. 32*a*, *ante*.

[167] Gen. Ord. 27; Official Form No. 56, see Form No. 136, *post*.

[168] *In re* Wright, No. 18069 Fed. Cas., s. c. 1 N. B. R. 393; *In re* Sturgeon, No. 13564 Fed. Cas., s. c. 1 N. B. R. 498.

[169] B. A. 1898, Sec. 25*a*. See Sec. 312, *post*.

ment has been rendered, and may be heard and determined by the appellate court in term or vacation as the same may be.[169] An order allowing labor claims has been reviewed by a circuit court of appeals under section 24*b* where no one claim amounted to $500.[170]

[170] *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96.

CHAPTER XV.

TRUSTEES.

§ 142. Appointment and qualifications.[1]

The office of trustee is created by statute.[2] Trustees are officers of the courts of bankruptcy. One trustee or three trustees are regularly appointed by the creditors of the bankrupt estate whose claims have been allowed.[3]

Such trustees are appointed at the first meeting of the creditors after an adjudication, or after a vacancy has occurred in the office of trustees, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, or if there is a vacancy in the office of trustee.[3] Such appointment by the creditors is subject to be approved or disapproved by the referee or by the judge.[4] The selection of a trustee by the creditors will not be disapproved by the court unless it clearly imperils the fair and efficient administration of the estate.[4*] The referee can only disapprove of the ap-

[1] See also Secs. 105 and 106, *ante*.

[2] B. A. 1898, Sec. 33.

[3] B. A. 1898, Secs. 44 to 50; Creditors' Meetings, Chap. XII.; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733, 2 N. B. N. 462; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. N. 315.

In re Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[4] Gen. Ord. 13; Falter v. Reinard, 104 Fed. Rep. 292, 4 Am. B. R. 782, 2 N. B. R. 1119, affirmed (C. C. A. 6th Cir.), *sub nom. In re* McGill, 106 Fed. Rep. 57, 5 Am. B. R. 154; *In re* Henschel (C. C. A. 2d Cir.), 109 Fed. Rep. 861, *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908; see also *ante*, Sec. 106; compare R. S. Sec. 5034.

[4*] *In re* Gill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 154.

In Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36, the court said: "After a careful examination of the whole situation I see no occasion to disapprove. It is to be remembered, in all such cases, that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with unless it clearly imperils the fair and efficient administration of the estate. I am not persuaded that there is any such danger in the present instance, and

pointment, the judge alone having power to reject.[5] If the creditors fail to appoint a trustee or trustees the judge or referee must do so.[6] The judge or referee should exercise this power only when the creditors have had full opportunity to elect a trustee and have failed to do so.[7] The court can not appoint an official trustee or any general trustee to act in classes of cases.[8]

A trustee should ordinarily be appointed, although no creditor appears to prove a debt, or although there are apparently no assets.[9] But if the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.[10]

Any individual who is competent to perform the duties and resides or has an office in the judicial district, or a corporation authorized by its charter or by law to act in such capacity and having an office in the judicial district, may be a trustee.[11] A creditor of a bankrupt or the attorney of the creditor is competent.[12] But a near relation, an attorney, or a confidential clerk of the bankrupt is not competent to serve as trustee.[13] Under the bankrupt law of 1867 a preferred creditor

if it should prove otherwise, the objecting creditors have their remedy by an application hereafter to remove."

[5] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; Gen. Ord. 13.

[6] B. A. 1898, Sec. 44; Sec. 2, clause 17, and Sec. 1, clause 7; Official Form No. 24, see Form No. 43, *post; In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162, 2 N. B. N. 29; *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50, 2 N. B. N. 680; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. N. 315.

[7] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

[8] Gen. Ord. 14.

[9] *In re* Cogswell, No. 2959 Fed. Cas., s. c. 1 Ben. 388; Anonymous, No. 457 Fed. Cas., s. c. 1 N. B. R. 122.

[10] Gen. Ord. 15; *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[11] B. A. 1898, Sec. 45. See *In re* Havens, No. 6231 Fed. Cas., s. c. 1 N. B. R. 485.

[12] *In re* Barrett, No. 1043 Fed. Cas., s. c. 2 Hughes 444; *In re* Clairmont, No. 2781 Fed. Cas., s. c. 1 N. B. R. 276; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. N. 315; *In re* Lazoris, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[13] *In re* Powell, No. 11354 Fed. Cas., s. c. 2 N. B. R. 45; *In re* Zinn,

was not eligible to be an assignee.[14] The present act has no such restriction.

It is the duty of the referee immediately upon the appointment and approval of the trustee to notify him in person or by mail of his appointment.[15] The notice must require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.[15] When the trustee accepts the trust he must qualify by giving a bond to the United States within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit.[16] If he declines to accept the trust a vacancy occurs, which must be filled at the next meeting of the creditors.[17]

§ 143. Bonds of trustees.

Before entering upon the performance of his duty a trustee, within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit, shall enter into bond to the United States, conditioned for the faithful performance of his duties.[18]

The amount of the bond is fixed by the creditors.[19] If they fail to fix the amount of the bond the court shall do so.[20] Joint trustees may give joint or several bonds.[21] A separate bond must be given in each case.[22] If the trustee fails to give bond within the time prescribed he is deemed to have declined the appointment, and there is a vacancy in his office.[23]

There must be at least two sureties upon each bond, who shall qualify in a sum equal at least to the amount of the bond.[24] The court must require evidence as to the actual value of the property of sureties.[24*] Corporations organized for the purpose of becoming sureties on bonds are authorized by law to

No. 18216 Fed. Cas., s. c. 4 N. B. R. 370; *In re* Whetmore, No. 17466 Fed. Cas., s. c. 16 N. B. R. 514; *In re* Mallory, 8990 Fed. Cas., s. c. 4 N. B. R. 153.

[14] R. S. Sec. 5035.

[15] Gen. Ord. 16.

[16] B. A. 1898, Sec. 50*b*; Official Form No. 25, see Form No. 44, *post*.

[17] B. A. 1898, Sec. 44.

[18] B. A. 1898, Sec. 50*b*.

[19] B. A. 1898, Sec. 50*c*.

[20] B. A. 1898, Sec. 50*c*.

[21] B. A. 1898, Sec. 50*j*.

[22] *In re* McFadden, No. 8785 Fed. Cas., s. c. 3 N. B. R. 104.

[23] B. A. 1898, Sec. 50*k*.

[24] B. A. 1898, Sec. 50*e, f*.

[24*] B. A. 1898, Sec. 50*d*.

do so, and may be accepted as sureties.[25] The court, judge or referee, must require evidence as to the actual value of the property of the sureties.[26] The sureties are approved by the judge or referee.[26]

Such bonds should be filed of record in the office of the clerk of the court, and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.[27] Such suits must be brought within two years after the estate has been closed.[28] A pending suit is not abated by the death or removal of a trustee.[29]

Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.[29*]

§ 144. Duties of a trustee.

The duties of a trustee in a general way are similar to those of a receiver appointed by a circuit court in a creditor's suit. He is an officer of the court.[30] It is his duty to take the property of the bankrupt, reduce it to money and distribute the proceeds among the creditors as directed by the court.

As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law he takes the property as a purchaser from the bankrupt, with notice of all outstanding rights and equities. Whatever the bankrupt could do to make his property available for the general creditors the trustee may do, but nothing more, except that he may sue for and recover that which was conveyed in fraud of the rights of the creditors, and set aside all fraudulent preferences. In this he represents the general or unsecured creditors, and his duties relate chiefly to their interests. Thus it is seen that the trustee represents the bankrupt for some purposes and the unsecured creditors for other purposes.[31] He must deal fairly between

[25] B. A. 1898, Sec. 50*g*.

[26] B. A. 1898, Sec. 50*b* and *d*. Official Form No. 26, see Form No. 45 *post*.

[27] B. A. 1898, Sec. 50*h*.

[28] B. A. 1898, Sec. 50*m*.

[30] McLean v. Mayo, 113 Fed. Rep. States v. Dewey, 39 Fed. Rep. 251.

[29*] B. A. 1898, Sec. 50*i*.

[29] B. A. 1898, Sec. 46; United 106, 7 Am. B. R. 115.

[31] See Dudley v. Easton, 104 U.

them. Where the estate is large and complicated and some of the creditors seem to be acting in collusion with the bankrupt, the court will not permit the trustee to be governed by any creditor or group of creditors but will direct him to report at a meeting of all the creditors and be governed by them and will appoint independent counsel to advise him.[32]

Immediately upon entering his duties the trustee should prepare a complete inventory of all the property of the bankrupt that comes into his possession.[33] He must make a report to the court within twenty days after receiving the notice of his appointment of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.[34] The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.[35]

The trustee must keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts.[36] A trustee of a partnership is required to keep separate accounts of the partnership property and of the property belonging to the individual partners.[37] The trustee must report to the court in writing the conditions of the estate, and the amount of money on hand, and such other details as may be required by the courts, within the first month after his appointment, and every two months thereafter, unless otherwise ordered by the court.[38] All accounts of trustees are referred as of course to the referee for audit, unless otherwise specially ordered by the court.[39]

S. 99; Chubb v. Upton, 95 U. S. 665; Glenny v. Langdon, 98 U. S. 20; *In re* Kansas City Mfg. Co., No. 7610. Fed. Cas., s. c. 9 N. B. R. 76; Buckingham v. McLean, 3 McLean 185, s. c. 13 How. 151; Bradshaw v. Klein, No. 1790 Fed. Cas., s. c. 2 Biss. 20; Bristol v. Sandford, No. 1893 Fed. Cas., s. c. 12 Blatch. 341; *In re* Price, 92 Fed. Rep. 987 at 989, 1 Am. B. R. 606 at 609.

[32] *In re* Arnett, 112 Fed. Rep. 770, 7 Am. B. R. 532; see also *In re* Rusch, 105 Fed. Rep. 607, 5 Am. B. R. 565.

[33] Gen. Ord. 17.

[34] Gen. Ord. 17. Form of trustee's return, see Official Form No. 47, see Form No. 91, *post.*

[35] Gen. Ord. 17.

[36] B. A. 1898, Sec. 47, clause 6.

[37] B. A. 1898, Sec. 5*d*.

[38] B. A. 1898, Sec. 47, clause 10.

[39] Gen. Ord. 17.

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing.[40]

In case the trustee neglects to file any report or statement which it is made his duty to file or make by the act or by any general order in bankruptcy within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office.[41] The referee must cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk.[41]

He must also furnish such information concerning the estate of which he is trustee, and his administration, as may be requested by the parties in interest.[42] If he secretes or destroys any documents belonging to a bankrupt's estate which came into his charge as trustee, he is liable to imprisonment.[43]

As soon as the trustee receives any money belonging to the estate he must deposit it in one of the designated depositories.[44] This money is withdrawn and disbursed only by check or draft on such depository.[45] The courts of bankruptcy designate by order banking institutions as depositories of the money of bankrupt estates as convenient as may be to the residences of trustees, and must require bonds to the United States, subject to their approval, to be given by such banking institutions, and may, from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond, or change any such depos-

[40] B. A. 1898, Sec. 47*c*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[41] Gen. Ord. 17.

[42] B. A. 1898, Sec. 47, clause 5, and Sec. 49.

[43] B. A. 1898, Sec. 29*a*. He may be prosecuted in a circuit court or a court of bankruptcy; B. A. 1898, Sec 23*c*, and Sec. 2, clause 4.

[44] B. A. 1898, Sec. 47, clause 3 and 61; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58. See *In re* Burt, 27 Fed. Rep. 548; *In re* Thorp, No. 14002 Fed. Cas., s. c. 2 Ware 294.

[45] B. A. 1898, Sec. 47, clause 4; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202.

itories.[46] It is probable that the court has power to direct the temporary investment of the money belonging to such estate, or to authorize the same to be deposited in any convenient bank upon interest.[47]

The trustee may, under the direction of the court, submit to arbitration any controversies arising in the settlement of the estate.[48] He may also, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estates.[49] The court will not ordinarily give the trustee direction as to whether he should employ an attorney. He must exercise his own discretion.[50] The trustee will not be allowed to employ the same counsel that represents interests in conflict with other interests represented by the trustee.[51] A trustee is not required to litigate every question brought to his notice by a creditor nor can he in every case require indemnity for costs from the creditor. He must act reasonably and in doubtful cases apply to the court.[52]

The trustee must pay upon an order by the court all legal taxes due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officer for such payment he shall be credited with the amount thereof. In case any question arises as to the amount or legality of such taxes the same shall be heard and determined by the court.[53]

It is the duty of the trustee to collect and reduce to money the property of the estate for which he is trustee under the direction of the court, and to close up the estate as expedi-

[46] B. A. 1898, Sec. 61*a*.

[47] This power was specially authorized under the act of 1867, R. S. Sec. 5060. See also B. A. 1898, Sec. 47*a*, clause 1, where it is provided that the trustee shall account for and pay over to the estate under his control all interest received by him upon property of such estate.

[48] B. A. 1898, Sec. 26*a*; Gen. Ord. 33.

[49] B. A. 1898, Sec. 27*a*; Gen. Ord. 35.

[50] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575; see also McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115; *In re* Baber, 119 Fed. Rep. 520, 9 Am. B. R. 406.

[51] *In re* Rusch, 105 Fed. Rep. 607, 5 Am. B. R. 565.

[52] *In re* Baird, 112 Fed. Rep. 960, 7 Am. B. R. 448.

[53] B. A. 1898, Sec. 64*a*; *In re* Tilden, 91 Fed. Rep. 500.

tiously as is compatible to the best interests of the parties in interest.[54] The duty of the trustee in collecting and distributing the estate is treated more fully in subsequent chapters.[55]

To this end he is authorized to prove a claim of the estate which he is administering against any like estate in the same manner as the claims of other creditors are proved;[56] to reclaim and recover for the benefit of the creditors any property conveyed, transferred or assigned, or incumbered by a person adjudged to be a bankrupt within four months prior to the filing of the petition against the bankrupt and while insolvent; where such conveyance, transfer, assignment or incumbrance was made with intent to hinder, delay or defraud creditors or is void as against creditors by the law of the state, territory or district in which the property is situate[57] to cause to be set aside levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy, except where a title is acquired by a *bona fide* purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry;[58] and to recover the property or its value in case the bankrupt has given a preference within four months prior to the filing of the petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.[59]

The trustee is authorized, upon a petition filed by himself or a creditor, to recover for the benefit of the estate any excess of fees paid to an attorney in contemplation of bankruptcy over and above a reasonable fee to be determined by the court.[60]

The trustee is subrogated to and may enforce the rights of

[54] B. A. 1898, Sec. 47, clause 2; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[55] Chapters XXIV and XXV, *post*.

[56] B. A. 1898, Sec. 57*m*.

[57] B. A. 1898, Sec. 67*e*. He has all the rights of creditors to attack such conveyances; Crooks v. Stewart, 7 Fed. Rep. 800; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169 at 180.

[58] B. A. 1898, Sec. 67*f*.

[59] B. A. 1898, Sec. 60*b*.

[60] B. A. 1898, Sec. 60*d*.

a creditor for the benefit of the estate where such creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt.[61]

The trustee must pay dividends within ten days after they are declared by the referee.[62] But he is entitled to recover from the creditor the amount of a dividend received upon a claim which has been reconsidered and rejected. He can recover the whole dividend if the claim is rejected in whole, or the proportional part thereof if rejected only in part.[63] The trustee is required to pay into court all dividends which remain unclaimed for six months after the final dividend has been declared.[64]

When three trustees have been appointed the concurrence of at least two of them will be necessary to the validity of any act concerning the administration of the estate.[65]

§ 145. Removal of trustees.

Upon application of creditors trustees may be removed by the court for cause upon hearing after notice to them.[66]

What constitutes sufficient cause for removal depends very largely upon the circumstances of each particular case. He may probably be removed if he proves to be incompetent or neglects his proper duties,[67] or if his relationship to the bankrupt is such as to prevent a fair administration of the trust,[68] or if he shows partiality to one class of creditors.[69] The power of removal is discretionary with the court.[70]

[61] B. A. 1898, Sec. 67*b*.

[62] B. A. 1898, Sec. 47, clause 9.

[63] B. A. 1898, Sec. 57*l*.

[64] B. A. 1898, Sec. 66*a*.

[65] B. A. 1898, Sec. 47*b*.

[66] B. A. 1898, Sec. 2, clause 17.

[67] Gen. Ord. 17; *In re* Morse, No. 9852 Fed. Cas., s. c. 7 N. B. R. 56; *Ex parte* Perkins, No. 10982 Fed. Cas., s. c. 5 Biss. 254; *In re* Prouty, 24 Fed. Rep. 554.

Erroneous legal advice, where the errors are so gross and frequent as to be evidence of the incompetency of his legal adviser, may be cause for ordering him to employ other counsel, but not necessarily for removing the trustee. See *In re* Blodgett, No. 1552 Fed. Cas., s. c. 5 N. B. R. 472.

[68] *In re* Powell, No. 11354 Fed. Cas., s. c. 2 N. B. R. 45; *In re* Zinn, No. 18216 Fed. Cas., s. c. 4 N. B. R. 370; *In re* Whetmore, No. 17466 Fed. Cas., s. c. 16 N. B. R. 514; *In re* Mallory, No. 8990 Fed. Cas., s. c. 4 N. B. R. 153.

[69] *Ex parte* Perkins, No. 10982 Fed. Cas., s. c. 5 Biss. 254.

[70] *In re* Blodgett, No. 1552 Fed. Cas., s. c. 5 N. B. R. 472; *In re* Adler, No. 82 Fed. Cas., s. c. 2

The application to remove a trustee must be made to the judge and not to a referee.[71] The application is made in the form of a petition.[72] The petition should be entitled in the court and cause and addressed to the judge. It should state the name of the petitioning creditor, and that it is for the interest of the estate of the bankrupt that the trustee be removed, and then set forth the causes for which the removal is requested and pray that notice may be served upon the trustee to show cause why an order should not be made removing him. The petition is filed in the clerk's office. A notice in the nature of a rule to show cause is issued by the clerk in the form prescribed[73] and served upon the trustee.

Upon the day named in the notice the trustee must appear and answer the allegations of the petition. If he fails to appear he may be committed for contempt. A hearing is had, as upon a rule to show cause, either upon affidavits or testimony in open court, and counsel for the creditors and for the trustee are heard. The court thereupon makes an order of removal if a proper case is made.[74] The removal of a trustee rests in the sound discretion of the court. It should be exercised to remove a trustee only when sufficient cause is shown rendering such removal necessary for the best interests of the estate. The order for removal is entered upon the journal of the court. When a party is removed for cause the court may compel him to pay all costs of the proceedings,[75] or direct in a proper case that the costs be paid out of the estate.[76]

When a trustee has been removed by order of the court the creditors of the bankrupt estate should, at their first meeting

Woods 571; *In re* Mallory, No. 8990 Fed. Cas., s. c. 4 N. B. R. 153; *In re* Sacchi, No. 12201 Fed. Cas., s. c. 6 N. B. R. 398.

[71] Gen. Ord. 13; *In re* Stokes, No. 13475 Fed. Cas., s. c. 1 N. B. R. 489.

[72] Official Form No. 52, see Form No. 150, *post.*

[73] Official Form No. 53, see Form No. 151, *post;* B. A. 1898, Sec. 2, clause 17. Gen. Ord. 17 requires seven days' notice in case of a removal for neglecting to file reports.

[74] Official Form No. 54, see Form No. 152, *post.*

[75] B. A. 1898, Sec. 1, clause 18; *In re* Morse, No. 9852 Fed. Cas., s. c. 7 N. B. R. 56; Official Form No. 54, see Form No. 152, *post.*

[76] B. A. 1898, Sec. 1, clause 18; *In re* Mallory, No. 8990 Fed. Cas., s. c. 4 N. B. R. 153; Official Form No. 54, see Form No. 152, *post.*

after such order has been entered, appoint a new trustee.[77] The referee regularly serves notice at once for a meeting to be held for that purpose.[78] The creditors must have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of such meeting.[79] The new trustee is elected in the same manner as the first one.[80] The same memorandum of election should be made as in the case of the first election.[81]

Vacancies caused by death, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, are filled in the same manner as when caused by an order of removal. They are appointed by the creditors at a regular meeting. If the creditors do not appoint a new trustee or trustees at such meeting the judge or the referee must do so.[82]

The death or removal of a trustee does not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.[83]

Although there is no special provision for the resignation of a trustee,[84] the judge has undoubtedly power to accept the resignation of a trustee and discharge him from his trust.

§ 146. Suits which may be prosecuted or defended by trustees.

The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt

[77] B. A. 1898, Sec. 44.

[78] Official Form No. 55, see Form No. 101, *post;* Gen. Ord. 25.

[79] B. A. 1898, Sec. 58*a* of the act of July 1, 1898, 30 Stat. at L.

[80] See How to conduct a creditors' meeting, Sec. 106.

[81] Official Form No. 22, see Form No. 41, *post.*

[82] B. A. 1898, Sec. 44.

[83] B. A. 1898, Sec. 46.

[84] See R. S. Sec. 5038.

prior to the adjudication with like force and effect as though it had been commenced by him.[85]

A trustee must therefore obtain leave of the court of bankruptcy to appear and either prosecute or defend a suit pending by or against the bankrupt at the time of filing the petition in bankruptcy. Under the act of 1867 the statute provided expressly that the assignee might prosecute or defend any pending action to which the bankrupt was a party.[86] If the trustee does not enter his appearance to prosecute or defend such pending suits they may proceed to final judgment or decree.[87] The cases under the act of 1867 established the doctrine that under that law the validity of a pending suit or of the judgment or decree thereon was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not he was equally bound with any other party acquiring an interest *pendente lite*.[88] The same rule is undoubtedly applicable to the law of 1898, except where the case is stayed under the first paragraph of section 11.[89]

If a suit in the name of the bankrupt is settled and dismissed after bankruptcy proceedings are instituted the trustee may move to have the case reinstated.[90] It was held under the former acts that the bankrupt might sue out a writ of error or take an appeal to review a judgment or decree rendered against him after the commencement of bankruptcy

[85] B. A. 1898, Sec. 11*b* and *c;* see Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 5 Am. B. R. 644; affirmed 187 U. S. 177, 9 Am. B. R. 47; Price v. Price, 48 Fed. Rep. 823.

[86] R. S. Sec. 5047; Norton v. Switzer, 93 U. S. 355; Hill v. Harding, 107 U. S. 631; Thatcher v. Rockwell, 105 U. S. 467; Boynton v Ball, 121 U. S. 457; *Ex parte* Stansfield, No. 13294 Fed. Cas., s. c. 4 Saw. 334; Kimberling v. Hartley, 1 Fed. Rep. 571.

[87] In Nat. Distilling Co. v. Seidel (Wis.), 79 N. W. R. 744, it was held discretionary with state court whether it will permit trustee to intervene.

[88] Thatcher v. Rockwell, 105 U. S. 467; Davis v. Friedlander, 104 U. S. 570; Dimock v. Revere Copper Co., 117 U. S. 565; Claflin v. Houseman, 93 U. S. 134; Eyster v. Gaff, 91 U. S. 521.

[89] Pickens v. Roy, 187 U. S. 177, 9 Am. B. R. 47; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

[90] Home Ins. Co. v. Hollis, 53 Ga. 659. See also Herdnon v. Howard, 9 Wall. 664; Knox v. Exchange Bank, 12 Wall. 379.

proceedings.[91] Where the judgment or decree is rendered before the bankruptcy proceedings are begun, the trustee is the proper person to prosecute or defend the suit in an appellate court.[92]

In the course of the administration of an estate in bankruptcy the trustee may be obliged to resort to a suit for the purpose of collecting or reducing to money the property of the estate for which he is trustee,[93] or for the purpose of reclaiming or recovering property or the value of such property as has been fraudulently conveyed,[94] or to set aside a fraudulent preference.[95] That the trustee has authority to bring and prosecute such suits can not be questioned. It is not necessary for him to apply to the court for leave to institute such suits. It is his duty to invoke a court of justice for these purposes if he can not obtain possession of the assets in any other way.

Prior to the amendment of February 5, 1903, the trustee was compelled to resort to the state courts for the purpose of collecting and reducing to money the property of the estate of which he was trustee, if a suit was necessary for that purpose. Since the amendment a trustee may, at his option, bring the suit in a state court or in the court of bankruptcy. This subject has been considered elsewhere.[96]

Suits against the trustee begun after bankruptcy proceedings have been instituted must be prosecuted in the court of bankruptcy, or in another court only by leave of the court of bankruptcy.[97] The trustee is an officer of the court, and in

[91] Dormire v. Cogly, 8 Blackf. (Ind.) 177; O'Neil v. Dougherty, 46 Cal. 575; Collins v. Marshall, 10 Rob. (La.) 112.

[92] Herndon v. Howard, 9 Wall. 664; Knox v. Exchange Bank, 12 Wall. 379; Day v. Laflin, 47 Mass. 280; Sandford v. Sandford, 58 N. Y. 67; Vairin v. Edmonson, 9 Ill. 120; Moffit v. Cruise, 7 Cold. (Tenn.) 137.

[93] B. A. 1898, Sec. 47, clause 2.

[94] B. A. 1898, Sec. 70*e*.

[95] B. A. 1898, Sec. 60*b*.

[96] Sec. 20, *ante;* Pond v. Exchange Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343.

[97] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537; 2 N. B. N. 388; *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180,

this respect the familiar rule with reference to suing receivers applies. It is undoubtedly a contempt of court to sue a trustee without leave of the court of bankruptcy in any other court.

A person claiming to be the owner of property in the hands of a trustee is entitled to a jury trial and can not be compelled to submit his claims to a reference.[98]

A suit on the bond of a trustee may be prosecuted in a district court [99] or in a state court.[99*]

§ 147. **Limitations of actions by or against trustees.**

The statute provides that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." [100]

This limitation applies to suits at law and in equity,[101] and to suits brought in a state or federal court.[102] The limitation applies, although the suit is brought in the name of the trustee for the use of another person.[103] The time is to be reckoned from the final decree. The filing of a bill or petition, although it is necessary to afterwards amend it, prevents the running of the statute.[104] But inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period.[105]

In order to avail of the advantage of the limitation it must be pleaded in some form.[106] Where the bill or petition shows that the cause of action is barred by the statute it may be raised by demurrer.[107] Otherwise it must be set up by plea or answer.

5 Am. B. R. 198, 3 N. B. N. 316; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654.

But see McFarlan Carriage Co. v. Solanas (C. C. A. 5th Cir.), 106 Fed. Rep. 145.

[98] *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658.

[99] U. S. v. Union Surety and Guaranty Co., 9 Am. B. R. 114.

[99*] Alexander v. Union Surety and Guaranty Co. (N. Y. Sup. Ct., App. Div.), 11 Am. B. R. 32.

[100] B. A. 1898, Sec. 11*d*.

[101] Baily v. Weir, 21 Wall. 342.

[102] Comegys v. McCord, 11 Ala. 932; Archer v. Duval, 1 Fla. 219; Friedlander v. Holloman, 9 B. R. 331; Peiper v. Harmer, 5 B. R. 252.

[103] Pike v. Lowell, 32 Me. 245.

[104] Bank v. Sherman, 101 U. S. 405.

[105] Amy v. Watertown (No. 2), 130 U. S. 320.

[106] Gormley v. Bunyan, 138 U. S. 623, 630; Lyon v. Betram, 20 How. 149; Retzer v. Wood, 109 U. S. 187; Upton v. McLaughlin, 105 U. S. 640.

[107] Harris v. Collins, 13 Ala. 388.

§ 148. Compensation and expenses of trustees.

The compensation of the trustees in suits which were commenced prior to Feb. 5, 1903, is fixed by the statute as follows:[108]

"Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

"In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

"The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause."

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.[109]

The compensation allowed to trustees by the act is in full compensation for the services performed by them; but does not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their ac-

[108] B. A. 1898, Sec. 48.

[109] B. A. 1898, Sec. 47*c*; 32 Stat. at L. 797.

counts.[110] Whether a trustee should be allowed a commission upon claims of secured creditors which passed through his hands depended upon whether such payments were considered dividends within the meaning of the statute. In one case it was held to be a dividend and a referee was allowed commissions on secured debts.[111] The courts generally held that the referee and trustee were not entitled to commissions on claims of secured creditors.[112] This question was definitely settled by the amendment of Feb. 5, 1903,[113] in which it was enacted that neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed by this act,[114] and Sec. 48*a* was amended to read:

"Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."

In any case in which the fees of the trustee are not required

[110] Gen. Ord. 35, par. 3; B. A. 1898, Sec. 62; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; 2 N. B. N. 23.

[111] *In re* Barber, 97 Fed. Rep. 547, 3 Am. B. R. 306.

[112] *In re* Fort Wayne Electric Corp., 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383, 2 N. B. N. 386; *In re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 191; *In re* Hinckel Brewing Co., 124 Fed. Rep. 702; *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; see also *In re* Kaiser, 112 Fed. Rep. 955, 8 Am. B. R. 108.

[113] 32 Stat. at L. 797.

[114] B. A. 1898, Sec. 72, as enacted in 32 Stat. at L. 797.

by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[114*]

[114*] Gen. Ord. 35, par. 4.

CHAPTER XVI.

WHAT PASSES TO THE TRUSTEE.

§ 149. Title to bankrupt's property.

The title to the property of the bankrupt, whatever it may be, remains in the bankrupt until a trustee is appointed and qualified.[1] Thus where no trustee is appointed the title of the bankrupt is not divested.[2] It has been held that after a petition filed, and before a trustee was appointed, a bankrupt might redeem land sold for taxes.[3] So also a bankrupt has been permitted to institute a suit in his own name for infringement of a copyright after the filing of a petition and prior to the appointment of a trustee.[4] But a bankrupt cannot maintain a suit in his own name in relation to his property, not exempt, pending bankruptcy proceedings after the appointment of a trustee.[5]

The title of the bankrupt in the interval between the adjudication and the appointment of the trustee is defeasible, and when the trustee is appointed is divested as of the date of the adjudication of bankruptcy.[6] During this period the

[1] Conner v. Long, 104 U. S. 228; Eyster v. Gaff, 91 U. S. 521; Hampton v. Rouse, 22 Wall. 263, 275; Sedgwick v. Grinnell, No. 12612 Fed. Cas., s. c. 9 Ben. 429; March v Heaton, No. 9061 Fed. Cas., s. c. 1 Lowell 278; Robinson v. Hall, No. 11952 Fed. Cas., s. c. 8 Ben. 61; Sutherland v. Davis, 42 Ind. 26.

[2] Robinson v. Hall, No. 11592 Fed. Cas., s c 8 Ben. 61.

[3] Hampton v Rouse, 22 Wall. 263.

[4] Myers v. Callaghan, 5 Fed. Rep. 726.

[5] Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 5 Am. B. R. 644; affirmed *sub nom.* Pickens v Roy, 187 U. S. 177, 9 Am. B. R. 47.

[6] B. A. 1898, Sec. 70*a;* Conner v. Long, 104 U. S. 230. In Carpenter Bros. v. O'Connor, 16 O. C. C. 526, an application was made to the state court for an order directing a receiver appointed by that court after an adjudication in a court of bankruptcy, to deliver property of the bankrupt in his possession to a trustee, subsequently appointed by the creditors in the proceeding in bankruptcy, on the ground that the trustee's title vested as of the date of adjudication and prior to the

bankrupt occupies a sort of fiduciary relation to his creditors.[7] All titles derived under and through the bankrupt originating during this interval are, by force of law and without regard to the knowledge or motive of the claimant, defeated by the appointment of a trustee.[8]

Transfers made by the bankrupt after the filing of the petition and before the adjudication are to be considered in the same class with those made within four months prior to the commencement of the bankruptcy proceedings. A *bona fide* sale for value is valid. But as the filing of a petition in bankruptcy is deemed notice to all the world,[9] it would appear that no *bona fide* sale could be made during this interval. Those who deal with a bankrupt pending bankruptcy proceedings do so at their peril.[10]

The trustee, or his successor, upon his appointment and qualification is vested by operation of law, without a deed of conveyance, with the title of the bankrupt *as of the date he was adjudged a bankrupt.*[11] In this respect the act of 1898 differs from the act of 1867, which provided for a deed of conveyance from the register to the assignee, and that such assignment should relate back *to the commencement of the proceedings* in bankruptcy.[12]

property coming into the possession of the receiver. The application was granted.

[7] March v. Heaton, No. 9061 Fed. Cas. s. c. 1 Lowell 278; Williams v Merritt, 103 Mass. 187.

[8] Bank v. Sherman, 101 U. S. 403; Taylor v. Robinson, 21 Fed. Rep. 209; *In re* Randall, No. 11552 Fed. Cas., s. c. 1 Saw. 56; Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[9] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; Bank v. Sherman, 101 U. S. 406; *In re* Wallace, No. 17094 Fed. Cas., s. c. Deady 433; Shawhan v. Wherritt, 7 How. 627; Mays v. Nat. Bank, 64 Penn. 74; Perley v. Dole, 38 Me. 558; Oakey v. Corry, 10 La. Ann. 502; *In re* Lake, No. 7992 Fed. Cas., s. c. 3 Biss. 204; *In re* Gregg, No. 5796 Fed. Cas., s. c. 1 Hask. 173.

[10] *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224, it was held that an agreement by an insolvent debtor, made after the filing of a petition in involuntary bankruptcy against him and in contemplation of the filing of a voluntary petition, that his attorney should take certain goods in payment for his services, where there was no actual delivery or change of possession until after the adjudication upon the voluntary petition, did not constitute a transfer of the property to give the attorney title to the property.

[11] B. A. 1898, Sec. 70*a*; *In re* Engle, 105 Fed. Rep. 893, 5 Am. B. R. 372.

[12] R. S. Sec. 5044.

A certified copy of the order approving the bond of a trustee is conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded imparts the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.[13]

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.[14]

A statutory conveyance can have no extra territorial effect upon real estate, and will not, therefore, convey title to property situated in a foreign country.[15] The statute, however, provides that the bankrupt shall "execute to his trustee transfers of all his property in foreign countries."[16] In this way the trustee becomes vested with the title to all the property of the bankrupt situated in foreign countries as well as that in the United States.

The trustee is vested "with the title of the bankrupt."[17] He takes no greater interest in or better title to the property than the bankrupt had,[18] except as to property disposed of by

[13] B. A. 1898, Sec. 21*e*; see Shawhan v. Wherritt, 7 How. 627; Herndon v. Howard, 9 Wall. 664; Alexander v. McCullough, 32 Leg. Int. 356; Cove v. Purcell, 56 N. Y. 649; Dambmann v. White, 48 Cal. 439; Burk v. Winters, 28 Ark. 6; Rogers v. Stevenson, 16 Minn. 68; Zantzinger v. Ribble, 36 Md. 32.

[14] B. A. 1898, Sec. 47*c*, 32 Stat. at L. 797.

[15] Oakey v. Bennett, 11 How. 33; Barnett v. Pool, 23 Tex. 517.

[16] B. A. 1898, Sec. 7, clause 5.

[17] B. A. 1898, Sec. 70*a*.

[18] *In re* Swift, 108 Fed. Rep. 212; *In re* Cobb, 96 Fed. Rep. 821, 3 Am. B. R. 129; Carling v. Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 8 Am. B. R. 29; Donaldson v. Farwell, 93 U. S. 631; *In re* McKay, No. 11978 Fed. Cas., s. c. 1 Lowell 345; *Ex parte* Dalby, No. 3540 Fed. Cas., s. c. 1 Lowell 431; Allen v. Whittemore, No. 241 Fed. Cas., s. c. 8 Ben. 485; *In re* Kansas City Stone Co., No. 7610 Fed. Cas., s. c. 9 N. B. R. 76; Kelly v. Scott, 49 N. Y. 595; Rowe v. Page, 54 N. H. 195; Chace v. Chapin, 130 Mass. 128; Dugan v. Nichols, 125 Mass. 45; Tucker v. Daly, 7 Grat. (Va.) 330.

As to the effect of a conditional

the bankrupt in fraud of the act. Hence, where the bankrupt would be estopped the trustee is estopped, except when he is subrogated to rights of creditors. So also it has been held that where a state statute gives to the party paying usurious interest the right to recover it, the trustee may do so,[19] but not otherwise.[20] Where a bankrupt is a beneficiary subject to the discretion of a trustee under a will, he has no interest which may be enforced by his trustee in bankruptcy.[21]

The trustee takes the title of the bankrupt subject to all equities, liens or incumbrances, whether created by operation or law or by the act of the bankrupt, which existed against the property in the hands of the bankrupt,[22] except in cases of levies, judgments, attachments or other judicial liens created against the property within four months preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void. This principle is deduced from the cases decided under the act of 1867,[23] and is directly

sale, see Field v. Baker, No. 4762 Fed. Cas., s. c. 12 Blatch. 438; Woods v. Oakman, 116 Mass. 599.

[19] Moore v. Jones, 23 Vt. 739; Wheelock v. Lee, 10 B. R. 363; *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

[20] Tiffany v. Boatman's Savings Institution, 18 Wall. 375; Bromley v. Smith, No. 1922 Fed. Cas., s. c. 2 Biss. 511; National Bank v. Gish's assignee, 72 Penn. 13; Nichols v. Bellows, 22 Vt. 581; Sparkawk v. Cochran, No. 13203 Fed. Cas., s. c. 30 Leg. Int. 233.

[21] Nichols v. Eaton, 91 U. S. 716.

[22] *In re* Hanna, 105 Fed. Rep. 587, 5 Am. B. R. 127, 3 N. B. N. 237; Chatt. Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441; *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; *In re* Cobb, 96 Fed. Rep. 821, 3 Am. B. R. 129; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744; *In re* Nicholas, 122 Fed. Rep. 299, 10 Am. B. R. 291; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; *In re* English, 122 Fed. Rep. 113, 10 Am. B. R. 133; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324; First National Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968; 10 Am. B. R. —.

[23] Yeatman v. Savings Institution, 95 U. S. 764; Jerome v. McCarter, 94 U. S. 734; Donaldson v. Farwell, 93 U. S. 631; Cook v. Tullis, 18 Wall. 332; Gibson v. Warden, 14 Wall. 244; Brown v. Heathcote, 1 Atk. 160; Crane v. Penny, 2 Fed. Rep. 187; Mattocks v. Baker, 2 Fed. Rep. 455; Mitchell v. Winslow, No. 9673 Fed. Cas., s. c. 2 Story 630; Windsor v. McLellan, No. 17887 Fed. Cas., s. c. 2 Story 492; Goddard v. Weaver, Noo. 5495 Fed. Cas., s. c. 1 Woods 257; *In re* Pusey, No. 11477 Fed. Cas., s. c. 6 N. B. R. 40; Parker v. Muggridge, , No. 10743

recognized by more than one provision of the present statute.[24] Another exception is where, as in unrecorded conditional sales and chattel mortgages, the bankrupt's title is not good against some third person but because of state laws is good in favor of creditors. In such cases the trustee is given the right of the creditors and gets title to the goods.[25]

Where property on which there is a valid lien is sold by a receiver in a foreclosure suit brought by the lienor the title to the proceeds passes to the trustee after satisfying the lien and costs.

The title remains in the trustees, unless conveyed to a purchaser,[26] until the estate is finally distributed by direction of the court.

Upon the confirmation of a composition offered by a bankrupt the title to his property revests in him.[27] But wherever a composition is set aside or a discharge revoked the trustee is, upon his appointment and qualification, vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.[28]

Fed. Cas., s. c. 2 Story 334; Fletcher v. Morey, No. 4864 Fed. Cas., s. c. 2 Story 555; Kelly v. Scott, 49 N. Y. 595; Talcott v. Dudley, 5 Ill. 427.

[24] B. A. 1898, Sec. 56*b*, Sec. 67*d* and *f*, and Sec. 60*b*.

[25] B. A. 1898, Sec. 67*a*; *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* New York Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; *In re* Galt, 120 Fed. Rep. 443, 9 Am. B. R. 682; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466, *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302; Spencer v. Duplan Silk Co., 112 Fed. Rep. 638, 7 Am. B. R. 563; *In re* Tyler, 104 Fed. Rep. 778, 5 Am. B. R. 152; *In re* Leigh, 96 Fed. Rep. 806; *In re* Taylor, 95 Fed. Rep. 956; but see *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; *In re* Hinsdale, 111 Fed. Rep. 502, 7 Am. B. R. 85.

The trustee, however, takes the title only to the extent of the claims of those against whom the title of the third party would not be good; *In re* Garcewich (C. C. A., 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Econ. Printing Co. (C. C. A., 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615.

[26] B. A. 1898, Sec. 70*c*.

[27] B. A. 1898, Sec. 70*f*. See Stevens v. Earles, 25 Mich. 40. See King v. Remington, 36 Minn. 15; Herndon v. Davenport, 75 Tex. 462; Oliver v. Sanborn, 60 Mich. 346.

[28] B. A. 1898, Sec. 70*d*.

§ 150. **The possession of the bankrupt's property.**

As soon as a trustee is appointed and qualified he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court and no person acting under any process from any other court can, without permission of the bankruptcy court, interfere with it, and to so interfere is a contempt of the bankruptcy court.[29] This is true, even if the trustee is not in manual possession of the property.[30]

The filing of a petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction.[31] The effect of filing such a petition is to place the property of the bankrupt constructively in the custody of the court of bankruptcy. Especially if the petition is subsequently sustained by the court.[32] Where the petition is dismissed it may be doubted if the mere filing of a petition will be held such custody as to render void dealings with such property pending an adjudication.

[29] White v. Schloerb, 178 U. S. 542. See also Sec. 18, *ante*.

In re Vogel, No. 16982, Fed. Cas., s. c. 7 Blatch. 18; *In re* Barrow, No. 1057, Fed. Cas., s. c. 1 N. B. R. 481; Markson v. Heaney, No. 9098, Fed. Cas., s. c. 1 Dill. 497; *In re* People's Mail Steamship Co., No. 10970 Fed. Cas., s. c. 3 Ben. 226; *In re* Kerosene Oil Co., No. 7725 Fed. Cas., s. c. 3 Ben. 35; McLean v. Lafayette Bank, No. 8885 Fed. Cas., s. c. 3 McLean 185; Watson v. Citizens' Savings Bank, No. 17279 Fed. Cas., s. c. 2 Hughes 200; *In re* Wallace, No. 17094 Fed. Cas., s. c. Deady 433; Jones v. Leach, No. 7475 Fed. Cas., s. c. 1 N. B. R. 595; Brock v. Terrill, No. 1914 Fed. Cas., s. c. 2 N. B. R. 643; Pennington v. Sale, No. 10939 Fed. Cas., s. c. 1 N. B. R. 572; Hewett v. Norton, No. 6441 Fed. Cas., s. c. Woods 68.

A trustee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshal and receivers are applicable with equal force to the protection of the trustee. Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Shields v. Coleman, 157 U. S. 168; Porter v. Sabin, 149 U. S. 473; McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115.

[30] See Sec. 23, *ante*, and cases there cited.

[31] Mueller v. Nugent, 184 U. S. 1; 5 Am. B. R. 176.

[32] *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875. Consult White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; *In re* Brooks, 91 Fed. Rep. 508, 1 Am. B. R. 531; Wayne Knitting Mills Co. v. Nugent, 104 Fed. Rep. 530, 4 Am. B. R. 747, s. c. 184 U. S. 1.

It is the duty of the bankrupt to prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail.[33] The bankrupt should surrender to the trustee the actual possession of all of his property, whether included in the schedule or not.[34] The trustee must himself be active. He should assert his right to the property if the bankrupt does not voluntarily surrender it.[35] A certified copy of the order approving his bond is sufficient authority for a trustee to demand actual possession.[36] If the bankrupt fails or refuses to deliver any part of the property in his possession the trustee may procure an order of court to compel him to do so.[37] The court will enforce such an order by commitment if necessary.[38]

Where an officer of a court has possession of the property the court will direct him to deliver it to the trustee as soon as he is appointed and qualified.[39]

§ 151. Trustees not bound to take incumbered interest.

Since the property passes to the trustee subject to equities it may be so burdened with liens and incumbrances as to be without value to the estate. In such case it can not be considered a real asset of the bankrupt.

[33] B. A. 1898, Sec. 7, clause 8.

[34] *In re* Peltasohn, No. 10912 Fed. Cas., s. c. 4 Dill. 107; *In re* Dresser, No. 4077 Fed. Cas., s. c. 3 N. B. R. 557; *In re* Kempner, No. 7689 Fed. Cas., s. c. 6 N. B. R. 521; *In re* Salkey, No. 12253 Fed. Cas., s. c. 6 Biss. 269; *In re* Speyer, No. 13239 Fed. Cas., s. c. 6 N. B. R. 255; *In re* How, No. 6747 Fed. Cas., s. c. 18 N. B. R. 565; *In re* McKenna, 9 Fed. Rep. 29; *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; see also *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117.

[35] It was held in England that the mere fact that the trustee had not taken possession of a debtor's property for two months after the date of his appointment, but had allowed the debtor to continue trading as before, was not sufficient to destroy his right to the property. *Ex parte* Cooper, 39 L. T. 260.

[36] B. A. 1898, Sec. 21*c*.

[37] *In re* How, No. 6747 Fed. Cas., s. c. 18 N. B. R. 565.

[38] Mueller v. Nugent, 184 U. S. 1, 5 Am. B. R. 176; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

[39] Carpenter Bros. v. O'Conner, 16 O. C. C. 526.

It has long been a recognized principle of bankrupt law that a trustee is not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit.[40] A trustee in this respect is regarded as being in a very different position from that of an executor of a deceased person. The former takes the property by operation of law, but the latter claims title through his testator, and is bound to perform his obligations to the extent of his assets. The trustee in such cases is required to elect within a reasonable time,[41] and if he refuses to elect when required to do so it is deemed an election to reject the estate.[42] Where the trustee elects not to take the property or right of the bankrupt and charge the estate with it, the property and right, whatever it is, remains in the bankrupt.[43] When a trustee once rejects property as onerous he can not later claim it if it turns out to be valuable.[44]

§ 152. Property of other persons in the possession of the bankrupt.

The statute contemplates that the trustee shall take all the property of the bankrupt at the time of the adjudication which may be applied to the payment of his debts. The trustee

[40] Sessions v. Romadka, 145 U. S. 39; Sparhawk v. Yerkes, 142 U. S. 1; American File Co. v. Garrett, 110 U. S. 295; Glenny v. Langdon, 98 U. S. 30, 31; DuShane v. Beall, 161 U. S. 513; *In re* Chambers, 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; Amory v. Lawrence, No. 336 Fed. Cas., s. c. 3 Clif. 523; Taylor v. Irwin, 20 Fed. Rep. 615, 620; Kimberling v. Hartly, 1 Fed. Rep. 571; Rugely & Harrison v. Robinson, 19 Ala. 404; Glenn v. Howard, 65 Md. 40; Nash v. Simpson, 78 Me. 142; National Bank v. State Bank, 10 Bush (Ky.) 367; Streeter v. Sumner, 31 N. H. 542.

[41] See Leaseholds, p. 165, *post.*

[42] Sessions v. Romadka, 145 U. S. 39; Taylor v. Irwin, 20 Fed. Rep. 615, 620; Amory v. Lawrence, No. 336 Fed. Cas., s. c. 3 Clif. 523; Oakey v. Gardiner, 2 La. Ann. 1005; Lawrence v. Knowles, 5 Bing. N. C. 399; Tuck v. Fyson, 6 Bing. 321; Graham v. Van Dieman's Land Co., 11 Exch. 101.

[43] Sparhawk v. Yerkes, 142 U. S. 1; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052 Fed. Cas., s. c. 6 Law Rep. 313.

[44] Meyers v. Josephson (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 10 Am. B. R. —, affirming 121 Fed. Rep. 142, 9 Am. B. R. 345, in which case it was also held that a trustee, having rejected an insurance policy as onerous, although he could not claim the proceeds, could claim the amount of the cash surrender value.

may, as has been stated, decline to take property which is of no value or benefit to the estate.[45]

Where property, lands, goods or money in his possession can be clearly identified to be owned by a person other than the bankrupt no useful end can be served by its vesting in the trustee. It would be absurd to say that anything shall vest in the trustee for no other purpose but in order that there may be proceedings brought against him, by which he shall be obliged to refund and account for such thing and pay costs of the proceeding out of the effects of the bankrupt which ought to be applied to the discharge of his debts. Such property does not vest in the trustee under the bankrupt act.[46] But if the property has become mingled or confused with the other property in the possession of the bankrupt, so that it possesses no *indicia* or earmarks by which it may be distinguished from all other property of the same description, it is conceived to be the property of the bankrupt, and as such passes to the trustee.[47] In such cases the person who owns the property is interested only as a general creditor of the estate.

It is not infrequently hard to determine who owns the property in the possession of the bankrupt. When the bankrupt has such property in his possession, which may belong to other persons, it ordinarily passes to the trustee until its ownership is determined.[48] The title which the trustee takes to such property is the same that the bankrupt had, and may be merely a title of possession. When the claimant establishes his title to the property it should be delivered to him. If there is a controversy it is for the court of bankruptcy to determine it. The proper practice in cases where the trustee has taken possession of property not belonging to the bankrupt is for the claimant to procure an order of the court of bankruptcy upon

[45] Sec. 151, *ante*.

[46] Cook v. Tullis, 18 Wall. 332; Clark v. Iselin, 21 Wall. 360; Porter v. Lazear, 109 U. S. 84; Tennessee etc., R. R. Co. v. East Alabama Ry. Co., 75 Ala. 529; Donaldson v. Farwell, 93 U. S. 631.

[47] Wood M. & R. Co. v. Broke, 9 B. R. 395; Adams v. Meyers, 62 Fed. Cas., s. c. 1 Saw. 306; Rahilly v. Wilson, No. 11532 Fed. Cas., s. c. 3 Dill. 420.

[48] *In re* Vogel, No. 16982 Fed. Cas., s. c. 7 Blatch. 18; In the matter of Moses, 1 Fed. Rep. 845; *In re* Beal, No. 1156 Fed. Cas., s. c. 1 Low. 323.

petition and proofs to deliver such property to him.[49] An attempt to obtain possession of such property in the hands of the trustee by writ of replevin, or other process, issued by another court is as much a contempt of the court of bankruptcy as if the claimant had endeavored to take it by force, and in such cases the sheriff or marshal will be ordered to return the property.[50]

Where property of another person is in the actual possession of the bankrupt after the filing of the petition and before the trustee or other officer of a court of bankruptcy acquires actual possession of it, the possession cannot be recovered by replevin instituted in a state court.[51] The reason is that the filing of the petition is a *caveat* to all the world and in effect an attachment and injunction, and a court of bankruptcy acquires constructive custody of all property in the possession of the debtor from the time of filing the petition, and the rule heretofore stated[52] applies to such property as much as to property in the possession of a trustee.

The question of the right of persons owning property in the possession of the bankrupt to recover it will become important

[49] White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 2 N. B. N. 721; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992.

In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316, the court said: "The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654, the court said: "The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

[50] White v. Schloerb, 178 U. S. 542; *In re* Vogel, No. 16982 Fed. Cas., s. c. 7 Blatch. 18; *In re* Ulrick, No. 14328 Fed. Cas., s. c. 6 Ben. 483; *In re* People's Mail Steamship Co., No. 10970 Fed. Cas., s. c. 3 Ben. 226; *In re* Kerosene Oil Co., No. 7725 Fed. Cas., s. c. 3 Ben. 35; *In re* Atkinson, No. 606 Fed. Cas., s. c. 7 N. B. R. 143; Moran v. Sturges, 154 U. S. 256.

[51] *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875.

[52] See cases cited in note 49 *supra*.

in cases of fraudulent sales. It will be especially so in cases of involuntary bankruptcy, where ten days must elapse between the filing of the petition and an adjudication. The doctrine is now well established by a preponderance of authority that a party not intending to pay, who has induced an owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods.[53] To justify a recision there should be a clear showing of deliberate and intentional fraud; the mere knowledge of insolvency and a failure to disclose it is not sufficient.[54] Mutual mistake will also justify a recision.[55] In such cases no title passes to the bankrupt. But if the vendor does not take steps to rescind the sale the title passes to the bankrupt and to the trustee.

Property in the possession of the bankrupt purchased on condition that the title shall not pass to him until the goods are paid for does not pass to the trustee, where such conditional sale is valid as against creditors under the state law.[55*] Where such property is purchased to be resold in the due course of business it passes to the purchaser's trustee, as representative of the creditors, where such conditional sale would be invalid as to creditors under the state law.[55**]

[53] Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74; *In re* Burkle, 116 Fed. Rep. 766, 8 Am. B. R. 542; Mr. Justice Davis, in Donaldson v. Farwell, 93 U. S. 631 and cases there collated. Montgomery v. Bucyrus Machine Works, 92 U. S. 257; Dugan v. Nichols, 125 Mass. 43; Davis v. Stewart, 8 Fed. Rep. 803; Jaffrey v. Brown, 29 Fed. Rep. 476, and note at the end of the opinion.

As to the right of stoppage in transitu, see *In re* Foot, No. 4907 Fed. Cas., s. c. 11 Blatch. 530; Sutro v. Hoile, 2 Neb. 186; Tufts v. Sylvester, 79 Me. 213; Benjamin on Sales, Sec. 828, *et seq.*

[54] *In re* O'Conner, 112 Fed. Rep. 666, 7 Am. B. R. 428; *In re* Roalswick, 110 Fed. Rep. 639, 6 Am. B. R. 752; *In re* Davis, 112 Fed. Rep. 294, 7 Am. B. R. 276; but see *In re* Epstein, 6 Am. B. R. 60. In *In re* Patterson & Co., 125 Fed. Rep. 562, mere false statements of financial condition knowingly made for the purpose of obtaining credit were held sufficient to justify a recision.

[55] *In re* Burkle, 116 Fed. Rep. 766, 8 Am. B. R. 542.

[55*] *In re* Kellogg, 112 Fed. Rep. 52, 7 Am. B. R. 270.

[55**] *In re* Carpenter, 125 Fed. Rep. 831; *In re* Garcewich, 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 405.

§ 153. **What property passes to the trustee generally.**

It may be stated as a general rule that all goods, property and rights of action properly available for the payment of the bankrupt's obligations or debts pass to the trustee in bankruptcy. Property subject to exemption under the state law does not pass.[56] The claim of a wife for alimony is not a property right and property awarded her as alimony after her bankruptcy does not pass to her trustee in bankruptcy.[57]

With this exception the statute enumerates six classes of property,[57*] the title of which shall be vested in the trustee, namely, to all, *first,* documents relating to his property; *second,* interests in patents, patent rights, copyrights, and trademarks; *third,* powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; *fourth,* property transferred by him in fraud of his creditors; *fifth,* property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and, *sixth,* rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

These provisions relate only to the property of the bankrupt or property in his possession, and do not include any other property.[58] They embrace all the real estate situated in the United States, but do not include that situated in foreign countries.[58*] A bankrupt may be compelled to execute a transfer of his real estate situated in foreign countries.[59] Vessels upon the high seas are deemed within the jurisdiction of the nation and the proper court of bankruptcy.[59*] All per-

[56] See Exemption, Chap. XVII.

B. A. 1898, Sec. 6, provides that "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

[57] *In re* Le Claire, 124 Fed. Rep. 654.

[57*] B. A. 1898, Sec. 70*a*.

[58] Porter v. Lazear, 109 U. S. 84; Tennessee, etc., R. R. Co. v. East Alabama Ry. Co., 75 Ala. 529; *In re* Angier, 388 Fed. Cas., 4 N. B. R. 619.

[58*] Oakey v. Bennett, 11 How. 33; Barnett v. Pool, 23 Tex. 517.

[59] Sec. 7, clause 5, of the act of July 1, 1898, 30 Stat. at L.

[59*] Crapo v. Kelly, 16 Wall. 610.

sonal property, wherever it is, passes under these provisions [60] for the reason that personal property is deemed to follow the domicile of the owner. Citizens of foreign countries in which the personal property may be situated are not bound by the bankrupt law of the United States. It has no extra-territorial effect. Although such property passes to the trustee as of the date of adjudication, it may be deemed not to have passed to affect rights acquired by foreign creditors in foreign forums prior to the actual possession of the trustee. This seems to be the rule in the United States with reference to foreign bankruptcy. The American courts have upheld attachments of resident creditors of foreign bankrupts upon property situated in this country against a foreign assignee who had not actually taken possession of such property.[60*]

Such property passes to the trustee whether named in the schedule of the bankrupt or not.[61]

§ 154. Documents.

All documents relating to the bankrupt's property pass to the trustee.[61*] These include [62] deeds or other muniments of title, contracts, securities (as bonds, mortgages, etc.), bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to his business. While, strictly speaking, a document is a written or printed paper, it may also include anything bearing a legible or significant

[60] Cannon v. Wellford, 22 Grat. (Va.) 195; Crapo v. Kelly, 16 Wall. 610; Selkrig v. Davies & Salt, 2 Dow 230, s. c. 2 Rose 97; decided by the House of Lords in 1814. For an exhaustive discussion of this subject, see Story's Conflict of Laws, Secs. 403 to 421.

[60*] Blake v. Williams, 6 Pick. (Mass.) 286; Milne v. Moreton, 6 Binn. (Pa.) 353; Dawes v. Boylston, 9 Mass. 337; Osgood v. Maguire, 61 N. Y. 529; Willitts v. Waite, 25 N. Y. 583; Abraham v. Plestoro, 3 Wend. (N. Y.) 538; Saunders v. Williams, 5 N. H. 213; Blanchard v. Russell, 13 Mass. 1; Fox v. Adams, 5 Greenl. (Me.) 245; Ingraham v. Geyer, 13 Mass. 146; Harrison v. Sterry, 5 Cranch 289; Zacher v. Fidelity Trust and Safety-Vault Co. (C. C. A. 6th Cir.), 106 Fed. Rep. 593.

[61] Holbrook v. Coney, 25 Ill. 447; Jewett v. Preston, 27 Me. 400; Burton v. Lockert, 9 Ark. 411; *In re* Schumpert, No. 12491 Fed. Cas., s. c. 8 N. B. R. 415.

[61*] B. A. 1898, Sec. 70, clause 1.

[62] The act defines a document to "include any book, deed, or instrument in writing." B. A. 1898, Sec. 1, clause 13.

inscription, as a stencil plate or marking and cancelling stamp or a seal.[63]

Where a bankrupt has transferred his documents or any of them to another person before bankruptcy proceedings were instituted, such documents can not be recovered by the trustee until such transfer is shown to be fraudulent under the act.[64]

§ 155. Patents, copyrights and trade-marks.

All interests in patents, patent rights, copyrights and trade-marks pass to the trustee.[65] But the trustee takes no greater interest in these rights than the bankrupt had. Under this provision the interest of the bankrupt as a patentee, assignee or a licensee passes to his trustee in bankruptcy. The title passes by operation of law, and no instrument need be recorded in the patent office.[66] It is, however, proper for a trustee to record the order approving his bond in the patent office.

The trustee is not bound to take the interest of the bankrupt in the patents, copyrights or trade-marks if it is conceived to be worthless or would prove to be a burden or unprofitable.[67] If he declines to take the right it remains in the bankrupt.[67] If he elects to take it, the trustee may maintain a suit for infringement of the patent, copyright or trade-mark in such courts as the bankrupt could have instituted it, but he is not obliged to bring such a suit.[68]

[63] See Century Dictionary, subject, Document.

[64] Rogers v. Winsor, No. 12023 Fed. Cas., s. c. 6 N. B. R. 246; *In re* West, 46 L. T. 823.

[65] B. A. 1898, Sec. 70, clause 2.

As to the nature of creditor's remedies for reaching book royalties, see Lord v. Hart, 118 Mass. 271; Stephens v. Cady, 14 How. 531.

As to trade-marks, see Helmbold v. Helmbold Manufacturing Co., 53 How. Prac. 453; Warren v. Warren Thread Co., 134 Mass. 247; Sohier v. Johnson, 111 Mass. 238; Leather Cloth Co. v. Cloth Co., 11 H. L. 523; Kidd v. Johnson, 100 U. S. 617; Royal Baking Powder Co. v. Sherell, 93 N. Y. 334.

[66] Prime v. Brandon Manufacturing Co., No. 11421 Fed. Cas., s. c. 16 Blatch. 453. Compare Gordon v. Anthony, No. 5605 Fed. Cas., s. c. 16 Blatch. 453. Compare Gordon v. 105 U. S. 131; Ashcroft v. Walworth, 580 Fed. Cas., s. c. 1 Holmes 152.

[67] Sessions v. Romadka, 145 U. S. 39.

[68] Kittle v. Hall, 29 Fed. Rep. 512, where the court said: "It cannot be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and

It has been held that the trustee is not entitled to patents issued after an adjudication, for which application had been made prior to the filing of the petition in bankruptcy.[69] It may be observed that in such cases the bankrupt owns an interest in the future patent which may be transferred before the patent issues.[70] It would therefore appear that the property in the patent should pass to the trustee under Sec. 70, clauses 2 or 5, of the act. If he elects to take it, he should record the order approving his bond in the patent office with a request that the patent issue to him as trustee.

§ 156. Powers of appointment, etc.

A power[71] is distinct from property. It is not an interest in property which can be transferred to another or sold on execution or devised by will; nor is it a chose in action. It was therefore held under the act of 1867 that a power of appointment did not pass to an assignee in bankruptcy of the person in whom the power resided.[72]

The act of 1898 expressly provides that powers which a bankrupt might have exercised for his own benefit pass to the trustee.[74] But those which he might have exercised for some other person do not pass.[73] The English bankrupt laws have for many years contained a similar provision.[74] The test of whether the power passes or not depends upon whether the power may be exercised by the bankrupt for his own benefit.

that his failure to do so is negligence."

[69] *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92.

[70] R. S. Sec. 4895; Hendrie v. Sayles, 98 U. S. 546; Walker on Patents, Sec. 171.

[71] As to powers generally, see Sugden on Powers; Chance on Powers; Farwell on Powers, 4 Kent's Com. 351, *et seq.*

[72] Jones v. Clifton, 101 U. S. 225.

[73] B. A. 1898, Sec. 70, clause 3.

[74] The statutes 13 Eliz., s. c. 7 2, 21 Jac. 1 c. 19 s. 12, provided that every interest, power, or possibility which the bankrupt could have departed withal, or could have destroyed by recovery of fine, is transferred under the bankruptcy. And the bankruptcy act of 1869, 32 and 33 Vic. c. 71 s. 15, par. 4, enacted, and the act of 1883, 46 and 47 Vic. c. 52, s. 44, provides that the property of the bankrupt divisible among his creditors shall comprise (i i) "the capacity to exercise and to take proceedings for exercising all such powers in and over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge."

or whether he can exercise it only in behalf of some other person. In the former case it passes to the trustee.[75] In the latter case it does not. A power of general appointment may be exercised for the benefit of himself, and therefore passes.[76] But it seems that the appointment must be exercised prior to the death of the bankrupt.[77]

This provision in bankruptcy law is similar to a rule in equity. The trustee for this purpose represents the creditors. Mr. Justice Gray, in Clapp *v.* Ingraham,[78] said: "It was settled in the English court of chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the house of lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate.[79] But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power when executed took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meager and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money should be consid-

[75] Doe v. Britian, 2 B. & Ald. 93; Badham v. Mee, 7 Bing. 695; Cooper v. Slight, 27 L. R. Chan. Div. 765; Ford v. Belmont, 7 Rob. (N. Y.) 97.

[76] Doe v. Britian, 2 B. & Ald. 93.

[77] Nichols v. Nixey, 29 L. R. Chan Div. 1005; *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, 3 N. B. N. 143.

[78] 126 Mass. 201.

[79] Thompson v. Towne, Prec. Ch. 52; s. c. 2 Vern. 319.

ered part of his assets, and his creditors should have the benefit of it.[80] The doctrine has been upheld to the full extent in England ever since." [81]

§ 157. Property fraudulently transferred by the bankrupt.

The bankrupt statute vests in the trustee and authorizes him to recover property fraudulently transferred. A transfer, as defined by the act, includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." [82]

Transfers which are deemed fraudulent in bankruptcy may be classified as follows: *First*, those which, independently of any legislative system of bankruptcy, would have been fraudulent at common law, or under a statute of frauds.[83] *Second*, those which, in the absence of a legislative system of bankruptcy, would have been unobjectionable, but are made void by the bankrupt act, as against its manifest policy of equal and speedy distribution.

With reference to this latter class, the bankrupt statute provides that transfers made by the bankrupt within four months before the filing of the petition shall be void in three classes of cases. *First*, conveyances and transfers whereby a creditor is enabled to obtain a preference of his claim over the other creditors;[84] *second*, conveyances and transfers which are intended to hinder, delay or defraud creditors, or any of them;[85] and, *third*, conveyances and transfers which are null and void as against creditors under the local laws of the several states.[86] In order to avoid a transfer fraudulent under the act it must fall within the provisions of the bankrupt statute.[86] These transfers will be treated in the next few sections.

[80] Townshend v. Windham, 2 Ves. Sen. 1, 9, 10; *Ex parte* Caswall, 1 Atk. 559, 560; Bainton v. Ward, 7 Ves. 503, note; s. c. cited 2 Ves. Sen. 2, and Belt's Supplt. 243; 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269.

[81] Chance on Powers, Chap. 15, Sec. 2; 2 Sugden on Powers (7th ed.), 27; Fleming v. Buchanan, DeG., M. & G. 976; *In re* Harvey Estate, 13 L. R. Chan. Div. 210.

[82] B. A. 1898, Sec. 1, clause 25.

[83] B. A. 1898, Sec. 70, clause 4.

[84] B. A. 1898, Sec. 60.

[85] B. A. 1898, Sec. 67*e*.

[86] Tiffany v. Lucas, 15 Wall. 410.

§ 158. **Transfers in fraud of creditors.**

All property transferred by the bankrupt in fraud of his creditors vests in the trustee.[87] There is no four months' limitation on this class of transfers.[88]

This provision includes fraudulent conveyances, which are so by common law, by statute law and by any other recognized rule of law, other than the special provisions of the bankrupt statute.[89] They are for the most part made fraudulent and void by statutes founded upon the statute of 13 Elizabeth, chap. 5, enacted in 1570, and perpetuated in 29 Elizabeth, chap. 5, passed in 1587.[90] This statute is merely a legislative declar-

[87] B. A. 1898, Sec. 70, clause 4. Consult Sec. 157, *ante*, for the different clauses of fraudulent transfers, and Secs. 159 to 161 for further treatment of same.

[88] *In re* Gray (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 647.

[89] Allen v. Massey, 17 Wall. 351; Pearsall v. Smith, 149 U. S. 231; Bradshaw v. Klein, No. 1790 Fed. Cas., s. c. 2 Biss. 20; Hyde v. Sontag, No. 6974 Fed. Cas., s. c. 1 Saw. 249; Allen v. Montgomery, 48 Miss. 101; Southard v. Benner, 72 N. Y. 424; Knowlton v. Moseley, 105 Mass. 136; Cady v. Whaling, No. 2285 Fed. Cas., s. c. 7 Biss. 430.

In Smith v. Ely, No. 13044 Fed. Cas., s. c. 10 N. B. R. 553, the court, speaking of the act of 1867, said: "Although no transfer made more than six months (four months under the present statute) before the filing of the petition can be made the ground of adjudicating the debtor a bankrupt, it in no sort follows that when the debtor has, upon lawful ground therefor, been decreed a bankrupt, the assignee cannot impeach any conveyance and recover any property which, were there no bankrupt law, the creditors (having first obtained judgment) might impeach and recover on the ground that it was conveyed or transferred to defraud them. On the contrary, the 14th section expressly, and the general rules of equity with equal certainty, do permit it."

For transfers void under the bankrupt act if made within four months, see Secs. 159, 160 and 161, *post*.

[90] Although this statute of Elizabeth is usually referred to as the foundation statute for avoiding fraudulent conveyances, the same principles are to a greater or less extent embodied in earlier statutes. The act of 50 Edward III., Chap. 6 (1376), provided that "Divers people . . . do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenants and chattels as if no such gift had been made." See

ation of the principles of the common law on this subject.[91] "It declared all gifts or conveyances of goods and chattels as well as of lands and tenements made in fraud of creditors to be void as against them." [92] Speaking of this statute, Judge Story observed that it has been "universally adopted in America as the basis of our jurisprudence on the subject." [93] It is not within the province of this work, however, to determine what conveyances are in fraud of creditors under the various statutes and recognized rules of law. The reader is referred to general works on that subject.[94]

An action to recover property fraudulently conveyed by the bankrupt must be instituted by the trustee.[95] The trustee for this purpose represents the general or unsecured creditors. The fraudulent debtor has no right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties. By operation only of the express terms of the act the right which before the adjudication in bankruptcy belonged to the creditors was taken from them and given to the trustee.[96] When he asserts such rights he claims under them and not under the bankrupt.[96] The negligence or refusal of a trustee to bring a suit to set aside such a conveyance is not sufficient to entitle a creditor to maintain a suit in his own name.[97] The

also statute of 2 Richard II., Chap. 3 (1379); 3 Henry VII., Chap. 4 (1487).

[91] In Cadogan v. Kennett, 2 Cowper, 434, Lord Mansfield said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes 13 El. c. 5 and 27 El. c. 4." The same rule is laid down in Clements v. Moore, 6 Wall. 312.

[92] Mr. Justice Gray, in Drake v. Rice, 130 Mass. 412.

[93] Story's Eq. Jur., Sec. 253.

[94] As to what constitutes such fraudulent conveyances generally, see Wait on Fraudulent Conveyances; Bump on Fraudulent Conveyances; Worthington on Fraudulent Conveyances.

[95] Trimble v. Woodhead, 102 U. S 647; Glenny v. Langdon, 98 U. S. 20; Allen & Co v. Montgomery, 48 Miss. 101; *In re* Meyers, No. 9518 Fed. Cas., s. c. 2 Ben. 424; Thurmond v. Andrews, 10 Bush (Ky.) 400; *In re* Gray (N. Y.), 47 App. Div. 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore), 70 Pac. Rep. 286.

[96] Crooks v. Stuart, 7 Fed. Rep. 800; Jones v. Smith, 38 Fed. Rep. 380; Trimble v. Woodhead, 102 U. S 647; Dudley v. Easton, 104 U. S. 99; *In re* Metzger, No. 9510 Fed. Cas., s. c. 2 N. B. R. 355; Pratt v. Curtis, No. 11375 Fed. Cas., s. c. 2 Lowell 87.

[97] Moyer v. Dewey, 103 U. S. 301;

proper remedy in such a case is an application to the court to compel the trustee to take requisite steps for the full and complete protection of the rights of his creditors.[98]

Fraud is a necessary element to give the trustee in bankruptcy a right of action. Insolvency of itself, or the fact that the property conveyed constituted more in value than the grantor could rightfully withdraw from the reach of creditors, does not vest such a right of action in the trustee.[99] The statute provides that the transfer shall be in fraud of his creditors.[100]

" The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whomever may have received it, except a *bona fide* holder for value." [101]

It seems, therefore, that a trustee may pursue the property or proceeds of property to whomever may have received it until he reaches a *bona fide* purchaser.[102] Thus if A, in fraud of his creditors, transfers the property to B, who afterwards sells it to C, with notice, who afterwards sells it to D, a *bona fide* purchaser for value, the trustee in bankruptcy of A may hold C liable in damages for the value of the property. The trustee, however, has no greater rights in this respect than the creditors would have under the state laws.[103]

Where a fraudulent transferee and the trustee rescind the transaction and the transferee turns the property over to the

Glenny v. Langdon, 98 U. S. 20; King v. Dietz, 12 Penn. St. 156; Lane v. Nickerson, 99 Ill. 284.

[98] See Glenny v. Langdon, 98 U. S. 20.

[99] Warren v. Moody, 122 U. S. 133; Adams v. Collier, 122 U. S. 382; Metropolitan National Bank v. Rogers, 53 Fed. Rep. 776, s. c. 3 C. C. A. 666.

[100] B. A. 1898, Sec. 70, clause 4.

[101] B. A. 1898, Sec. 70*e*.

As to what constitutes a *bona fide* holder, see Marsh v. Armstrong, 20 Minn. 81; Murray v. Jones, 50 Ga. 109; Harrell v. Beal, 17 Wall. 590; Sedgwick v. Place, No. 12621 Fed. Cas., s. c. 12 Blatch. 163.

[102] Sedgwick v. Place, No. 12621 Fed. Cas., s. c. 12 Blatch. 163.

[103] *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224, 2 N. B. N. 701.

trustee the trustee takes the title the bankrupt had and does not take as the grantee of the fraudulent transferee.[104]

When a fraudulent conveyance or transfer is set aside the court will order the property turned over to the trustee in bankruptcy,[105] but will preserve rights under the local exemption laws.[106]

§ 159. Transfers to prefer creditors.

The act, as amended Feb. 5, 1903, provides that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, made a transfer of any of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or regis-

[104] *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

[105] In Keating v. Keefer, No. 7635 Fed. Cas., s. c. 5 N. B. R. 133, the court said:

"The circumstances of this case are such as to force the conviction upon my mind that the transfers to defendant, and the placing of the title to the land in question in her name were made and done with intent to hinder, delay and defraud not only the then existing creditors of Henry M. Keefer, but his future creditors also. A decree must be entered in accordance with the foregoing conclusions, and declaring the said farm, together with all the stock, grain and other personal property upon it, except such as the law excepts, assets of the said bankrupt, Henry M. Keefer, and subject to be disposed of and distributed under the bankrupt act for the payment of his debts and the expenses of the bankruptcy proceedings, and for delivery and surrender up to the complainant as assignee of the said bankrupt, of the possession of all said property, except as aforesaid, for the accounting by the defendant of all personal property on said farm at the time the bankruptcy proceedings were commenced (adjudication), sold, disposed of or converted by her, other than for the necessary keep of the live stock, and for the preservation of said property, and requiring the defendant to execute and deliver all conveyances, releases, assignments, transfers or acquittances necessary to carry said decree into full force and effect, and for costs to the complainant."

See also Sands v. Codwise, 4 Johns (N. Y.) 536.

[106] B. A. 1898, Sec. 70; McFarland v. Goodman, No. 8780 Fed. Cas., s. c. 6 Biss. 111; *In re* Detert, No. 3829 Fed. Cas., s. c. 11 N. B. R. 293.

tering is required. If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.[107]

Before the amendment the act made any transfer by an in-

[107] B. A. 1898, Sec. 60, 32 Stat. at L. 797.

In Bean v. Brookmire, No. 1168 Fed. Cas., s. c. 1 Dill. 25, speaking of a similar provision (5 R. S. Sec. 5128) under the act of 1867, Mr. Justice Miller said: "It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said.

"But they were about to frame a system of laws, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors. But they found that this gen- the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not without hardship be made of universal application. When a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt, knowing that he must soon be helpless, would desire to pay or secure favorite creditors. They knowing his inability to pay, and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

"In this dilemma, congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong; and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences.

"In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law, which requires equal distribution, is not called into action for four months, the transaction, if otherwise honest, shall stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution."

See also Matthews v. Westphal, 48 Fed. Rep. 664; Anibal v. Heacock, 2 Fed. Rep. 169; Gibson v. Warden, 14 Wall. 244; Toof v. Martin, 13 Wall. 40; Wager v. Hall, 16 Wall. 584; Shawhan v. Wherritt, 7 How. 627; Locke v. Winning, 3 Mass. 325.

solvent, the effect of which was to enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class, a preference, and allowed the trustee to avoid a preference made within four months of the filing of the petition if the person receiving it had reasonable cause to believe a preference was intended. Since the amendment the transfer must be made within four months of the filing of the petition in order to be a preference, and the trustee may avoid any preference if the person receiving it had reasonable cause to believe a preference was intended. In regard to the recovery of property by the trustee the effect is the same.

This provision evidently refers to property transferred to or for the benefit of a creditor for the purpose of creating a preference. Though a preference of creditors by a transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by the common law and is not forbidden by many of the states. It is, however, made invalid by the bankrupt act, providing three things concur.[108] *First,* At the time of the transfer the bankrupt must be insolvent. A person is deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[109] *Second,* The transfer must be made within four months before the filing of the petition.[110] The day on which the transfer is made is excluded in computing the four months.[111] *Third,* The person to be benefited must

[108] The section here under consideration corresponds with R. S. Sec. 5128, embracing a part of Sec. 35 of the act of 1867. The two sections differ in some particulars. For cases construing Sec. 35 of the act of 1867, see Tiffany v. Lucas, 15 Wall. 410; Bartholow v. Bean, 18 Wall. 635; Buchanan v. Smith, 16 Wall. 277; Toof v. Martin, 13 Wall. 40; West Phila. Bank v. Dickon, 95 U. S. 180; Mays v. Fritton, 20 Wall. 414; Michaels v. Post, 21 Wall. 398; Judson v. The Courier Co., 8 Fed. Rep. 422.

[109] B. A. 1898, Sec. 1, clause 15; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449, 2 N. B. N. 390; compare Wagner v. Hall, 16 Wall. 584.

[110] *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148.

[111] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553.

have had reasonable cause to believe that it was intended thereby to give a preference. The existence of the required reasonable cause for belief may be inferred from the circumstances of the transaction.[112] When these things concur the trustee is entitled to recover the property so transferred.

Every case of this sort must be decided, however, on its own facts, and it will never be possible to lay down any general formula applicable to all cases. The intent to receive a preference necessarily involves the idea of an expectation of the debtor paying some others less than their whole debt.[113]

All levies, judgments, attachments or other liens, obtained through legal proceedings within four months prior to the filing of the petition are void and the property so levied on passes to the trustee;[114] but where property levied on has been sold to an innocent purchaser for value, such purchaser has a good title. The proceeds of such sale go to the trustee and not to the judgment creditor.[115]

[112] Tiffany v. Lucas, 15 Wall. 410; Gattman v. Honea, No. 5271 Fed. Cas., s. c. 12 N. B. R. 493; Singer v. Sloane, No. 12898 Fed. Cas., s. c. 3 Dill. 110; Brooks v. Scroggins, 11 B. R. 258; Buchanan v. Smith, 16 Wall. 277; *In re* Gregg, No. 5797 Fed. Cas., s. c. 4 N. B. R. 456; Alderdice v. State Bank, No. 154 Fed. Cas., s. c. 1 Hughes 47; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449, 2 N. B. N. 390; *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220, 2 N. B. N. 890; *In re* Kenney, 97 Fed. Rep. 554, 3 Am. B. R. 353; Taft v. Fourth Nat. Bank (Sup. Ct. Cincinnati), 2 N. B. N. 1145; Hackney v. Raymond Bros. Co. (Neb.), 10 Am. B. R. 213; Stedman v. Bank, 117 Fed. Rep. 237, 9 Am. B. R. 4; Chittenden v. Barton (N. Y.), 5 Am. B. R. 775; Lyon v. Clark, 129 Mich. 381; *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 8 Am. B. R. 45; Brown v. Guichard (N. Y.), 7 Am. B. R. 515.

In Gattman v. Honea, *supra*, the court said: "But this knowledge of the party may be established by circumstantial evidence, as may any other fact, even the commission of the highest crimes known to the law; and this is especially so in cases of fraud, rarely established by positive testimony, the knowledge and motives of men usually being ascertained by their acts more than their words."

[113] For illustration of what constitutes a preferential transfer, consult Preferences, Chap. XVIII.

[114] B. A. 1898, Sec. 67*f*; *In re* Francis-Valentine Co., 93 Fed. Rep. 953, 2 Am. B. R. 188.

[115] *In re* Kenney, 95 Fed. Rep. 427, 2 Am. B. R. 494; *In re* Franks, 95 Fed. Rep. 635, 2 Am. B. R. 634.

§ 160. Property transferred to hinder, delay or defraud creditors.

The bankrupt act provides "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings or otherwise for the benefit of the creditors." [116]

This provision manifestly relates to cases where the transaction in question is original and complete in itself at the time it occurred, and has no reference for its consideration to anything between the parties which had gone before it.[117] It includes any transfer which has for its object to hinder, delay or defraud creditors, even though the purpose be not to prefer a creditor, and even though the transaction does not fall within the statute of frauds. A transfer fraudulent under the statute of frauds may be set aside under this section if made within the time specified,[118] as well as under the provision relating to transfers in fraud of creditors.[119]

In order to avoid a transfer under this provision three things

[116] B. A. 1898, Sec. 67*e*. This section corresponds to U. S. Sec. 5129, embracing a part of Sec. 35 of the act of 1867; Pollock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B. R. 616; *In re* Steininger Mercantile Co. (C. C. A. 5th Cir.), 107 Fed. Rep. 669, 6 Am. B. R. 68; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278; Sherman v. Luckhordt (Sup. Kan.), 11 Am. B. R. 26, overruling 9 Am. B. R. 312, 65 Kan. 610.

[117] Gibson v. Warden, 14 Wall. 249; Bean v. Brookmire, No. 1168 Fed. Cas., s. c. 1 Dill. 35.

[118] Andrews v. Graves, No. 376 Fed. Cas., s. c. 1 Dill. 108.

[119] B. A. 1898, Sec. 70*e*. See also Sec. 158, *ante*.

must concur. *First,* The debtor must have been adjudicated a bankrupt under the provisions of this act. *Second,* The transfer must have been made subsequent to the passage of the act and within four months prior to the filing of the petition. The day on which the transfer is made is excluded in computing the four months.[120] *Third,* The existence of an intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, or any of them. If any of these elements are wanting the transfer can not be avoided under this provision.

Transfers made in good faith for a present fair consideration and transfers of property exempt from execution and liability for debts by the law of the debtor's domicile can not be avoided under this provision. They are expressly excluded in terms. The object of this provision is not to reach property honestly sold for a fair price. As Mr. Justice Davis,[121] in construing a similar provision of the act of 1867, observed: "Clearly *all* sales are not forbidden. It would be absurd to suppose that congress intended to set the seal of condemnation on every transaction of the bankrupt which occurred within six [four] months of bankruptcy, without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and can not be imputed to congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, not to those with an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the bankrupt act. If it were so, no one would know with whom he could safely deal, and, besides, a person in this condition would have no encourage-

[120] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553.

See also Wood v. Owings, 1 Cranch 239, where a deed signed, sealed and delivered May 30, 1800, and acknowledged June 14, 1800, was held to have been made before the act of 1800 took effect, which was on June 1, 1800.

[121] In Tiffany v. Lucas, 15 Wall. 421. See also *In re* Pusey, No. 11478 Fed. Cas., s. c. 7 B. R. 45; *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233; *In re* Valligreete, No. 16823 Fed. Cas., s. c. 4 N. B. R. 307; *In re* Union Pacific R. Co., No. 14376 Fed. Cas., s. c. 10 N. B. R. 178; *Ex parte* Potts, No. 11344 Fed. Cas., s. c. Crabbe 469; *Ex parte* Topham, 8 L. R. Chan. App. 614; *Ex parte* Craven, 10 L. R. Eq. 648; *Ex parte* Tempest, 6 L. R. Chan. App. 70.

ment to make proper efforts to extricate himself from difficulty."

"The question therefore in every case is whether the act done is a *bona fide* transaction or whether it is a trick and contrivance to defeat creditors." [122]

General Assignments for the Benefit of Creditors.—An assignment for the benefit of creditors is a familiar example of a transfer voidable under this section. In the absence of actual fraud an assignment for the benefit of creditors, though constructively fraudulent under the bankrupt act, is not void but voidable, and is voidable only at the suit of the trustee in bankruptcy. Where the assignment is made within four months of the filing of the petition it may be set aside and the assignee compelled to deliver the property to the trustee in bankruptcy.[123] The ground for avoiding such an assignment under the present act is that it delays and hinders creditors, for the reason that it puts his estate into a course of distribution different from that prescribed by the act.

Under the act of 1867 this same question was presented in determining whether an assignment for the benefit of creditors constituted an act of bankruptcy on the ground that it hindered, delayed or defrauded creditors. There is considerable conflict in the earlier decisions on this point, but it may be asserted that the decided weight of authority is to the effect that such an assignment did constitute an act of bankruptcy for the reason stated above.[124] Under the present act

[122] Lord Mansfield, in Cadogan v. Kennett, 2 Cowper 435. See also Wagner v. Smith, 13 B. J. Lea (Tenn.) 569, where the court says the test as to whether a conveyance is fraudulent or void as to a creditor is, does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or device had not been resorted to?"

[123] *In re* Gutwillig, 90 Fed. Rep. 481; approved by the supreme court in West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, and affirmed by C. C. A. 2d Cir., 92 Fed. Rep. 337; *In re* Gray (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 647; *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

[124] Globe Ins. Co. v. Ins. Co., No. 5486 Fed. Cas., s. c. 14 N. B. R. 311; Barnes v. Retten, No. 1019 Fed. Cas., s. c. 8 Phila. 133; Cragin v. Thompson, No. 3320 Fed. Cas., s. c. 2 Dill. 513; *In re* Frisbee, No. 5129 Fed. Cas., s. c. 14 Blatch. 185; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, s. c. No. 7496 Fed. Cas.;

such an assignment is expressly made an act of bankruptcy.[125] An assignment for the benefit of creditors may be set aside if made within four months before the filing of the petition.[126]

In re Kintzing, No. 7833 Fed. Cas., s. c. 3 N. B. R. 217; *In re* Mendelsohn, No. 9420 Fed. Cas., s. c. 3 Sawy. 342; *In re* Randall, No. 11551 Fed. Cas., s. c. Deady 557; *In re* Smith, No. 12974 Fed. Cas., s. c. 4 Ben. 1.

This principle was recognized by the supreme court in Boese v. King, 108 U. S. 385, when they said: "It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and therefore independently of the bankruptcy court, constituted itself an act of bankruptcy, for which, upon the petition of a creditor filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court."

For contrary decisions, see Langley v. Perry, No. 8067 Fed. Cas., s. c. 2 N. B. R. 596; Sedgwick v. Place, No. 12622 Fed. Cas., s. c. 1 N. B. R. 673, s. c. 34 Conn. 552.

[125] B. A. 1898, Sec. 3, clause 4.

[126] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; *In re* Gray (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 647; *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1.

In *In re* Gutwillig, 90 Fed. Rep. 481, considering this question, Judge Brown said: "Aside from the above general considerations, the specific provisions of the present bankrupt act afford to creditors such important advantages over an administration of assets through a voluntary assignee, under the state law, that such assignments must be held to be 'transfers in fraud of creditors,' because they necessarily deprive them of those advantages, viz., (a) The choice of the trustee, and therewith the greater stability, supervision and control in the disposition of the assets. (b) Liens by attachment, execution or other proceedings at law or in equity within four months, are voidable under the bankrupt law, but not so under a voluntary assignment. This is a difference that is often of extreme importance. (c) Under this assignment, and by the state law applicable to it, employes are preferred, without limitation as to amount or time; by the bankrupt law they are limited to $300 each and to claims accruing within three months. (d) The fees and commissions may reach five per cent., chargeable under voluntary assignments in this state, but are much less under the bankrupt law.

"Whether the act be considered therefore in principle or in detail, I must hold that a voluntary assignment for creditors, which by the statute is made an 'act of bankruptcy,' is voidable by the trustee, and that the assets should be brought into the bankruptcy court."

This case was affirmed (92 Fed. Rep. 337), on appeal to the circuit court of appeals for the second circuit, the court of appeals saying: "We entertain no doubt, that a voluntary general assignment, with or without preferences, made by an insolvent debtor within the prescribed four months is fraudulent and intended by him to 'hinder, delay and defraud' creditors within the meaning of the section, because its necessary effect is to defeat the op-

But if it was made prior to that time and is valid at common law it can not be set aside.[127]

§ 161. Transfers void as to creditors under state laws.

The bankrupt act provides that "All conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." [128]

By this provision congress has adopted the state laws for the purpose of determining whether a transfer is void as against creditors. The provision is not confined to any particular class of transfers. Any conveyance or transfer of his property made by a bankrupt within four months before the filing of the petition may be held null and void as against the creditors of the bankrupt, provided it could have been set aside by the creditors under the local law. The failure to register or properly record a deed or bill of sale or mortgage, as required by the local statute,[129] or to give possession of personal property [130] are familiar examples. In most states

eration of the bankrupt act and the rights of the creditors to such an administration of the assets as that act is intended to provide. The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them."

It was approved by the supreme court in West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

[127] Mayer v. Hellman, 91 U. S. 496.

[128] B. A. 1898, Sec. 67*e*.

[129] *In re* Leigh, 96 Fed. Rep. 806; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302. See Sawyer v. Turpin, 91 U. S. 114; Bank v. Hunt, 11 Wall. 391; *In re* Leland, 10 Blatch. 503, s. c. No. 8234 Fed. Cas.; *In re* Wynne, 4 N. B. R. 23, No. 18117 Fed. Cas.; Allen v. Massey, 4 N. B. R. 231, No. 231 Fed. Cas. and 17 Wall. 352; Harvey v. Crane, 5 N B. R. 218, s. c. No. 6178 Fed. Cas., and see note; Edmonson v. Hyde, 2 Saw. 205, No. 4285 Fed. Cas.

[130] *In re* Taylor, 95 Fed. Rep. 956; Spencer v. Duplan Silk Co., 112 Fed. Rep. 638, 7 Am. B. R. 563.

such a transfer is valid between the parties, but may be avoided where rights of creditors are concerned. In such cases the trustees in bankruptcy may recover for the creditor's property so transferred, provided there has been an adjudication of bankruptcy.

Adopting the state laws as a rule of decision does not violate the constitutional provision with reference to uniformity. The uniformity required relates to the national legislation only. It is well settled that the laws of the several states regulating exemptions may be left in force so long and to such an extent as congress may see fit.[131] The same reasoning may be applied to state statutes relating to the rights of creditors.

§ 162. Real and personal property.

The title to all property which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, passes to the trustee.[132]

The test as to whether property is of such a character as to pass or not depends upon whether, under the local law where the property has its situs, the bankrupt could have transferred it, or whether it could have been levied upon and sold under judicial process against him. If it is of such a character it passes. If not, it does not pass to the trustee. Such questions are determinable only by local law where the property has its situs.[133] The situs of real property is the state in which it is situated.[134] The situs of personal property is the domicile of the bankrupt.[134]

The effect of this provision is to transfer the greater part of

[131] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed. Cas., s. c. 1 Dill. 45; *In re* Jordan, No. 7514 Fed. Cas., s. c. 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., s. c. 10 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., s. c. 2 Hughes 322.

[132] B. A. 1898, Sec. 70, clause 5; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

[133] Spindle v. Shreve, 111 U. S. 546; Nichols v. Levy, 5 Wall. 433; Mason v. Beebee, 44 Fed. Rep. 558; *In re* McKenna, 9 Fed. Rep. 27. See also Nichols v. Eaton, 91 U. S. 729; Reynolds v. Hanna, 55 Fed. Rep. 795.

[134] Oakey v. Bennett, 11 How. 33. See also *In re* Bugbee, No. 2115 Fed. Cas., s. c. 9 N. B. R. 258.

the assets of the bankrupt. They include a large number of different classes of property, which will be more particularly discussed under separate heads.

§ 163. Interest in real estate.

The title to all real estate within the United States held by the bankrupt at the time of filing the petition is vested in the trustee.[135] But as a title vested by law can have no extra territorial operations, lands situated in foreign countries do not pass except by deed.[135] The bankrupt should therefore execute a transfer of his real estate situated in foreign countries.[136]

Any interest in real estate which is alienable or subject to levy and execution passes to the trustee. Thus it has been held that an equity of redemption,[137] property devised,[138] a vested remainder,[139] a reversion with rent incident thereto,[140] a fee subject to an easement,[141] accretions to land by alluvion,[142] an estate of the husband by courtesy or dower [143] a resulting trust [144] or any vested interest [145] is such property as vests in a trustee. It has been held on the other hand that a contingent interest in an estate in remainder,[146] the income of a life estate under a will,[147] or Indian lands under an allotment act of

[135] Oakey v. Bennett, 11 How. 33; Barnett v. Pool, 23 Tex. 517.

[136] B. A. 1898, Sec. 7, clause 5.

[137] Barron v. Newberry, No. 1056 Fed. Cas., s. c. 1 Biss. 149; Robinson v. Denny, 57 Ala. 492. See also 4 Kent's Com. 160; *Ex parte* Ames, No. 323 Fed. Cas., s. c. 1 How. 561; *In re* Novak, 111 Fed. Rep. 161, 7 Am. B. R. 27.

[138] Sandford v. Lackland, No. 12312 Fed. Cas., s. c. 2 Dill. 6; *Ex parte* Fuller, No. 5147 Fed. Cas., s. c. 2 Story 327.

[139] *In re* Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572, 3 N. B. N. 141; *In re* Twaddell, 110 Fed. Rep. 145, 6 Am. B. R. 539; *In re* Shenberger, 102 Fed. Rep. 978, 4 Am. B. R. 487; *In re* McHarry (C. C. A. 7th Cir.), 111 Fed. Rep. 498, 7 Am. B. R. 83; Belcher v. Burnett, 126 Mass. 230; see also Putnam v. Story, 132 Mass. 205.

[140] Evans v. Hamrick & Co., 61 Penn. St. 19.

[141] Banks v. Ogden, 2 Wall. 57.

[142] Banks v. Ogden, 2 Wall. 57.

[143] *In re* McKenna, 9 Fed. Rep. 27; Hasseltine v. Prince, 95 Fed. Rep. 802, 2 Am. B. R. 600.

[144] *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41.

[145] *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268.

[146] *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, 3 N. B. N. 143, affirmed (C. C. A. 3d Cir.), 108 Fed. Rep. 520; *In re* Hoadley, 2 N. B. N. 704.

[147] Monroe v. Dewey (Mass.), 2 N. B. N. 840. But see *In re* Baudouine, 96 Fed. Rep. 536, 3 Am. B. R. 55; *In re* St. John, 105 Fed. Rep.

congress [148] do not pass to the trustee. Whether an equitable interest in real estate will pass to a trustee depends upon the local law where the property has its situs.[149]

§ 164. Dower and curtesy.

Real estate of the bankrupt passes to the trustee subject to his wife's right of dower. A right of dower by a wife is no part of the bankrupt's property, and it can not be barred by a sale by the trustee in bankruptcy under order of the court.[150] The same rule is applied in England.[151]

The present statute recognizes this right of the widow when it provides that in case of the death of the bankrupt the widow and children shall be entitled to all rights of dower and allowance allowed by the law of the state of the bankrupt's residence.[152] The wife is not estopped to claim dower by reason of having joined her husband in a deed which is fraudulent as against creditors, and which for this reason has been set aside by the trustee.[153] In what property the wife has a right of dower and the nature of the dower depends upon the local law. The wife of a bankrupt has no inchoate right of dower in real estate which has vested in a trustee as assets of a partnership.[154]

An estate by curtesy in a wife's property does not pass to the trustee of her husband during her life.[155]

§ 165. Leaseholds.

A lease which may be transferred by a bankrupt or levied upon and sold under judicial process against him prior to the

234, 5 Am. B. R. 190, 3 N. B. N. 114.

[148] *In re* Russie, 96 Fed. Rep. 609, 3 Am. B. R. 6.

[149] Spindle v. Shreve, 111 U. S. 542; *In re* Goldman, 102 Fed. Rep. 122, 4 Am. B. R. 100, 2 N. B. N. 818.

[150] Porter v. Lazear, 109 U. S. 84; *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 92*n*; *In re* Slack, 111 Fed. Rep. 523, 7 Am. B. R. 121; *In re* Angier, No. 388 Fed. Cas., s. c. 4 B. R. 619; *In re* Hester, No. 6437 Fed. Cas., s. c. 5 N. B. R. 285. But see Hill v. Bowers, 4 Heisk. (Tenn.) 272; Bostick v. Jordan, 7 Tenn. 370.

[151] Smith v. Smith, 5 Ves. 189; Squire v. Compton, Vin. Ab. Dower G. pl. 60.

[152] B. A. 1898, Sec. 8.

[153] Cox v. Wilder, No. 3308 Fed. Cas., s. c. 2 Dill. 45; *In re* Detert, No. 3829 Fed. Cas., s. c. 11 N. B. R. 293; McFarland & Goodman, No. 8789 Fed. Cas., s. c. 6 Biss. 111.

[154] Hiscock v. Jaycox, No. 6531 Fed. Cas., s. c. 12 N. B. R. 507.

[155] Hesseltine v. Prince, 95 Fed. Rep. 802, 2 Am. B. R. 600; *In re* McKenna, 9 Fed. Rep. 27.

filing of the petition, is not terminated by bankruptcy but passes to the trustee.[156] Although the legal title passes, the trustee is not bound to take the lease and charge the estate with the payment of rent. He may elect not to take the lease when it would be a burden and not a benefit to the estate on the ground that it is onerous property.[157]

Under the statute of 1867 a landlord was not entitled to prove a debt for rent accruing subsequent to the filing of the petition.[158] But it was held that if the assignee in bankruptcy continued to occupy the leased premises that he was bound to pay rent for the time he actually used them.[159] Such rent

[156] *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564, 2 N. B. N. 360, Judge Lowell said: "A lease recently examined was made for a term of several hundred years, upon a payment of $16,000 at the beginning of the term, and subject to a future rent of $1 a year if demanded by the lessor. Clearly, this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankrupt act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication."

See also *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246, 2 N. B. N. 106; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson, etc., Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313. *Contra, In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Hays, etc., Co., 117 Fed. Rep. 879, 9 Am. B. R. 144.

[157] See Trustee not bound to take encumbered interest, Sec. 151, and Rent, Sec. 120.

In re Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *Ex parte* Whitman, not reported, but referred to by Judge Ware in Smith v. Gordon, No. 13052 Fed. Cas., s. c. 6 Law Rep. 313; *In re* Ten Eyck, No. 13829 Fed. Cas., s. c. 7 N. B. R. 26; Turner v. Richardson, 7 East's Reports 336; Welch v. Myers, 4 Campbell 368; Thomas v. Pemberton and Kittredge, 7 Taunt. 205; Ansell v. Robson, 2 Crompton & Jervis, 610; Clark v. Hume, Ryan & Moody's Reports 207; Page v. Godden, 2 Starkie 309; Hastings v. Wilson, Holt, 296; Wheeler v. Bramah, 3 Campbell 340; Hill v. Dobie, 2 Moore 342; Hill v. Dobie, 8 Taunt. 325; Hanson v. Stevenson, 1 Barnewall & Alderson 303; Carter v. Warne, 4 Carrington & Payne 191; Goodwin v. Noble, 8 Ellis & Blackburn 587.

[158] R. S. Sec. 5071; *In re* Webb, No. 17315 Fed. Cas., s. c. 6 N. B. R. 302; *In re* Huffnagel, No. 6837, s. c. 12 N. B. R. 554; *In re* Butler, No. 2236 Fed. Cas., s. c. 6 N. B. R. 501.

[159] *In re* Huffnagel, No. 6837 Fed. Cas., s. c. 12 N. B. R. 554; *In re* Dunham, No. 4145 Fed. Cas., s. c.

was considered a provable debt as expenses of administration.[159] This rule has been applied under the present act.[160]

Under the act of 1841 leases passed to a trustee, subject to his election to take or reject them.[161] In England leases have passed to a trustee or assignee under the earlier acts, subject to an election to take or refuse them[162] Since the act of 1869 (32 and 33 Vic.) leases have passed subject to a statutory disclaimer, and no power of election has been recognized.[162] It is

27 Leg. Int. 404; Buckner v. Jewell, No. 3060 Fed. Cas., s. c. 2 Woods 220· *In re* McGrath, No. 8808 Fed. Cas., s. c. 5 Ben. 183; *In re* Walton, No. 17131 Fed. Cas., s. c. 1 N. B. R. 557; *In re* Appold, No. 499 Fed. Cas., s. c. 1 N. B. R. 621; *In re* Hamburger, No. 5975 Fed. Cas., s. c. 12 N. B. R. 277; *In re* Ives, No. 7116 Fed. Cas., s. c. 18 N. B. R. 28; *In re* Yeaton, No. 18133 Fed. Cas., s. c. 1 Low. 420. See Rent, Sec. 120, *ante*.

[160] *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730.

[161] *Ex parte* Whitman, not reported, but referred to by Judge Ware, in Smith v. Gordon, No. 13052 Fed. Cas., 6 Law Rep. 313.

[162] See Robson on Bankruptcy, 460, *et seq.*

In Wilson v. Wallani, 5 Ex. Div. 155, Judge Stephen reviews the English statutes upon this point, and reaches the conclusion on page 163 as follows: "I think that under the first set of bankruptcy laws — those which were consolidated in 1824 — the power of the trustees to renounce onerous leases arose from the absence of any legal enactment citing such leases in them, and from the insufficiency for that purpose (as explained in Copeland v. Stephens, 1 B. & A. 393) of a general assignment. Under the second set of bankruptcy laws, including the act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of s. 145 of the act of 1849. This act was repealed by 32 and 33 Vict. c. 83. Under the third system established by the act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognized in him. It thus appears to me that the power of election conferred by the act of 1849, being repealed by express words, and the estate being vested in the trustee by the express words of the act of 1869, he has no power to get rid of it, except by following the express words of s. 23. I do not think this view is inconsistent with the cases to which I have referred. They show only that the provisions of the act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole, I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *Ex parte* Dressler (9 Ch. D. 252) is an express authority as to their personal

therefore evident that cases decided prior to the act of 1869 may be useful in construing the act of 1898 in this respect.

Assuming that a leasehold estate vests under the act of 1898 in the trustee, subject to his election to take or reject it, the first inquiry is what is necessary to constitute such election? The safer practice is for the trustee to immediately serve a written notice upon the lessor stating his election. If he elects not to take he may make a new lease with the same landlord with reference to using the premises as may be for the best interests of the bankrupt's estate.

When the trustee does not give a notice of his election in writing his intention may be presumed from his acts. No general rule can be laid down as to the effect of remaining in possession of the leased premises, or paying rent for them, or doing any other act consistent with the supposition that the trustee has not elected to take the lease as a part of the property of the bankrupt. Each case must be determined by the particular circumstances belonging to it, and the examination of the decisions is only useful to get at the general principle by which they are governed. Thus, ordinarily, if he takes any steps toward the management of or continues to use the leased premises, he may be presumed to have elected to take the lease.[163]

liability, assuming the lease to be vested in them absolutely." In this case he held that the disclaimer was not formal, and therefore not binding. See also Titterton v. Cooper, 9 L. R. Q. B. Div. 473.

The act of 1883, enacted since this decision, also provides for formal disclaimer.

[163] It has been held that it amounts to an election for the trustee to intermeddle with and assume the management of a farm. Thomas v. Pemberton, 7 Taunt. 206; Bradshaw v. Jones, 20 L. T. 781, s. c. W. R. 1010; or where the trustee allowed his cows to remain upon the pasture land for two days after appointment and ordered them to be milked there, Welch v. Myers, 4 Camp. 368, or where he pays rent for leased property, Ansell v. Robson, 2 C. & J. 610; also Broome v. Robinson, 7 East 339. Where the trustee takes possession of leasehold property, although the trustee delivered up the keys immediately after the bankrupt's effects are sold, Hansen v. Stevenson, 1 B. & A. 303; or where the trustee of a bankrupt lessee chosen on the 15th of November kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, although on the 23d of December he disclaimed the lease by letter to the landlord, Clark v. Hume, R. & M. 207; or where the trustee assigns the lease to the owner as security for advances,

He must make an election within a reasonable time.[164] If he fails to do this, or refuses when requested, he is deemed to have elected not to take the lease, and it remains in the bankrupt.[165]

Where the trustee elects to take the lease he takes it subject to equities.[166] He thereby makes the estate and himself personally liable for the payment of rent for the full term of the lease or until it passes by assignment to another person.[167] He may relieve himself of liability by surrendering the lease to the lessor or assigning it to a third party, who may be a pauper.[168] The reason for this rule is that the trustee holds in privity of estate only, not in privity of contract, between

Mackey v. Pattenden, 30 L. J. Q. B. 225, s. c. 4 L. T. 285; or where the trustees so act as to make the property of less value, Carter v. Warne, 4 C. & P. 191; or where the trustees sell a bankrupt's estate and reversionary interest in the premises, Page v. Godden, 2 Stark 309. See also Hastings v. Wilson, Holt, 290.

But it was held not to be an election to take where trustees of a bankrupt having allowed his effects to remain on the premises occupied by him nearly twelve months after the bankruptcy and paid the arrears of the rent due, at the same time intimating to the landlord that they did not mean to take the land unless it could be advantageously disposed of; effects were soon after sold and removed from the premises; the land was put up for sale by order of the trustees, but there were no bidders; they omitted to return the key to the landlord for nearly four months after, Wheeler v. Bramah, 3 Camp. 340; or where the trustee of a bankrupt lessee of a hotel, upon the bankruptcy, closed the hotel with the exception of the bar, which was occupied by a third party, tenant to the bankrupt before bankruptcy, and he was supplied by order of the trustee with liquor at a slight advance over cost price, Goodwin v. Noble, 27 L. J. Q. B. 204, s. c. 8 El. & Bl. 587; or where trustees were possessed of a farm, part of which he had under-let to another, released such under tenant, being afterwards asked by the lessor to elect, refused to take the original lease, Hill v. Dobie, 2 Moore 342, s. c. 8 Taunt. 325. Trustees may likewise do reasonable acts to ascertain the value of property by putting up farms to sell. See Turner v. Richardson, 7 East. 336; Hastings v. Wilson, Holt, 290.

[164] Clark v. Hume, R. & M. 207.

[165] See Sparhawk v. Yerkes, 142 U. S. 1; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052 Fed. Cas., 6 L. R. 313.

[166] *Ex parte* Faxon, No. 4704 Fed. Cas., s. c. 1 Low. 404. See McFarland Carriage Co. v. Solanes, 108 Fed. Rep. 532.

[167] Hansen v. Stevenson, 1 B. & A. 307; Thomas v. Pemberton, 7 Taunt. 205; Welch v. Myers, 4 Camp. 368; Ansell v. Robson, 2 C. & J. 610; Carter v. Warne, 4 Car. & P. 191; Hastings v. Wilson, Holt, 290.

In Clark v. Hume, R. & M. 207, a trustee in bankruptcy was held personally liable.

[168] Hopkinson v. Lovering, 11 L. R. Q. B. Div. 92. As to the right

himself and the landlord, which is the sole basis of his liability. If this is taken away by assignment it destroys the privity, and hence the liability.

Following the English decisions a trustee will not be allowed to sell off crops, manure, hay or straw,[169] or to remove fixtures[170] contrary to the terms of the lease.

The benefit of a contract or option for a lease to which the bankrupt is entitled will also probably vest in the trustee, and may be assigned by him,[171] or he may decline to take such contract.[172] Where the trustee elects to take such contract or option the lessor will not be bound to grant a lease to him, unless he enters into the same covenants as the bankrupt must have entered into if solvent.[173] It may be that the trustee can not assign the benefit of such a contract so as to entitle the assignee of it to a lease without a stipulation to that effect.[174]

The acceptance or rejection of the lease by the trustee will not release from liability a surety for the lessee.[175] The surety will continue liable for breaches of covenant committed before the lease is surrendered.

A trustee has no greater rights under a lease than the lessee. A landlord may reënter and terminate a lease containing such a covenant,[176] or may enforce a lien for rent under a state law.[177]

to pursue a bankrupt after bankruptcy proceedings in an action of covenant, see Auriol v. Mills, 4 T. R. 60.

[169] *Ex parte* Maundrell, 2 Mad. 315; *Ex parte* Whittington, Buck. 87

[170] See Stansfield v. Portsmouth, 4 C. B. N. S. 120, s. c. 4 Jur. N. S. 440; Saint v. Pilley, L. R. 10 Ex. 137, s. c. 33 L. T. 93.

[171] Buckland v. Papillon, 1 L. R. Eq. 477; Crosbie v. Tooke, 1 M. & K. 421; Morgan v. Rhodes, 1 M. & K. 435.

[172] *Ex parte* Blake, 11 Chan. Div. 572; *Ex parte* Llynvi Coal Co., 7 Chan. App. 28.

[173] Powell v. Lloyd, 1 Y. & J. 427, s. c. 2 Y. & J. 372; Page v. Broom, 3 Beav. 36.

[174] See Dowell v. Dew, 1 W. & C. Chan. 365; Buckland v. Papillon, 1 L. R. Eq. 477; Weatherall v. Geering, 12 Ves. 504.

[175] B. A. 1898, Sec. 16; Inglis v. McDougal, 1 J. B. Moore 196; Tuck v. Fyson, 6 Bing. 321.

[176] *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564, 2 N. B. N. 360; *In re* Arnstein, 701 Fed. Rep. 106, 4 Am. B. R. 246, 2 N. B. N. 106.

[177] McFarland Carriage Co. v. Solanes, 108 Fed. Rep. 532; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

§ 166. **Growing crops, fixtures and good-will.**

Growing crops which are annually produced by the cultivator are considered emblements, and before their severance from the soil pass to the trustee as personal property.[178] But where the crop is gathered after an adjudication by the bankrupt he should be allowed a reasonable compensation for work and care from the date of adjudication.[179] They do not pass where a mortgagee is entitled to possession and demands it in pursuance of the terms of his mortgage,[180] or where the bankrupt has parted with his interest in the crops,[181] or where the crop is planted by a bankrupt after the filing of a petition in bankruptcy.[182]

Where the terms of the lease permit a tenant to remove fixtures the trustee succeeds to his right,[183] but otherwise not.[184] The general rule with reference to tenants is, that after the expiration of his tenancy he has no right to remove fixtures which he might have removed during his lease,[185] but that they become the property of the landlord.[186]

Where goodwill is local, and not of a personal nature, it will pass to the trustee.[187] The reason for this exception may be readily understood when it is considered that the whole value of a good-will may be inseparable from personal

[178] *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95; *In re* Daubner, 96 Fed. Rep. 805, 3 Am. B. R. 368; *In re* Coffman, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re* Rooney, 109 Fed. Rep. 601; *In re* Schumpert, No. 12491 Fed. Cas., s. c. 8 N. B. R. 415; *Ex parte* National Mercantile Bank, 16 Chan. Div. 104.

[179] *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95.

[180] Bagnall v. Villar, 12 Chan. Div. 812.

[181] Consult *In re* Gregg, No. 5796 Fed. Cas., s. c. 1 Hask. 173.

[182] *In re* Barnett, No. 1024 Fed. Cas., s. c. 3 Pitts. Rep. 559.

[183] See *In re* Breck, No. 1822 Fed. Cas., s. c. 8 Ben. 93; Stansfeld v. Portsmouth, 4 C. B. Rep. N. S. 118.

[184] *Ex parte* Ames, No. 323 Fed. Cas., s. c. 1 Low. 561; *Ex parte* Thomas, 44 L. T. 781, s. c. 29 W. R. 527; *Ex parte* Morrow, No. 9850 Fed. Fed. Cas., s. c. 1 Low. 386.

[185] See Lyde v. Russell, 1 B. & Ad. 394; Pugh v. Arton, L. R. 8 Eq. 626. See also and compare McIntosh v. Trotter, 3 M. & W. 184; Weaton v. Woodcock, 7 M. & W. 14.

[186] See *In re* Thomas, 29 W. R. 527, s. c. 44 L. T. 781.

[187] See *Ex parte* Punnett, 16 Chan. Div. 226; *Ex parte* Thomas, 2 Mont. D. & DeG. 294, s. c. 10 L. J. Bankruptcy 75.

professional skill, as, for example, that of a surgeon or lawyer, such being very different in nature from a commercial matter.[188]

§ 167. Goods and chattels generally.

All the personal estate, merchandise, stocks, bonds, notes, money, plate, furniture, etc., so as to include every sort of personal property, except such as is exempt by the state law, passes to and vests in the trustee.

Personal property belonging to the bankrupt, which is in the possession of his agents or factors, is considered in his possession, and accordingly passes to the trustee. Thus, grain in a warehouse has been held to vest in a trustee.[189] But goods in a United States bonded warehouse, on which the duties have not been paid, for they are in the possession of the United States, were held not to pass.[190] Legacies or personal property inherited prior to filing the petition pass to the trustee,[191] but such property inherited after that date does not pass to the trustee.[192]

Where a stock of goods was transferred for the purpose of defrauding creditors of a firm and was subsequently retransferred to the bankrupts, the property was held to pass to the trustee.[193]

[188] See Farr v. Pearce, 3 Madd. 74.

[189] Brook v. Scoggins, No. 1936 Fed. Cas., s. c. 11 N. B. R. 258.

[190] *In re* Clifford, No. 2893 Fed. Cas., s. c. 2 Saw. 428.

[191] *In re* Stoner, 105 Fed. Rep. 752, 5 Am. B. R. 402, 3 N. B. N. 423.

[192] *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

But see *Ex parte* Newhall, No. 10159 Fed. Cas., s. c. 2 Story 360.

For a further discussion of this question, see Sec. 175, *post*.

[193] *In re* Brown, 91 Fed. Rep. 358, the court said: "Nor does it affect the question that, at the time the bankrupt act was passed, the title to the property in dispute was in the Brown-Heath Company, the fraudulent grantee, and was therefore beyond the reach of the bankruptcy court, assuming that the device of a conveyance by the partners to a corporation formed and controlled by them to take it would have that effect. By the voluntary reconveyance of the property by the Brown-Heath Company it becomes a part of the bankrupt estate, to be administered as such. The court is not called upon to set aside a conveyance. There is no such effect attaching to property which has been, at some time prior to the proceedings in bankruptcy, the subject of a fraudulent transfer, as to preclude the court of bankruptcy from thereafter dealing with such property, when the title is in the bankrupt. There is no contention that the bankrupt does not have the legal title, and is not in fact the owner of this property."

Whether the property of a husband or wife passes to the trustee in bankruptcy of the estate of the other depends upon local law.[194] If, under the law of the situs, the property of a wife or husband is subject to the payment of the debts of the other it passes to the trustee, if not, it does not pass to the trustee but remains the separate property of such husband or wife not declared bankrupt. Thus it has been held that property of a bankrupt's wife, engaged in business without complying with a statute to entitle her to the privilege of a *femme sole* trader, passes to the trustee of her husband.[195] So also where the product of the separate property of the wife is liable for her husband's debts it passes to the trustee.[196] Where property has been conveyed to the wife in fraud of creditors it passes to the husband's trustee.[197] It has been held that, where a wife is entitled to one-third of the husband's personal property upon decree of divorce, the whole of his property passes to his trustee pending divorce proceedings by the wife.[198]

It has been that a conditional sale of personal property in writing not acknowledged or recorded vests in the trustee and cannot be reclaimed by the vendor.[199]

It has been held that the interest of an infant partner passes to the trustee of the partnership.[200] But the earnings of a minor son, who has been expressly emancipated by his father, are not assets of the father's estate.[201]

[194] *In re* Rooney, 109 Fed. Rep. 601; *In re* Hammond, 98 Fed. Rep. 845, 3 Am. B. R. 466; *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555; Greensfelder v. Corbett (Sup. Ct. Ill.), 3 N. B. N. 825; Hawk v. Hawk, 102 Fed. Rep. 679, 4 Am. B. R. 463, 2 N. B. N. 940.

[195] *In re* Hammond, 98 Fed. Rep. 845, 3 Am. B. R. 466.

[196] *In re* Rooney, 109 Fed. Rep. 601.

[197] *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555; Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; Greensfelder v. Corbett (Sup. Ct. Ill.), 3 N. B. N. 825.

[198] Hawk v. Hawk, 102 Fed. Rep. 679, 4 Am. B. R. 463, 2 N. B. N. 940.

[199] *In re* Legg, 96 Fed. Rep. 326; *In re* Garcewich (C. C. A., 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Economical Printing Co. (C. C. A., 2nd Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; Chesapeake Shoe Co. v. Seldner (C. C. A., 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466.

[200] *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

[201] *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41.

A diamond stud worth $250,[202] a gold watch [203] and a Masonic uniform [203] have been held not to pass to the trustee but may be held by a bankrupt as wearing apparel.

§ 168. Shares of stock.

Questions with reference to shares of stock will arise in bankruptcy proceedings in two relations. *First*, where the share is owned by the bankrupt, and, *second*, when a bankrupt corporation may enforce subscriptions for shares of stock.

First, Shares of stock in incorporated companies, standing in the name of a bankrupt, pass to his trustee subject to his election to take or reject them.[204] Where the stock stands in the name of a fictitious person, but belongs to the bankrupt, the court may direct the corporation to erase the name of the fictitious person and insert the bankrupt's name on their books.[205] Stock delivered as security for a *bona fide* debt, with power of attorney to have transfer made on books of the company, does not pass.[206] The trustee, however, may redeem such stock by paying the debt which it secures. Nor does stock pass which was honestly purchased with a wife's separate property years before the commencement of bankruptcy proceedings.[207]

Where the assignee elects to take stock he is entitled to have it transferred on the books of the corporation.[208] The trustee thereupon becomes a stockholder in the corporation, and may attend meetings of the corporation and vote the stock,[209] and is liable for assessments upon such stock. Where

[202] *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140.

[203] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259, 2 N. B. N. 296; Sellers v. Bell (C. C. A., 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529.

[204] American File Company v. Garrett, 110 U. S. 286; Graham v. The Van Diemen's Land Co., 11 Ex. Rep. 101; South Straffordshire Ry. Co. v. Burnside, 5 Ex. Rep. 128.

[205] Green v. The Bank of England, 3 Y. & C. 722.

As to stock standing in the name of the wife of a bankrupt but which was purchased with joint funds see Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. A. 490.

[206] Dickinson v. Central National Bank, 129 Mass. 279.

[207] Glover v. Love, 26 Coop. Sup. Court Rep. 657.

[208] Wilson v. Atlantic, etc., R. Co., 2 Fed. Rep. 459.

[209] American File Co. v. Garrett, 110 U. S. 294-5.

he elects not to take the stock, neither he nor the bankrupt's estate is liable for such assessments.[210]

Second, A trustee of a bankrupt corporation is entitled to recover unpaid subscriptions upon stock in such company as assets of the bankrupt company.[211] And the directors can not relieve the stockholders by refusing to make the call.[212] Nor can the shareholder make the defense of false and fraudulent representations inducing such subscription, especially when the subscriber has not been vigilant in discovering such fraud and repudiating his contract,[213] nor the defense of irregular organization of the corporation.[214] Such assessments are considered a trust fund for the creditors, and a stockholder indebted to the bankrupt corporation for unpaid shares of stock can not set off against this fund a debt due him by the corporation.[215]

§ 169. **Membership in exchanges, franchises and privileges.** Membership in an exchange vests in the trustee, subject to the rules of the exchange.[216] The trustee, however, may elect not to take such certificate of membership.[217] In such case the certificate of membership remains in the bankrupt, and can not be taken from him afterwards by the trustee if it becomes valuable.[217]

A franchise or privilege which might have been transferred

[210] American File Co. v. Garrett, 110 U. S. 288.

[211] Rathbone v. Ayer, 82 N. Y. Supp. 235; *In re* Morris Arc Lamp Co., 10 Am. B. R. 569; Payson v. Stoever, No. 10863, Fed. Cas., s. c. 2 Dill. 427; Payson v. Withers, No. 10864, Fed. Cas., s. c. 5 Biss. 269; Payson v. Brooke, No. 10857, Fed. Cas., s. c. 1 Weekly Notes, 89; *In re* Republic Insurance Co., No. 11704, Fed. Cas., s. c. 3 Biss. 452; Upton v. Hansbrough, No. 16801, Fed. Cas., s. c. 3 Biss. 417.

[212] Rathbone v. Ayer, 82 N. Y. Supp. 235.

[213] Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, 91 U. S. 65; Ogilvie v. Knox Insurance Co., 22 How. 380; Sawyer v. Hoag, 17 Wall. 610.

[214] Chubb v. Upton, 95 U. S. 667.

[215] Sawyer v. Hoag, 17 Wall. 610.

[216] Page v. Edmonds, 187 U. S. 596, 9 Am. B. R. 277; *In re* Gaylord, 111 Fed. Rep. 717, 7 Am. B. R. 195; *In re* Neimann, 124 Fed. Rep. 738; Hyde v. Woods, 94 U. S. 523; *In re* Werder, 15 Fed. Rep. 789; *In re* Warder, 10 Fed. Rep. 275; *In re* Ketchum, 1 Fed. Rep. 840. But see *in re* Sutherland, No. 13637, Fed. Cas., s. c. 6 Biss. 526.

[217] Sparhawk v. Yerkes, 142 U. S. 1. See also Meyers v. Josephson (C. C. A., 5th Cir.), 124 Fed. Rep. 734, affirming 121 Fed. Rep. 142, 9 Am. B. R. 345.

by the bankrupt or levied upon and sold under judicial process against him before the filing of the petition will pass to the trustee as an asset of the bankrupt's estate. Thus it was held that a permit to occupy a stand in market, revokable at the pleasure of the comptroller and transferable only with his permission, but which was ordinarily bought and sold for money, passes;[218] so also a license to take toll for crossing a bridge,[219] or a license to sell liquor.[220] But a franchise to take toll on a turnpike, being personal in its nature, was held not to pass to the trustee.[221] So also where a lease to a public house was determinable on the bankruptcy of the lessee, and contained a covenant by the lessee upon the termination of the term to assign the licenses to the lessor, it was held that no interest in the licenses passed to the trustee, but the lessor was entitled to have the licenses delivered up to him upon the bankruptcy of the lessee.[222]

§ 170. Negotiable instruments.

All bills of exchange, promissory notes and other negotiable instruments belonging to the bankrupt vest in the trustee.[223] The bankrupt is no longer able to sue on such instruments, or to convey any perfect title to them by endorsement or otherwise. If the bankrupt makes a *bona fide* transfer of the instrument without endorsement before, he may endorse it after bankruptcy, and such endorsement will enable the holder of the instrument to maintain an action upon it in his own name.[224]

When a bill of exchange or a note is dishonored after the bankruptcy of the drawer or maker, notice of dishonor must

[218] *In re* Gallagher, No. 5192, Fed. Cas., s. c. 16 Blatch. 410; *In re* Emrich, 101 Fed. Rep. 231, 4 Am. B. R. 89, 2 N. B. N. 656.

[219] Stewart v. Hargrove, 23 Ala. 429.

[220] *In re* Fisher, 98 Fed. Rep. 89, affirmed (C. C. A., 1st Cir.), 103 Fed. Rep. 860, 4 Am. B. R. 646, 2 N. B. N. 221; *In re* Brodbine, 93 Fed. Rep. 643, 2 Am. B. R. 53; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412, 2 N. B. N. 245; *In re* Olewine, 125 Fed. Rep. 840.

[221] People v. Duncan, 41 Cal. 508.

[222] *Ex parte* Royle, 46 L. T. Bk. 85, s. c. 25 W. R. 560.

[223] Kitchen v. Bartsch, 7 East, 53; Gay v. Kingsley, 93 Mass. 345; Smith v. Chandler, 69 Mass. 392.

[224] Hughes v. Nelson, 29 N. J. Eq. 547; Hersey v. Elliott, 67 Me. 526; *Ex parte* Greening, 13 Ves. 206; Watkins v. Maule, 2 J. & W. 237; *Ex parte* Mowbray, 1 J. & W. 428; Smith v. Pickering, 1 Peak's N. P. Rep. 69.

be given as though bankruptcy had not intervened.[225] The better opinion seems to be that a notice to the bankrupt is a proper and sufficient notice if the trustee has not been appointed. He is the only person who can be notified.[226] If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, upon application to the court, will be permitted to prosecute. After a trustee has been appointed the safer practice is to give notice to him and also to the bankrupt.

§ 171. Pensions.

Pensions of a bankrupt granted by the government for military services are not vested in the trustee in bankruptcy, as they are made by statute inalienable and not subject to attachment.[227] It has been held that the bankrupt's pension money in his hands at the time of filing his petition as it was received and not loaned or invested or changed in its nature will not pass to the trustee.[228] In England the rule is otherwise.[229] Salary and pensions of the army and navy and all persons employed or engaged in the civil service pass to the trustee in bankruptcy.

§ 172. Insurance policies.

Policies of insurance vest in the trustee, but the bankrupt act provides [230] that "when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within

[225] *Ex parte* Tremont National Bank, No. 14169, Fed. Cas., s. c. 2 Low. 409; *Ex parte* Moline, 19 Ves. 216; Esdaile v. Sowerby, 11 East. 114; Nicholson v. Gouthit, 2 H. Black. 609; Bowes v. Howe, 5 Taunt. 30; Rohde v. Proctor, 4 B. & Cres. 517; Donnell v. Savings Bank, 80 Mo. 165; House v. National Bank, 43 O. S. 346; Calahan v. Bank of Kentucky, 82 Ky. 231.

[226] *Ex parte* Tremont National Bank, No. 14169, Fed. Cas., s. c. 2 Low. 409.

[227] R. S. Secs. 4745 and 4747; see Streeter v. Sumner, 11 Foster (N. H.) 557.

[228] *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53.

[229] 46 and 47 Vict. Chap. 52, Sec. 52, which is substantially the same provision as that contained in Secs. 89 and 90 of the bankrupt act of 1869 (32 and 33 Vict.).

[230] B. A. 1898, Sec. 70, clause 5. Consult *in re* Bennett, No. 1315, Fed. Cas., s. c. 2 N. B. R. 181, as to Erben's case. *In re* Welling (C. C. A., 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340.

thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

The status of life insurance policies will give rise to many interesting questions with reference to whether such policies pass to the trustee. Where such policies have a cash surrender value and are payable to the bankrupt, his estate or personal representatives, they undoubtedly pass to the trustee.[231] Policies without a cash surrender value also pass provided they have an actual value[232] and it has been held that the bankrupt should be permitted to pay that actual value and receive a conveyance from the trustee of all claims thereto.[233] It is to be observed that the trustee does not take policies of insurance payable to the wife, children or other kin of the bankrupt, but only policies, the proceeds of which are payable to the bankrupt, his estate or personal representatives.

The rule with reference to insurance policies passing is well illustrated *In re* Steele.[235] It was there held that a policy payable to the bankrupt, his executors, administrators or assigns, became part of the assets of the bankrupt's estate, unless he availed himself of the right to pay the surrender value to the trustee; a policy issued on the life of one bankrupt, whose wife, another bankrupt, was to pay the premiums and receive the

[231] *In re* Diack, 100 Fed. Rep. 770, 3 Am. B. R. 723, 2 N. B. N. 664; *In re* Boardman, 103 Fed. Rep. 783, 4 Am. B. R. 620, 2 N. B. N. 821; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76, 3 N. B. N. 254; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 186, 1 N. B. N. 44–60; *In re* Becker, 106 Fed. Rep. 54, 5 Am. B. R. 438, 3 N. B. N. 267; *In re* Steele, 98 Fed. Rep. 78, 3 Am. B. R. 549, 2 N. B. N. 281, reversed on another point in Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330.

[232] *In re* Welling (C. C. A., 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 40; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76.

[233] *In re* Welling (C. C. A., 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340.

[235] 98 Fed. Rep. 78, 3 Am. B. R. 549, 2 N. B. N. 281. This decree was reversed in Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330, on the ground that the bankrupt was entitled to claim these policies as exempt under the state law.

benefit of the policy, was part of the estate of the wife; another policy payable to the executors, administrators or assigns of the bankrupt, who had by a writing assigned the same to his fiancee, who afterwards became his wife, made the policy one payable to the wife of the bankrupt and it did not pass to the trustee.

Where an endowment policy is payable to the bankrupt and in case of his death to his wife, the bankrupt's interest in the surrender value of the policy passes to the trustee.[236]

A policy of insurance does not pass to the trustee where it has no cash surrender value and no value except upon the contingency of the death of the bankrupt, if the premiums are kept paid,[237] or where the bankrupt is the beneficiary and not a contracting party and would not be entitled to the surrender value of the policy.[238] In other words if the bankrupt's interest in the policy at the date of his bankruptcy has no cash value, nothing passes to the trustee. The measure of cash value is the surrender value of the policy when the petition was filed.

In the schedules, which the petitioner in bankruptcy must file, the amount and character of insurance policies should be stated.

A life insurance policy, which would otherwise pass to the trustee, has been held not exempted by a state law exempting

[236] *In re* Diack, 100 Fed. Rep. 770, 3 Am. B. R. 723, 2 N. B. N. 664; *In re* Boardman, 103 Fed. Rep. 783, 4 Am. B. R. 620, 2 N. B. N. 821; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76, 3 N. B. N. 254; *In re* Welling (C. C. A., 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340; *In re* Steele, 98 Fed. Rep. 78. *In re* Slingluff and *In re* Steele seem to hold that the entire interest passes to the trustee and that wife of the bankrupt loses her contingent right. *In re* Diack, *In re* Boardman and *In re* Welling protect the wife's contingent right and any equitable lien she may have obtained by paying premiums. *In re* Steel is expressly disapproved of in *In re* Welling; see also Haskell v. Equitable Life Assur. Society, 181 Mass. 341; Pingrey v. National Ins. Co., 144 Mass. 374; Pulsifer v. Hussey, 97 Me. 434, 9 Am. B. R. 657.

[237] *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389, 2 N. B. N. 230; *In re* Josephson, 121 Fed. Rep. 142, 9 Am. B. R. 345, affirmed by C. C. A., 5th Cir. in 124 Fed. Rep. 734.

[238] *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92.

it from liability for debts.[239] The opposite view is entertained by others.[240]

It has been held that when a trustee has once rejected a policy as having no surrender value and as being onerous he can not claim the proceeds if the premiums are kept up and the policy becomes valuable because of the death of the bankrupt, but that he can claim the amount of the surrender value out of the proceeds if it later appear that there was a surrender value.[241]

§ 173. Property held by the bankrupt as trustee.

Property which the bankrupt holds in trust for some other person does not vest in the trustee.[242] The act of 1867 provided that no property held by the bankrupt in trust should pass.[243] This was a mere declaration of a well-settled principle,[244] which

[239] *In re* Scheld (C. C. A., 9th Cir.) 104 Fed. Rep. 870, 5 Am. B. R. 102; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 186, 1 N. B. N. 44–60; *In re* Holden (C. C. A., 9th Cir.) 114 Fed. Rep. 650, 113 Fed. Rep. 141, 7 Am. B. R. 615.

[240] Steele v. Buel (C. C. A., 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330; Pulsifer v. Hussey, 97 Me. 434, 9 Am. B. R. 657

[241] *In re* Josephson, 121 Fed. Rep. 142, 9 Am. B. R. 345, affirmed (C. C. A., 5th Cir.) 124 Fed. Rep. 734.

[242] Perry on Trusts, Sec. 345; see also Carpenter v. Marnell, 3 B. & P. 40.

[243] R. S. Sec. 5053.

[244] This rule was laid down as early as 1742 by Lord Chief Justice Willes, in Scott v. Surman, Willes' Rep. 400: "My notion," he said, "is that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts. And I found this my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again upon the rule concerning circuity of action; for I think it would be very absurd to say that anything shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and, according to the case of Burdett v. Willett, will likewise have costs decreed against them; and so the effects of the bankrupt which ought to be applied to the discharge of his debts will be wasted to serve no purpose whatever. If, therefore, the bankrupt were seized of a trust estate in lands, for the reasons already men-

will be followed under the present statute. It applies only to naked trusts, where the trustee holds the legal title but has no beneficial interest in the subject of the trust. There can be little difficulty in determining trust property under an express trust in writing. Clearly property held under a deed or will for the benefit of some other person is trust property, and consequently does not vest in the trustee in bankruptcy.[245]

There are cases, however, in which it is hard to determine whether property is held in trust or not. These are chiefly cases where funds or money have been entrusted to the bankrupt for some specific purpose. The general rule in such cases is thus stated by Judge Hall: "Money delivered to the bankrupt in trust, if ear-marked or separately kept and retained as trust property to be delivered or paid over in the same bills or coin in which it was received by the bankrupt, would not pass under such assignment, but would be considered as 'trust property'; but an amount of money due from the bankrupt as a trustee, and which could not be distinguished from any other moneys in his possession, or under his control; or which was only due from him because he had used trust funds for his own purposes, or otherwise misapplied them, could not be considered as 'property,' held by the bankrupt in trust." [246]

Thus it has been held to be trust property where a broker keeps the bonds of his principal, or proceeds from the sale of them, in a particular envelope or box, separate and apart

tioned I should think that it did not vest in the assignees at all, but that the legal estate as to that should still remain in the bankrupt for the benefit of the *cestui que trust*."

Speaking of the opinion of Lord Chief Justice Willes, Vice-Chancellor Whittlesey, in Ontario Bank v. Mumford, 5 N. Y. Chan. Rep. 616, after referring to the quotation above, said: "But as his associates upon the bench were not prepared to put the decision of the case then under consideration upon that ground the point was left undecided. That notion of this learned and distinguished jurist, however, was subsequently followed, and has long since become the settled law, not only in England but in this state."

See also Ludwig v. Highley, 5 Pa. St. 132; Kip v. Bank of New York, 10 Johns. (N. Y.) 63; Blin v. Pierce, 20 Vt. 25.

[245] Faxon v. Folvey, 110 Mass. 392; Swepson v. Rouse, 65 N. C. 34.

[246] In Hosmer v. Jewett, No. 6713, Fed. Cas., s. c. 6 Ben. 208; *In re* Richard, 104 Fed. Rep. 792, 4 Am. B. R. 700, 2 N. B. N. 1029.

from his own property.[247] It is well settled in such cases that an exchange of securities is not a confusion of property, but that such new securities are held in trust for his principal.[248] So assets of a partnership in the hands of one partner charged with the payment of the debts of the firm are trust property.[249] But where property becomes so mingled with the general assets of the bankrupt as not to be capable of identification it is conceived to belong to the bankrupt. The relation between him and the beneficiary becomes that of mere debtor and creditor. Thus, where a consignee has sold property prior to his bankruptcy, and has mingled the proceeds with his general assets, such proceeds are not considered trust property.[250] So also money deposited in a bank prior to its bankruptcy passes to the trustee of the insolvent bank,[251] but a note deposited for collection and not credited to the account of the depositor so that he could check against it might be trust property. For the same reason money placed in the hands of the bankrupt to be invested, and he fails to invest as directed, passes to his trustee in bankruptcy.[252]

There is likewise a sort of fiduciary relation between vendee and vendor, somewhat resembling that of trustee and beneficiary in case of a fraudulent sale of goods when the vendor elects to rescind the contract of sale and reclaim the goods.[253]

Controversies with reference to whether property is held in

[247] Cook v. Tullis, 17 Wall. 332; Voight v. Lewis, No. 16989, Fed. Cas., s. c. 14 N. B. R. 543. See also Hugewitter v. Von Sacks, No. 14343, Fed. Cas., s. c. 4 Ben. 167.

[248] Cook v. Tullis, 18 Wall. 340; Clark v. Iselin, 21 Wall. 360; Burnhisel v. Turner, 22 Wall. 170; Sawyer v. Turpin, 91 U. S. 114; Taylor v. Plumer, 3 Maule & S. 562.

[249] Jones v. Newsom, No. 7484, Fed. Cas., s. c. 7 Biss. 321; Amsinck v. Bean, 22 Wall. 395; Holland v. Fuller, 13 Ind. 195.

[250] *In re* Coan & Ten Brocke Manufacturing Co., No. 2915, Fed. Cas., s. c. 6 Biss. 315; White v. Jones, No. 17550, Fed. Cas., s. c. 6 N. B. R. 175.

[251] Phelan v. Iron Mountain Bank, No. 11069, Fed. Cas., 4 Dill. 88; *In re* Bank of Madison, No. 890, Fed. Cas., s. c. 5 Biss. 515; Bank of Commerce v. Russell, No. 884, Fed. Cas., s. c. 2 Dill. 215; Illinois Trust and Savings Bank v. National Bank, 15 Fed. Rep. 858.

[252] *In re* Janeway, No. 7208, Fed. Cas., s. c. 4 N. B. R. 100; *In re* Hosie, 7 B. R. 601, s. c. No. 6711, Fed. Cas. See also Hosmer v. Jewett, No. 6713, Fed. Cas., s. c. 6 Ben. 208.

But see *ex parte* Hobbs, No. 6549, Fed. Cas., s. c. 2 Low. 491.

[253] See property of other persons in possession of the bankrupt, Sec. 152. *ante*.

trust or not are to be determined by the court of bankruptcy. They ordinarily arise either upon the application of the trustee for possession of the property or upon the application of the beneficiary to have the property delivered to him, or the value of such property paid to him. In either case an order of the court will be made only upon petition and proofs.

§ 174. Trust property in which the bankrupt has a beneficial interest.

Whether the beneficial interest of a bankrupt in property held in trust passes to the trustee or not depends upon whether it is such an interest that the bankrupt might have transferred it, or it might have been levied upon or sold under judicial process against him. If it is so vested it passes.[254] If it is not, it will not pass to the trustee.[255] Such questions are determinable only by the local law of the state, territory or district where the property has its situs.[256]

The bankruptcy of the beneficiary ordinarily puts an end to any discretion which the trustee under the trust may have in the disposition of the trust funds, and vests the whole interest of the *cestui que trust* in the trustee in bankruptcy.[257] But where the bankrupt's interest is terminated by his bank-

[254] Sandford v. Lackland, No. 12312, Fed. Cas., s. c. 2 Dill. 6; Smith v. Profitt, 82 Va. 832; Sparhawk v. Cloon, 125 Mass. 263; Anderson v. Miller, 15 Smedes & M. (Miss.) 286.

[255] Spindle v. Shreve, 111 U. S. 542.

[256] Nichols v. Levy, 5 Wall. 433; Spindle v. Shreve, 111 U. S. 542. See also Nichols v. Eaton, 91 U. S. 729.

In some of the states, as in New York, Illinois and Tennessee, there are statutory provisions preventing the alienation of trust estates or exempting the interests of the beneficiaries therein from liability for the debts where the trust is created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered. Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; Williams v. Thorn, 70 N. Y. 270; Nichols v. Levy, 5 Wall. 433; Spindle v. Shreve, 111 U. S. 542–548, and one branch of Potter v. Couch, 141 U. S. 319, 320, were cases where statutory provisions were construed and applied.

[257] Snowdon v. Dales, 6 Sim. 524; Graves v. Dolphin, 1 Sim. 66; Younghusband v. Gisborne, 1 Coll. 400; Piercy v. Roberts, 1 Myl. & K. 4; *Re* Sanderson's Trust, 3 K. & J. 497; Green v. Spicer, 1 R. & M. 395.

ruptcy there is nothing to pass to the trustee, because his beneficial interest in the trust property is ended.[258]

§ 175. After-acquired property.

Property acquired by a bankrupt subsequent to the commencement of bankruptcy proceedings and which does not pass to the trustee is called after-acquired property. Such property in this country is liable for his debts prior to bankruptcy only on condition he does not succeed in obtaining a discharge.

Under the act of 1841 all property vested in the bankrupt, at the time of the decree declaring him a bankrupt, passed to his assignee and only property acquired after the adjudication was after-acquired property.[259] Under the act of 1867 the date of cleavage was the date of filing the petition and any property acquired thereafter was after-acquired property.[260]

Section 70 of the bankrupt act of 1898 provides that the title of the bankrupt shall vest in the trustee "as of the date he was adjudged a bankrupt" (except such as is exempt), to six classes of property there enumerated. These are *first,* documents; *second,* patents and copyrights; *third,* powers; *fourth,* property transferred in fraud of creditors; *fifth,* property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and *sixth,* rights of action upon contracts. The only right or title the trustee has to any of the bankrupt's property is acquired under this section.[261] If

[258] Nichols v. Eaton, 91 U. S. 716.

[259] Act of 1841, Sec. 3, 5 Stat. at L. 443; *Ex parte* Newhall, No. 10159, Fed. Cas., s. c. 2 Story, 360; Fisher v. Currier, 7 Mat. (Mass.) 427.

[260] *In re* Barnett, No. 1024, Fed. Cas., s. c. 3 Pitts. Rep. 559; Mays v. National Bank, 64 Penn. St. 74; Day v. Superior Court, 61 Cal. 489; Mosby v. Steele & Metcalfe, 7 Ala. 299; *In re* Benson, No. 1328, Fed. Cas., s. c. 8 Biss. 116; *In re* Grant, No. 5693, Fed. Cas., s. c. 2 Story, 312.

In England, after-acquired property is an asset of the bankrupt's estate (46–7 Viet., Chap. 52, Sec. 44, (i),) and has been so treated from early times, act of 5 Geo. II., Chap. 30; *Ex parte* Proudfoot (1743), 1 Atk. 252; Ashley v. Kell, 2 Stra. 1207; Webb v. Ward, 7 T. R. 296; Kitchen v. Bartsch, 7 East. 53; Crofton v. Poole (1830), 1 B. & Ad. 568; Bankrupt act of 1869 (32–3 Viet.), Sec. 15.

[261] Steele v. Buell (C. C. A., 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330; *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92.

property of the bankrupt is not embraced in one of the six provisions it does not pass to the trustee, and if acquired after the commencement of bankruptcy proceedings is after-acquired property. It will be observed that no date is fixed in the first four and sixth clauses other than the date of adjudication to determine what property in those classes passes to the trustee. It must be the property the title to which is vested in the bankrupt at the date he is adjudged a bankrupt.

The fifth clause specifies particularly that it is the property, which was alienable or subject to levy and execution at the date of filing the petition, which passes. This property passes as of the date of the adjudication and only such property passes as was alienable or subject to levy and execution at the date of filing the petition. Property acquired by the bankrupt between the date of filing the petition and the adjudication which would otherwise be embraced within the fifth clause may be considered after-acquired property.[262]

After-acquired property includes all property acquired in a new business in which he may have engaged,[264] money borrowed for the purpose of engaging in business,[265] or crops planted after the adjudication,[266] wages or salary, property which may come to him by way of inheritance or devise, such as he may have obtained from a wife upon his divorce granted after bankruptcy,[267] property acquired under an agreement made subsequent to bankruptcy,[268] and a right to redeem lands obtained by a waiver of a previous forfeiture.[269]

The trustee has no interest whatever in after-acquired property, and is not entitled to examine the bankrupt relative to such property.[270]

[262] *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

[264] *In re* Rosenfield, No. 12059, Fed. Cas., s. c. 1 N. B. R. 319.

[265] *In re* Patterson, No. 10815, Fed. Cas., s. c. 1 Ben. 496.

[266] *In re* Barnett, No. 1024, Fed. Cas., s. c. 3 Pitts. Rep. 559. See *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95.

[267] *In re* Benson, No. 1328, Fed. Cas., s. c. 8 Biss. 116.

[268] Cullen v. Dawson, 24 Minn. 66; *In re* Oleson, 110 Fed. Rep. 796, 7 Am. B. R. 22.

[269] Kittridge v. McLoughlin, 33 Me. 327.

[270] *In re* Patterson, No. 10815, Fed. Cas., s. c. 1 Ben. 496; *In re* Rosenfield, No. 12059, Fed. Cas., s. c. 1 N. B. R. 319; *In re* Levy, No. 8296, Fed. Cas., s. c. 1 Ben. 496.

A court of chancery will interfere by injunction to protect the bankrupt in the enjoyment of such property until it can be ascertained whether he will obtain his discharge.[271]

§ 176. Rights of action upon contracts, for injury, etc., to property.

The bankrupt act transfers and vests in the trustee all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, the bankrupt's property.[272] This provision is in accord with the general spirit of the act that everything belonging to the bankrupt that can be turned to profit passes to the trustee for the benefit of the creditors. The trustee, however, as in case of property, may elect to adopt or reject such rights of action, according as they are likely to be beneficial or onerous to the estate.[273] Where the trustee does not elect to exercise such a right of action, it remains in the bankrupt.[274]

This provision authorizes the trustee to maintain suits arising from two distinct causes of actions. *First*, those arising *ex contractu*, and, *second*, those arising *ex delictu*, so far as they affect property.

First: Actions upon Contracts.—As a general prop-

[271] Mosby v. Steele & Metcalfe, 7 Ala. 299.

[272] B. A. 1898, Sec. 70, clause 6.

[273] Gibson v. Carruthers, 8 M. & W. 326, Rolfe, B.; Lawrence v. Knowles, 5 Bing. N. C. 399; Morgan v. Bain, L. R. 10 C. P. 15; *In re* Phœnix Bessimer Steel Co., 4 Chan. D. 108. See also Sparhawk v. Yerkes, 142 U. S. 1; Sessions v. Romadka, 145 U. S. 39; American File Co. v. Garrett, 110 U. S. 295; Glenny v. Langdon, 98 U. S. 30.

In Kittle v. Hall, 29 Fed. Rep. 512, the court said: "It can not be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and that his failure to do so is negligence."

[274] Chilton v. Cabiness, 14 Ala. 447.

In Clark v. Calvert, 8 Taunt. 742, an action for trespass on land before the bankruptcy of the assignee was maintained by the bankrupt in his own name. The court said (p. 751): "We form our opinion on the precise nature of the action and on the ground that the assignees had not interposed." See also Rogers v. Spence, 13 M. & W. 571, affirmed in the House of Lords, 12 Clark & Finn. 700.

Consult also Sparhawk v. Yerkes, 142 U. S. 1; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052, Fed. Cas., s. c. 6 Law Rep. 313.

osition bankruptcy does not discharge a contract.[275] In no case can the party who contracted with a bankrupt set up the bankruptcy against the assignees as a reason for not doing what he has agreed to do.[276] But where the contract has not been executed by the bankrupt he, or the trustee (if he may do the act), must perform the condition which remains to be performed in order to claim the benefit of the contract.[277]

Cases arising upon contracts may be either for the consideration of liquidated damages or for unliquidated damages on account of a breach of the covenants contained in the contract. All the rights of action being vested in the trustee by the bankrupt act, he, and not the bankrupt, must maintain all suits upon contracts made with the bankrupt, as well for unliquidated [278] as for liquidated damages, whether the breach occurred before [279] or after the bankruptcy,[280] unless the trustee elects to abandon the right.

Thus the trustee is the proper party to institute a suit to recover the value of lands or goods and merchandise sold by the bankrupt,[281] or to maintain a suit for damages for not delivering goods to the bankrupt which had been contracted for,[282] or a suit to recover money had and received from the bankrupt.[283] So also the trustee, where a right of action exists under the state or federal law, may recover money lost in gambling,[284] or for usurious interest may bring a suit to recover it.[285] In those cases, where the common law prevails with reference to wife's property, choses in action belonging to her

[275] Brooke v. Hewitt, 3 Ves. 253; Carey v. Nagel, No. 2403, Fed. Cas., s. c. 2 Biss. 244.

[276] Rolfe, B. in Gibson v. Carruthers, 8 M. & W. 327.

[277] Gibson v. Carruthers, 8 M. & W. 321.

[278] Wright v. Fairfield, 2 B. & Ad. 727.

[279] Beckham v. Drake, 2 H. L. 579.

[280] Gibson v. Carruthers, 8 M. & W. 321; Schondler v. Wace, 1 Camp. 487.

[281] Stewne v. Aylesworth, 18 Conn. 244.

[282] Wright v. Fairfield, 2 B. & Ad. 727; Gibson v. Carruthers, 8 M. & W. 321.

[283] Foster v. Lowell, 4 Mass. 307.

[284] Moore v. Jones, 23 Vt. 739; Brandon v. Pate, 2 H. Black, 308; Brandon v. Sands, 2 Ves. Jr. 514. But see Lafountain v. Savings Bank, 56 Vt. 332.

[285] Wright v. First National Bank, No. 18078, Fed. Cas., s. c. 8 Biss. 243; Bromley v. Smith, No. 1922, Fed. Cas., s. c. 2 Biss. 511; Monongahela Bank v. Overholt, 96 Penn. St. 327; Gray v. Bennett, 44 Mass. 522. See also Tiffany v. Boatman's Institution, 18 Wall. 375.

do not pass to the trustee, unless reduced to possession.[286] Nor does purely personal property of the wife, as ornaments, jewelry, apparel, etc., pass, even in those states.[287] A wife's separate property never passes to the trustee of the bankrupt husband.[288]

Although, generally, rights under contracts pass to the trustee, the general rule is subject to two important exceptions.

First Exception. A right of action where the breach of a contract involves injury to the person or the feelings of the bankrupt, without immediate reference to his rights of property, does not pass to the trustee.[289] Such rights of action, for instance, are those for the breach of a contract of marriage, or for negligently carrying the bankrupt by rail, coach or vessel, or negligently conducting a cure whereby his person is injured, or negligently conducting a suit whereby he is imprisoned. Although, it is true, the estate of the bankrupt is incidentally affected by the recovery or failure to recover in such actions, the gist of the action is conceived to be personal in its nature, and therefore does not pass to the trustee.

Second Exception. A right of action arising upon an executory contract, in which the personal skill or conduct of the bankrupt forms a material part, does not vest in the trustee.[290]

Some contracts of this nature are necessarily terminated by the bankruptcy because it becomes impossible to perform the condition thereafter. A contract by a bankrupt to enter into partnership is a familiar example. Manifestly neither the bankrupt nor his trustee can perform the part agreed or maintain a suit for the breach of it.

Other contracts of this nature can be performed by the

[286] Shay v. Sessaman, 10 Penn. St. 432; Chilton v. Cabiness, 14 Ala. 447.

[287] *In re* Grant, No. 5693, Fed. Cas., s. c. 2 Story, 312; *In re* Ludlow, No. 8599, Fed. Cas., s. c. 1 N. Y. Leg. Obs. 332; T. L. Lexan v. Wilson, 43 Me. 186; Carr v. Gale, No. 2434, Fed. Cas., s. c. 2 Ware, 330; Backhouse v. Jett, 710, Fed. Cas., s. c. 1 Brock, 500.

[288] See Voohees v. Bonesteel, 16 Wall. 16; Porter v. Lazear, 109 U. S. 84; Driggs v. Russell, No. 4084, Fed. Cas., s. c. 3 N. B. R. 161; *In re* Eldred, No. 4328, Fed. Cas., s. c. 3 N. B. R. 256; Glenn v. Johnson, 18 Wall. 476.

[289] See Beckham v. Drake, 8 M. & W. 846; s. c. in House of Lords, 2 H. L. 579, where this subject is elaborately discussed.

[290] Streeter v. Sumner, 11 Foster (N. H.) 542. See also Gibson v. Carruthers, 8 M. & W. 321; and Beckham v. Drake, 2 H. L. 579.

bankrupt, although by no other person. Such are contracts with authors, actors, musicians, artists, etc. It may be doubted if such a contract may be enforced by a trustee under the present statute. It can not at all events be doubted that where a contract remains to be executed, and it can not be executed without the cooperation of the bankrupt, that the trustee can not enforce the contract unless he can procure the bankrupt to cooperate with him. Under the present statute after-acquired property does not pass. The bankrupt may refuse to do his part, and thereupon make a new contract with the same party and receive the benefit of it himself.

SECOND: ACTIONS FOR INJURY, ETC., TO PROPERTY.—A right of action *ex delicto* for the recovery of damages arising from the unlawful taking or detention of, or injury to, the bankrupt's property is expressly vested in the trustee.[291]

Such actions are confined to those relating to his real or personal property. Thus, claims for an unlawful seizure of property by a foreign government,[292] claims against the United States by a citizen [293] or a resident alien,[294] pass to the trustee. It has also been held that the trustee and not the bankrupt is the proper party to institute a suit to recover for improvement made on government lands,[295] or for money obtained by deceit and fraud,[296] or against a sheriff for not collecting the contents of an execution.[297]

ACTIONS FOR PERSONAL INJURIES.—A right of action, however, for the recovery of damages for injury to the person or the personal feelings of the bankrupt are personal torts, and does not vest in a trustee.[298] Such are actions for malicious

[291] B. A. 1898, Sec. 70, clause 6.

[292] Clark v. Clark, 17 How. 315; Comegys v. Vasse, 1 Pet. 193; Williams v. Heard, 140 U. S. 529.

[293] Erwin v. United States, 97 U. S. 392.

[294] Phelps v. McDonald, 99 U. S. 298.

[295] French v. Carr, 7 Ill. 664.

[296] Hyde v. Tufts, 45 N. Y. Sup. Ct. 56.

[297] Sullivan v. Bridge, 1 Mass. 511.

[298] *In re* Haensell, 91 Fed. Rep. 355, Judge DeHaven, after quoting the provisions of the act relating to what property vests in the trustee, said: "A cause of action for damages arising out of a personal wrong suffered by the bankrupt is not embraced in the foregoing description of property, the title to which, by operation of law, vests in the trustee of the bankrupt. The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal. It can not be as-

prosecutions,[299] or a trespass for seizing and selling the plaintiff's goods under a false claim of debt,[300] or slander or libel,[301] or an assault and battery, or deceit, arising out of a fraudulent recommendation of a person to a position of confidence, whereby property entrusted to him is lost.[302]

signed, is not subject to levy and sale upon judicial process, and the statute does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute any part of his estate in bankruptcy. The law follows, in this respect, section 14 of the bankruptcy act of 1867 (14 U. S. Stats. 517), in the construction of which it was uniformly held that rights of action for personal torts did not vest in the assignee in bankruptcy." See also cases cited in the notes below in this section.

[299] *In re* Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286; Noonan v. Orton, 34 Wis. 259.

[300] Brewer v. Dew, 11 M. & W. 625; Rogers v. Spence, 13 M. & W. 571; affirmed in the House of Lords, 12 Clark & Fenn. 700.

[301] Dillard v. Collins, 25 Grat. (Va.) 343.

[302] *In re* Brick, 4 Fed. Rep. 804; *In re* Crockett, No. 3402, Fed. Cas., s. c. 2 Ben. 514.

CHAPTER XVII.

EXEMPTIONS.

§ 177. By what laws exemptions are governed.

No particular property of the bankrupt is mentioned in the act as exempt from being applied to the payment of his debts. Military uniforms, arms and equipments are exempted by the statutes of the United States.[1]

The bankrupt statute declares that it "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." [2]

By this provision congress evidently intended to adopt the laws of the several states and territories [2*] regulating exemptions. A court of bankruptcy is, therefore, to look to the exemption laws of the several states and territories for the description of the person who may claim exemption and for the amount and species of the property to be exempt.[3] A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the state laws and to none other.[4] In order to claim exemptions in bankruptcy he must comply with the requirements of the state law.[5] If he fails to bring

[1] R. S. Sec. 1628.

[2] B. A. 1898, Sec. 6. Compare R. S. Sec. 5045.

Exemptions in bankruptcy and under state laws compared. See Holland v. Withers, 76 Ga. 667.

[2*] B. A. 1898, Sec. 1, clause 24, provides that "states shall include the territories, the Indian Territory, Alaska and the District of Columbia." See also *in re* McKercher and Pettigrew, 8 N. B. R. 409.

[3] Richardson v. Woodward (C. C. A., 4th Cir.), 104 Fed. Rep. 873, 5 Am. B. R. 94; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; Steele v. Buel (C. C. A., 8th Cir.). 104 Fed. Rep. 968.

[4] *In re* Manning, 112 Fed. Rep. 948, 7 Am. B. R. 571.

[5] *In re* Farish, No. 4647, Fed. Cas., s. c. 2 N. B. R. 168; *In re* Gainey, No. 5181, Fed. Cas., s. c. 2 N. B. R. 525; *In re* Jackson, No. 7127, Fed. Cas., s. c. 2 N. B. R.

himself within the conditions and requirements of such law, the property claimed is not exempt from the operation of the bankrupt law, and the trustee should administer it for the benefit of creditors.

In applying these exemption laws the bankruptcy courts will adopt and follow the construction of them announced by the highest court of the state the statute of which is involved.[6] If the state law has not been construed by the state tribunals, or if there is a conflict of opinion as to the meaning of a particular provision, the courts of bankruptcy are free to decide it. Otherwise they are bound by the interpretation given by the state courts. These are familiar and well-settled rules recognized by the United States courts with reference to state laws and constitutions generally.[7] A state law which is invalid or unconstitutional under a state or the federal constitution is not adopted by this provision.[8] A court of bankruptcy will not enforce such a law. The law which governs any particular case is that prescribed by the state laws in force at the time of the filing of the petition in the state wherein the bankrupt has had his domicile for the six months, or the greater portion thereof, immediately preceding the filing of

508; Guise v. State, 41 Ark. 249; Briggs v. McCullough, 36 Cal. 542; Griffin v. Sutherland, 14 Barb. (N. Y.) 456.

[6] *In re* Stevenson, 93 Fed. Rep. 789; *In re* Pope, 98 Fed. Rep. 722; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re* Irvin (C. C. A., 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689; affirming *in re* Stone 116 Fed. Rep. 35, 8 Am. B. R. 416; *In re* Woodard, 2 Am. B. R. 692; *In re* Wyllie, No. 18112, Fed. Cas., s. c. 2 Hughes, 449; Goodall v. Tuttle, No. 5533, Fed. Cas., s. c. 3 Biss. 219.

The supreme court of the United States recognized this principle, with reference to exemption laws, in Gunn v. Barry, 15 Wall. 621, when it said: "It may well be doubted whether both these provisions [of the exemption statute of Georgia] were not intended to be wholly prospective in their effect. But as we understand the supreme court of the state has come to a different conclusion we shall not consider the question."

[7] Morly v. Lakeshore Ry. Co., 146 U. S. 162; Leffingwell v. Warren, 2 Black. 603; Randall v. Brigham, 7 Wall. 541; Provident Institution v. Massachusetts, 6 Wall. 630; Bucher v. Cheshire R. R. Co., 125 U. S. 582.

[8] See *in re* Everitt, No. 4579, Fed. Cas., s. c. 9 N. B. R. 90; *In re* Dillard, No. 3912, Fed. Cas., s. c. 2 Hughes 190.

As to when an exemption law is unconstitutional because it impairs the obligation of a contract, see Gunn v. Barry, 15 Wall. 610.

the petition.[9] This will usually be the law of the state in which the petition is filed. It is not necessarily so. A person may be adjudged a bankrupt in a district where he has his principal place of business and which is not the district of his domicile.[10] In such cases the amount and the species of the property to be exempt is determined by the law of the state of his domicile, and not the state in which he has his principal place of business. It is not necessary or proper to look to the law of the state in which the property is situated to see if it is exempt. If the property is exempt under the law of the state of the bankrupt's domicile, it is exempt wherever it may be situated.[11]

It has been held that a statute exempting wearing apparel included a diamond stud worth $250,[12] a watch,[13] a masonic uniform,[14] and a statute exempting tools of an artisan or mechanic include the articles which a baker uses to carry on his trade, [15] and a watch where it was necessary for the workman to know the time.[16] Where growing crops are not exempt under the state law the bankrupt is not entitled to the growing crops on an exempt homestead.[17]

A bankrupt is not entitled to exemptions out of the proceeds of the sale of a license to sell liquor in Pennsylvania.[18]

There is a square conflict of authority as to whether or not an insurance policy exempt by the laws of the bankrupt's domicile is governed by Sec. 70 of the Act.[19]

[9] B. A. 1898, Sec. 6; *In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81, 2 N. B. N. 636; *In re* Grimes, 94 Fed. Rep. 800; *In re* Woodard, 95 Fed. Rep. 260; *In re* Buelow, 98 Fed. Rep. 86; *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262. See *in re* Kerr, No. 7729, Fed. Cas., s. c. 9 N. B. R. 566; *In re* Dillard, No. 3912, Fed. Cas., s. c. 2 Hughes, 190.

[10] B. A. 1898, Sec. 2, clause 1.

[11] *In re* Stevens, No. 13392, Fed. Cas., s. c. 2 Biss. 373.

[12] *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140.

[13] *In re* Jones, 97 Fed. Rep. 773; Sellers v. Bell (C. C. A., 5th Cir.) 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529.

But see *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549.

[14] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259, 2 N. B. N. 296.

[15] *In re* Petersen, 95 Fed. Rep. 417, 2 Am. B. R. 630.

[16] *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Coller, 111 Fed. Rep. 503, 7 Am. B. R. 131.

[17] *In re* Coffman, 93 Fed. Rep. 422, 1 Am. B. R. 530.

[18] *In re* Myers, 102 Fed. Rep. 869, 4 Am. B. R. 536, 2 N. B. N. 1049.

[19] That Sec. 70 does apply see *in re* Scheld (C. C. A., 9th Cir.) 104 Fed. Rep. 870, 5 Am. B. R. 102; *In*

THE DOMICILE OF A BANKRUPT.—By domicile is meant that residence from which there is no present intention to remove, or to which there is a general intention to return. The domicile of a bankrupt does not depend on citizenship, nor on residence, but on the concurrence of two elements: *first,* residence in a place, and, *second,* the intention for the present to make that place his home.[20] A person can not be without a legal domicile somewhere.[21] The domicile of a person may be changed. To constitute a new domicile two things are indispensable: *first,* residence in a new locality, and, *second,* the intention to remain there. The change can not be made except *facto et animo.* Both are alike necessary. Mere absence from a fixed home, however long continued, can not work the change. There must be *animus* to change the prior domicile for another. Until the new one is acquired the old one remains.[22] The fact that a man absconds to avoid arrest, leaving his family behind, does not change his domicile.[23]

The domicile of a corporation can only be in the state by which it was created.[24] A corporation can not change its domicile.[24]

The domicile which determines what state law of exemptions applies is the domicile which the bankrupt has had for more than three of the six months immediately preceding the filing of the petition. If he has not had a domicile for more than three months in any one state during this period, he is not entitled to exemptions. The law of no state applies to such a case. It may be contended that where a bankrupt has had a domicile in one state for more than three months, and

re Holden (C. C. A., 9th Cir.), 114 Fed. Rep. 650, 113 Fed. Rep. 141, 7 Am. B. R. 615; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 186.

Contra Steele v. Buel (C. C. A., 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165; Pulsifer v. Hussey, 97 Me. 434, 9 Am. B. R. 657.

[20] Bouvier's Law Dic., subject, "Domicil"; Century Dic., subject, "Domicile"; Mitchell v. United States, 21 Wall. 352–3; Morris v. Gilmer, 129 U. S. 328.

[21] Desmare v. United States, 93 U. S. 610.

[22] Morris v. Gilmer, 129 U. S. 328; Mitchell v. United States, 22 Wall. 353; Bouvier's Dic., subject, "Domicil."

[23] *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332.

[24] Bank of Augusta v. Earl, 13 Pet. 585; Lafayette Insurance Co. v. French, 18 How. 404; Shaw v. Quincy Mining Co., 145 U. S. 450.

has then removed his domicile into another state, and within three months thereafter a petition in bankruptcy is filed, that he has forfeited his right to claim exemptions. The statute does not seem to be so limited. A bankrupt can establish only one domicile within the six months immediately preceding the filing of the petition. It would seem that the law of the state in which he had this domicile, whether it be the first or the last part of the six months, would determine what state law applies.

Where a person has established a domicile in a state the burden is upon the creditor opposing claim to exemption on the ground that the bankrupt has changed his domicile.[25]

§ 178. Constitutionality of clause providing for exemptions. It can not be seriously urged against the constitutionality of section 6 of the act, adopting the state exemption laws, that congress is without power to grant exemptions to the bankrupt.[26] The power of congress in this respect, as with reference to other matters relating to the subject of the bankruptcies, is plenary and has no limitation but the discretion of congress and uniformity.[27]

Under the act of 1867, as amended,[28] there was at one time considerable discussion in regard to the constitutionality of a clause allowing exemptions under the state laws.[29] The ground of the objection was that the constitution of the United States gave congress power to establish a uniform system of bankruptcy. The exemptions prescribed by the various state laws differ widely in the amount and species of property exempted, and also in the requirements. It was

[25] *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160.

[26] *In re* Kean, No. 7630, Fed. Cas., s. c. 2 Hughes, 322; *In re* Smith, No. 12986, Fed. Cas., s. c. 8 N. B. R. 401.

[27] U. S. Const., Art. I., Sec. 8. See Powers of congress, Chap. II., *ante*.

[28] R. S. Sec. 5045.

[29] Hanover National Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1; Darling & Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209, Fed. Cas., s. c. 1 Dill. 45; *In re* Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180; *In re* Jordan, No. 7515, Fed. Cas., s. c. 10 N. B. R. 427; *In re* Kean, No. 7630, Fed. Cas., s. c. 2 Hughes, 322; *In re* Everitt, No. 4579, Fed. Cas., s. c. 9 N. B. R. 90.

Contra, *In re* Deckert, No. 3728, Fed. Cas., s. c. 2 Hughes, 183; *In re* Duerson, No. 4117, Fed. Cas., s. c. 13 N. B. R. 183.

contended that this occasioned a lack of uniformity in the bankrupt law. It may be considered, however, settled that the uniformity required by the constitution relates to national legislation only, and therefore the laws of the several states regulating exemptions may be left in force so long and to such an extent as congress may see fit.[29]

§ 179. Title to exempt property.

As a general rule, property exempted by the laws of the several states may be divided into two classes: *first,* specific lands or chattels where selection is not required or has been exercised, and, *second,* exemptions which consist of certain articles to be selected from many or of property to a certain valuation to be set apart from a large quantity. In some states the homestead must be selected and designated in advance of proceedings against the debtor. In such cases it belongs to the first class of exemptions. In case the homestead may be selected at any time it belongs to the second class.

The title to exempt property does not pass to the trustee.[30] Property which is specifically designated by the state statute, or which has been set apart by the trustee, may be considered exempt property. The title to such property is in the bankrupt.[31] He may sell it or mortgage it or maintain suits in respect to it, as for the recovery of it in specie or for any damages or wrongs done in respect to it.[32] Where a transfer of exempt property has been surrendered as a preference the title is then in the bankrupt, and he may claim his exemp-

[30] B. A. 1898, Sec. 70*a*, vests title in property, except what is exempt. *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760, 2 N. B. N. 1101; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308, 3 N. B. N. 233; *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599; *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57; Lockwood v. Exchange Nat. Bank, 190 U. S. 294.

[31] Schlitz v. Schatz, No. 12459, Fed. Cas., s. c. 2 Biss. 248; *In re* Hunt, No. 6883, Fed. Cas., s. c. 5 N. B. R. 493; Bush v. Lester, 55 Ga. 579; s. c. 15 N. B. R. 36; *In re* Hester, No. 6437, Fed. Cas., s. c. 5 N. B. R. 285; Felker v. Crane, 77 Ga. 484; Wilkinson v. Waite, 41 Vt. 508; Simpson v. Houston, 97 N. C. 344.

[32] Winn v. Morse, 59 N. H. 210; Sulling v. Gunderman, 35 Tex. 545; Henly v. Lanier, 75 N. C. 172; Schlitz v. Schatz, No. 12459, Fed. Cas., s. c. 2 Biss. 248.

tion in it.[33] Upon the death of the bankrupt exempt property descends to his heirs according to the law of the state.[34]

Property of the second class can not be considered exempt property until it is selected and set apart.[35] It must necessarily pass to the trustee.[36] It may never be selected nor set apart as an exemption. It can not be determined in advance precisely what property, if any, will be set apart. The trustee must have temporary dominion over it in order that the exemption may be measured and set apart by him. He may be said to take a defeasible title to such property. When it is so designated and set apart as exempt the title of the trustee is defeated by the superior title of the bankrupt.[37] Where a homestead exemption is disputed and doubtful the title may be treated as in the trustee subject to the determination of the question, and if it is abandoned by the trustee it vests absolutely in the trustee.[38] The proper way to determine whether or not disputed property is exempt is for the trustee to report it to the referee as exempt or not exempt, to which report the aggrieved party should take exceptions.[39]

§ 180. Jurisdiction of a court of bankruptcy over exempt property.

The statute expressly authorizes a court of bankruptcy to determine all claims of bankrupts to their exemptions.[40] It is

[33] *In re* Falconer (C. C. A., 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; Bashinski v. Talbott (C. C. A., 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513, affirming *In re* Talbott, 116 Fed. Rep. 417, 8 Am. B. R. 427; but see *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451.

[34] *In re* Hester, No. 6437, Fed. Cas., s. c. 5 N. B. R. 285; *In re* Lambert, No. 8026, Fed. Cas., s. c. 2 N. B. R. 426; Rix v. Bank, 11869, Fed. Cas., s. c. 2 Dill. 367; Bullymore v. Cooper, 46 N. Y. 236; Fehley v. Barr, 66 Penn. 196.

[35] Woolfolk v. Murray, 44 Ga. 137–8.

[36] *In re* Mayer (C. C. A., 7th Cir.), 108 Fed. Rep. 599; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801.

[37] *In re* Hatch, 102 Fed. Rep. 280; *In re* Camp, 91 Fed. Rep. 745; *In re* Hill, 96 Fed. Rep. 185; *In re* Gibbs, 109 Fed. Rep. 627; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308.

[38] *In re* Mayer (C. C. A., 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117.

[39] *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; McGahan v. Anderson (C. C. A., 4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641.

[40] B. A. 1898, Sec. 2, clause 11; McGahan v. Anderson (C. C. A.,

the duty of the bankrupt to make a claim for such exemptions as he may be entitled to in the schedule filed by him.[41] A voluntary bankrupt should claim his exemptions at the time of filing the petition.[42] It devolves upon the trustee, and it is his duty, to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after his appointment.[43]

From this it would seem that the jurisdiction of the court of bankruptcy in regard to exempt property is limited to determining the claims and designating and setting apart such property.[44] A state court will not review the decision of a court of bankruptcy as to what property is properly exempted by the state law.[45] When the property is so designated and set apart it does not pass to the trustee, nor is it subject to be administered by the court as a part of the bankrupt's estate.[46] But where no specific property has been set off to the bankrupt the bankruptcy court has jurisdiction to determine all liens claimed.[47]

Although the trustee never obtains title to exempt property, he must at least have temporary dominion over it in order that the exemption may be measured and set apart by him.[48] When the exemption consists of one article to be selected from many, or of property to a certain valuation to be set apart from a large quantity, it would seem that the possession and control must pass for the time being to the trustee. In case the exemption is of some specific chattel or chattels, where neither selection nor valuation is required, there is not an equal reason for the trustee to have possession.

4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641.

[41] B. A. 1898, Sec. 7, clause 8.

[42] *In re* Friedrich (C. C. A., 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Lucius, 124 Fed. Rep. 455.

[43] B. A. 1898, Sec. 47, clause 11; *In re* Fredrich (C. C. A., 7th Cir.) 100 Fed. Rep. 284, 3 Am. B. R. 801.

[44] Lockwood v. Exchange Nat. Bank, 190 U. S. 294; *In re* Swords, 112 Fed. Rep. 661, 7 Am. B. R. 436; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798.

[45] Maxwell v. McCune, 37 Tex. 515; Woolfolk v. Murray, 44 Ga. 133.

[46] B. A. 1898, Sec. 70*a*. Lockwood v. Exchange Nat. Bank, 190 U. S. 294. See Title to exempt property, Sec. 179, *ante*.

[47] *In re* Lucius, 124 Fed. Rep. 455.

[48] Sheldon v. Rounds, 40 Mich. 427; see Title to exempt property, Sec. 179, *ante*.

After the exempt property has been designated and set apart by the trustee it has been administered and has passed out of the possession and control of the court. The trustee and the creditors have no further concern with it. The court has no jurisdiction to defend such property from adverse claims or liens that may or may not be extinguished by the bankruptcy proceedings [49] nor to order the sale of a bankrupt's homestead.[49*] It will not entertain a proceeding to enforce a lien upon such property,[50] nor has it jurisdiction to determine the effect of waiver notes and the rights of creditors holding such obligations.[50] The decision of the rights of parties properly belongs to the tribunals of the state under the laws of which they are claimed. The court of bankruptcy may postpone the granting of a discharge until a person who claims the property as against the bankrupt can settle his rights in a state court [51] or may restrain its own officials or persons subject to its jurisdiction from interfering with the exempt property. It will not, however, assist the bankrupt in enforcing his rights to such property beyond preventing such interference with it. Such questions are, as has been stated above, left to the state courts.

§ 181. Liens on exempt property.

The object of the bankrupt statute in allowing exemptions to the bankrupt is to set apart a portion of the property in the schedule of the bankrupt for his use free from the claims of creditors. The title to property exempted by the state laws in specie can never pass to the trustee. The bankrupt may deal with it as he sees fit. All liens on such property remain unimpaired and unaffected by bankruptcy proceedings. The rights of lien-holders are a special property which

[49] Lockwood v. Exchange Nat. Bank, 190 U. S. 294; Jeffries v. Bartlett, 20 Fed. Rep. 495.

[49*] Ingram v. Wilson (C. C. A. 8th Cir.), 125 Fed. Rep. 913.

[50] Lockwood v. Exchange Nat. Bank, 190 U. S. 294; *In re* Gibbs, 109 Fed. Rep. 627; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308, 3 N. B. N. 233; *In re* Grimes, 96 Fed. Rep. 529; *In re* Hill, 96 Fed. Rep. 185; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165.

But see *In re* Sisler, 96 Fed. Rep. 402, 2 Am. B. R. 760; *In re* Woodruff, 96 Fed. Rep. 317; 2 Am. B. R. 678; *In re* Garden, 93 Fed. Rep. 423.

[51] Lockwood v. Exchange Nat. Bank, 190 U. S. 294.

the bankrupt law does not take away. Such liens are enforceable in the state courts against such property.[52] The taking of exempt property upon execution before the commencement of bankruptcy proceedings does not constitute a valid lien and will not prevent such property being set off to the bankrupt.[53]

Where property to a certain valuation, to be selected by the bankrupt, is exempted, as a homestead or an equivalent, it is set off to the bankrupt free from all claims of creditors.[54] If the bankrupt selects property to be exempted, as required by the state law, it does not pass to the trustee as a part of the bankrupt's estate. But if the bankrupt does not comply with the requirements of the state law, the property will pass to the trustee to be distributed among the creditors like other assets of the bankrupt.[55] Where the selection is properly and duly made, the question frequently arises with reference to what effect liens on such property may have. If the property of the bankrupt is encumbered by liens the court may order the property sold. The bankrupt will then be entitled to claim exemptions out of the fund arising from the sale of the equity of redemption, or to select the property to the value allowed by the state law.[56] The effect of liens on exempt property and the right to select property to be exempted

[52] Rix v. Capitol Bank, No. 11869, Fed. Cas., s. c. 2 Dill. 367; Schlitz v. Schatz, No. 12459, Fed. Cas., s. c. 2 Biss. 248; Fowler v. Wood, 26 S. C. 169; Haworth v. Travis, 67 Ill. 301; Jackson v. Allen, 30 Ark. 110; Cumming v. Clegg, 52 Ga. 605; Hatcher v. Jones, 53 Ga. 208; *In re* Lambert, No. 8026, Fed. Cas., s. c. 2 N. B. R. 426; Tuesley v. Robinson, 103 Mass. 558.

[53] *In re* Martin, No. 9152, Fed. Cas., s. c. 2 Hughes, 418; *In re* Owens, No. 10632, Fed. Cas., s. c. 6 Biss. 432.

[54] *In re* Brown, No. 1980, Fed. Cas., s. c. 3 N. B. R. 250; *In re* May, No. 9326, Fed. Cas., s. c. 2 Cin. Law Bul. 152; *In re* Jones, No. 7445, Fed. Cas., s. c. 2 Dill. 343.

[55] *In re* Farish, No. 4647, Fed. Cas., s. c. 2 N. B. R. 168; *In re* Gainey, No. 5181, Fed. Cas., s. c. 2 N. B. R. 525; *In re* Jackson, No. 7127, Fed. Cas., s. c. 2 N. B. R. 508; *In re* Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re* West, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re* Stephens, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re* Boorstin, 114 Fed. Rep. 696, 8 Am. B. R. 89. See Title to exempt property, Sec. 179, *ante*.

[56] *In re* May, No. 9326, Fed. Cas., s. c. 2 Cin. Law Bul. 152; *In re* Jones, No. 7445, Fed. Cas., s. c. 2 Dill. 343.

depends solely upon the law of the state in which the bankrupt has his domicile. It may be stated as a general rule that a mechanic's lien for improvements and a vendor's lien [57] are superior to a homestead exemption in land, and that other liens are subordinate to it.

To illustrate the general rule, suppose that a bankrupt owns two lots of land, A and B, and both of them are mortgaged; that upon the sale under an order of the court of bankruptcy there is a surplus over and above paying the mortgage debt on lot "A"; that lot "B" does not sell for enough to pay the mortgage debt; and that judgments against the bankrupt have attached as liens on the land. The order of payment would be as follows: The mortgagee of lot "A" would be paid in full. The mortgagee of lot "B" would take the proceeds of the sale and become a general creditor to the extent of the balance of his debt. The bankrupt would be entitled to his exemption from the sale of the equity of redemption in lot "A," or the balance of the proceeds after paying the mortgage debt. If there be still a balance of proceeds the judgment lien-holders should next be paid in order of their priority. This illustrates the general rule with reference to the effect of liens upon exempt property. It is, however, subject to be varied by the law of a particular state.

§ 182. Who may claim exemptions.

The right to claim exemptions is personal to the bankrupt and his family. The claim is regularly made by the bankrupt himself. He may, however, claim his exemption through his agent or attorney.[58] In the absence or disability of the husband, the wife or children may present the claim.[59] No other person can assert the right of exemption unless possibly

[57] *In re* Perdue, No. 10975, Fed. Cas., s. c. 2 N. B. R. 183; *In re* Whitehead, No. 17562, Fed. Cas., s. c. 2 N. B. R. 599; Fehley v. Barr, 66 Pa. 196.

[58] Regan v. Zeeb, 28 Ohio St. 483; Wilson v. McElroy, 32 Pa. St. 82.

[59] Smith v. Kehr, No. 13071, Fed. Cas., s. c. 2 Dill. 50, affirmed 20 Wall. 31; *In re* Pratt, No. 11370, Fed. Cas., s. c. 1 Flip. 353. This is the subject of special enactment in some of the states.

a mortgagee of exempted property where the exemption is waived in or by the mortgagee.[60] Neither a bankrupt nor his wife can claim exemptions by courtesy or dower in the lifetime of the other.[61] It should be borne in mind that the court is to look to the laws of the several states and territories for the description of the person who may claim exemptions. The rules stated above will apply under most, if not all, of these laws.

§ 183. Waiver of exemption.

The statute expressly makes it the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.[62] This he should do. If the bankrupt fails to make a claim for his exemptions in his schedule, does he thereby waive his right to claim them?

A bankrupt can not waive his right of exemption in property specifically set apart to him by the statute so that the trustee can acquire title to it for the benefit of the estate unless he expressly conveys it to the trustee. It does not pass by operation of law.[63] It may be doubted if, as a general rule, he will be deemed to waive his right to claim exemptions out of property to be selected by him by simply failing to make the claim in his schedule. If the claim is not made in the schedule an amendment will usually be allowed,[64] but not if the avowed purpose is to pay creditors against whom he has waived exemption.[65] Where a bankrupt claimed her exemptions in her schedules as required by the bankrupt act, she is entitled to them though she did not claim them in the time required by the state law, and the mere fact that meanwhile the goods themselves have been sold by a receiver under direction of the court as perishable, will not deprive her of the right to come in upon the proceeds.[65*] He must, however, make

[60] Edmondson v. Hyde, No. 4285, Fed. Cas., s. c. 2 Saw. 205.

In Wisconsin mortgagee can not claim such exemption. *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278.

[61] *In re* McKenna, 9 Fed. Rep. 27; Kelly v. Strange, No. 7676, Fed. Cas. s. c. 3 N. B. R. 8.

[62] B. A. 1898, Sec. 7, clause 8.

[63] B. A. 1898, Sec. 70*a*.

[64] *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557.

[65] Moran v. King, 111 Fed. Rep. 730, 7 Am. B. R. 176.

[65*] *In re* LeVay, 125 Fed. Rep. 990.

the claim in a court of bankruptcy before his discharge.[66] He will not be permitted to assert such a claim in a state court subsequent to his discharge.[67] The right to claim exemption has been denied a bankrupt after being a fugitive from justice for ten years.[68]

As a general rule it may be stated that where a debtor would be held to have waived his right to exemptions in a proceeding in a state court he will probably be held to have waived it in a court of bankruptcy. The general doctrine is recognized in most states that an exemption is a personal privilege, and that debtors may waive it by contract or surrender or by neglecting to claim it before the sale.[69] Where no claim for an exemption is made in the progress of a case and before there is judgment, execution and a sale, the debtor is usually deemed to have waived his right of exemption in the property sold. He may, however, assert his claim at any time before the sale of the property.[70]

A waiver in favor of some particular creditors can not be made to inure to the benefit of the general creditors.[71] A debtor may waive his exemption in favor of one creditor and insist upon it as against another.

A bankrupt may forfeit his right to an exemption by fraud.

[66] *In re* Kean, No. 7630, Fed. Cas., s. c. 2 Hughes, 322.

[67] Steele v. Moody, 53 Ala. 418; Gayle v. Randall, 71 Ala. 469; Woolfolk v. Murray, 44 Ga. 133; Maxwell v. McCune, 37 Tex. 515.

[68] *In re* Moyer, 15 Fed. Rep. 598.

[69] Consult Spitley v. Frost, 15 Fed. Rep. 304 (this case was reversed on another point in 121 U. S. 552); Green v. Blunt, 50 Ia. 79; Pond v. Kimball, 101 Mass. 105; Wicker v. Comstock, 52 Wis. 315; People v. Palmer, 46 Ill. 398; Clapp v. Thomas, 5 Allen (Mass.) 158; Hewes v. Parkman, 20 Pick. (Mass.) 90; McKinney v. Reader, 6 Watts, 34; Hutchinson v. Campbell, 25 Pa. St. 273; Lauck's Appeal, 24 Pa. St. 426; Hammer v. Freese, 19 Pa. St. 255; Bowyer's Appeal, 21 Pa. St. 210; Case v. Dunmore, 23 Pa. St. 93; Brackett v. Watkins, 21 Wend. (N. Y.) 68.

[70] Bartholomew v. West, No. 1071, Fed. Cas., s. c. 2 Dill. 290; Slaughter v. Detiney, 15 Ind. 49; McClusky v. McNeely, 8 Ill. 578; Shepherd v. Murrill, 90 N. C. 208. See also Weaver's Appeal, 18 Pa. St. 307; Yost v. Heffner, 69 Pa. St. 68; Toenes v. Moog, 78 Ala. 558.

[71] *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171, 3 N. B. N. 447; *In re* Black, 104 Fed. Rep. 289, 4 Am. B. R. 776, 3 N. B. N. 47; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165; but see *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263.

Thus where a bankrupt gave a deed of trust as security of money then loaned to him and for future advances, and afterwards declared a homestead on one of the lots so conveyed in trust, and subsequently obtained further advances without disclosing the fact that he had declared a homestead on the premises, he was not allowed to claim his exemption.[72] Where a bankrupt conceals a great part of his property and takes it out of the jurisdiction he can not claim exemptions out of his remaining property.[73] A bankrupt can not while insolvent build a house with money derived from goods not paid for and then claim it as a homestead.[74] A bankrupt is not, however, deprived of his right to a homestead exemption merely because, while insolvent, he moved into the house for the purpose of claiming it as exempt.[75]

When there are no other assets the bankrupt must pay costs out of exempt property.[76]

§ 184. Waiver to exemption in property fraudulently conveyed.

Does a bankrupt waive his right to claim an exemption in property which he had conveyed in fraud of creditors prior to the commencement of bankruptcy proceedings, and which the trustee subsequently recovered for the benefit of the estate? There is a conflict of authority on this point. The better reason seems to support the rule that the bankrupt does not waive his right to claim a homestead exemption in lands so conveyed and recovered.[77]

[72] *In re* Haake, No. 5883, Fed. Cas., s. c. 2 Saw. 231.

[73] *In re* Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410.

[74] McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641. See also *In re* Schechter, 9 Am. B. R. 729; Cannon v. Dexter, etc., Co. (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 9 Am. B. R. 724; *In re* Campbell, 124 Fed. Rep. 417; *In re* Butler, 120 Fed. Rep. 100, 9 Am. B. R. 539. These cases depend largely on the construction of State statutes.

[75] *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 416; Huenergardt v. Brittain Dry Goods Co. (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 8 Am. B. R. 341.

[76] *In re* Hines, 117 Fed. Rep. 790; *In re* Collier, 93 Fed. Rep. 191, 1 Am. B. R. 182; *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53.

[77] McFarland v. Goodman, No. 8789, Fed. Cas., s. c. 6 Biss. 111; Cox v. Wilder, No. 3308, Fed. Cas., s. c. 2 Dill. 45, reversing No. 3309,

The argument in favor of this rule may be briefly stated. Homestead laws are favorably construed by the courts in the interest of the debtor's family. It is true that the debtor may have conveyed his homestead right and would be estopped to claim it as against his grantee or any person claiming under him. The trustee does not claim under the deed of conveyance, but in hostility to it. The property is recovered by the trustee as representative of the creditors. When so recovered the deed is declared to be null and void as between the bankrupt and the trustee. Surely the trustee can not claim to be subrogated to any rights of the grantee. His rights are the same that they would have been had the deed never been made. If the bankrupt had the right of exemption as against creditors before the deed was made, he is not estopped, as against the trustee, to claim the right to the homestead or the value to the extent given by the statute. It does not make the estate any less than if the fraudulent conveyance had not been made. An opposite view would give the creditors a profit out of the attempted fraud at the expense of the bankrupt's family.

There are cases, however, which hold that the bankrupt waives his right to an exemption in property fraudulently conveyed by him.[78] The argument in favor of this position is substantially as follows: The deed is valid between the bankrupt and his grantee. He thereby extinguishes his

Fed. Cas., s. c. 5 N. B. R. 443; Smith v. Kehr, No. 13071, Fed. Cas., s. c. 2 Dill. 50; Bartholomew v. West, No. 1071, Fed. Cas., s. c. 2 Dill. 290; Penny v. Taylor, No. 10957, Fed. Cas., s. c. 10 N. B. R. 200; *In re* Poleman, No. 11247, Fed. Cas., s. c. 5 Biss. 526; *In re* Detert, No. 3829, Fed. Cas., s. c. 11 N. B. R. 293; Vogler v. Montgomery, 54 Mo. 577; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432, 2 N. B. N. 981; *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 5 Am. B. R. 404, 3 N. B. N. 454; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513, affirming *In re* Talbott, 116 Fed. Rep. 417, 8 Am. B. R. 427.

As to the effect of a fraudulent conveyance upon the right of dower, see Scribner on Dower, Chap. IX.

[78] *In re* Graham, No. 5660, Fed. Cas., s. c. 2 Biss. 449; Keating v. Keefer, No. 7635, Fed. Cas., s. c. 5 N. B. R. 133; Cox v. Wilder, No. 3309, Fed. Cas., s. c. 5 N. B. R. 443, which was reversed by the circuit court in No. 3308, Fed. Cas., s. c. 2 Dill. 45; *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451.

homestead interest. Whatever passed to the grantee remains subject to the creditors' demands. The grantee can not hold against adjudged fraud. The grantor can not reclaim his grant. The annihilation of the homestead by the bankrupt leaves the premises like any other realty owned by the grantor to which no pretense of a homestead interest ever obtained. It inures to the benefit of the creditors whom it was sought to defraud.

There seem to be two principal objections to this rule. *First,* The creditors are benefited by a provision of a deed which must be held invalid as between the bankrupt and the creditors in order that the property may be recovered at all by the trustee; and, *second,* because it gives the creditors a profit out of the attempted fraud at the expense of the family, for whose benefit the exemption is mainly, if not wholly, provided. If the law gave to a single man the right to this exemption, it might accord with the natural desire to punish fraud to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family subverts the policy on which the exemption is provided and allowed.

A bankrupt will not usually be deemed to have waived his right to a homestead exemption by previously waiving his homestead rights in mortgaged property in favor of a particular creditor.[79] The reason for this is that the waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the trustee in bankruptcy for the creditors.

§ 185. Dower.

The bankrupt statute expressly provides that in case of the death of the bankrupt the widow and the children are entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence.[80] The effect of this provi-

[79] *In re* Poleman, No. 11247, Fed. Cas., s. c. 5 Biss. 526; Rix v. Capitol Bank, No. 11869, Fed. Cas., s. c. 2 Dill. 367. See *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263.

[80] B. A. 1898, Sec. 8.

The act of 1867 contained no such provision. The act of August 19, 1841, Sec. 2 (5 Stat. at L.), contained a provision similar to the present act, viz.: "Nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, which

sion is to preserve the right of dower in the bankrupt's estate after the title has passed from the bankrupt to the trustee.[81] It is a mere declaration of a well-recognized principle of law and of the construction, which the bankrupt act of 1867 received without any such proviso.[82]

Whether the contingent or inchoate right of dower attaches to property in hands of the trustee depends upon the law of the state of the bankrupt's residence. This becomes important if the trustee has occasion to convey any real estate, either for the purpose of reducing it to money or to free it from mortgage or other liens and charges, or for any purpose whatever. How may the trustee make such a conveyance as to pass title to real estate free of all claims of dower? The general rule in this respect may be thus stated:

In those states in which the wife is entitled to dower only in lands of which her husband died seized the trustee may convey any lands held by him free of dower during the lifetime of the bankrupt.[83] The wife's right of dower will attach only to such real property as remains in the hands of the trustee at the time of the death of the bankrupt. She has no contingent right of dower in lands of the bankrupt prior to that time. The bankrupt could have sold them free of dower, and the trustee is in the same position. The wife has no greater claims against the trustee than she would have against her husband had bankruptcy proceedings not intervened.

In those states in which the wife is entitled to dower in all

may be vested by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." See also Worcester v. Clark, 2 Grant (Pa.) 84.

[81] *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 92*n*.

In re Buckingham, 102 Fed. Rep. 972. A widow had waived her right to homestead exemption in certain property and the property was sold. She was allowed subsequently to claim a homestead exemption out of the proceeds of the sale of other real estate in the hands of the trustee in bankruptcy.

[82] Porter v. Lazear, 109 U. S. 89. affirming 87 Pa. St. 513; Speake v. Kinard, 4 S. C. 54; *In re* Angier, No. 388, Fed. Cas., s. c. 4 N. B. R. 619; *In re* Bartenbach, No. 1068, Fed. Cas., s. c. 11 N. B. R. 61; Dwyer v. Garlough, 31 Ohio St. 158; Warford v. Noble, 2 Fed. Rep. 202; Worcester v. Clark, 2 Grant (Pa.) 84.

[83] Kelly v. Strange, No. 7676, Fed. Cas., s. c. 3 N. B. R. 8.

lands owned by her husband during coverture the trustee may proceed to sell free of dower only when the wife consents to the sale and asks to have an equivalent of her contingent right of dower set off to her in money. In such case the trustee may convey lands free of dower.[84] The value of her contingent interest or inchoate right of dower is computed usually by tables for finding the present value of such interest.[85] If the wife refuses to consent the property can be sold only subject to her right of dower.[86]

Dower and homestead rights are governed by substantially the same rules and principles.[87] What has been said with reference to exemptions in this chapter will assist in answering many questions which may arise with reference to dower.[88]

§ 186. How to set apart exemptions.

The bankrupt statute provides means for setting apart exemptions to the bankrupt and his family. It is made the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.[89] It devolves upon the trustee, and it is his duty, to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court within twenty days after receiving notice of his appointment.[90] The trustee has no discretion with reference to what property shall be exempt. The right of the bankrupt is absolute and fixed by the law of the state in which he has had his domicile

[84] *In re* Bartenbach, No. 1068, Fed. Cas., s. c. 11 N. B. R. 61.

[85] Consult Glauque & McClure's Present Value Tables.

[86] Porter v. Lazear, 109 U. S. 84.

[87] B. A. 1898, Sec. 6; Cox v. Wilder, No. 3309, Fed. Cas., s. c. 5 N. B. R. 443, reversed in No. 3308, Fed. Cas., s. c. 2 Dill. 45; McFarland v. Goodman, No. 8789, Fed. Cas., s. c. 6 Biss. 111.

[88] As to dower in partnership property, consult Exemptions in partnership property, Sec. 187, *post.*

[89] B. A. 1898, Sec. 7, clause 8; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Lucius, 124 Fed. Rep. 455.

A bankrupt was refused leave to amend in *In re* Moran, 105 Fed. Rep. 901, 5 Am. B. R. 472. He was permitted to amend his schedule in this respect in *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866; 5 Am. B. R. 404, 3 N. B. N. 454; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557.

[90] B. A. 1898, Sec. 47, clause 11; Gen. Ord. 17; *In re* Friedreeks (C. C. A. 7th Cir.), 100 Fed. Rep. 284; 3 Am. B. R. 801; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432.

for the greater part of the six months immediately preceding the filing of the petition.[91] The trustee regularly allows the claim of the bankrupt to and sets apart such articles as are specifically exempted by the statute of that state, regardless of their value or the situation of the bankrupt. He should also set apart the homestead, or the value thereof, and such articles as the bankrupt may be entitled to select under the state law. The trustee should, as soon thereafter as possible, file with the referee an itemized report of the property thus set apart.[92] General Order 17 requires the specification of the separate articles and their separate appraisement.[93] His act in setting aside the exemptions claimed is ministerial, and no issue on the question of the bankrupt's right to them is raised until his report is filed.[94] The creditors may then raise this issue by taking exceptions to the report within twenty days.[95] A creditor who has received notice of the filing of the petition and that he is a scheduled creditor is charged with notice of whatever transpires in the administration of the estate and a failure to contest the bankrupt's claim for exemptions is such laches as will deprive him of the right to reopen the matter.[96] The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt.[97] The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office.[98]

Ordinarily exemptions can not be set off until after the

[91] B. A. 1898, Sec. 6.

[92] Official Form No. 47; see Form No. 91, *post.*

[93] *In re* Manning, 112 Fed. Rep. 948, 7 Am. B. R. 571.

[94] *In re* Campbell, 124 Fed. Rep. 417.

[95] Gen. Ord. 17; *In re* Campbell, 124 Fed. Rep. 417; *In re* Smith, 93 Fed. Rep. 791, 1 Am. B. R. 266.

[96] *In re* Reese, 115 Fed. Rep. 993, 8 Am. B. R. 411.

[97] *In re* Campbell, 124 Fed. Rep. 417; *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549.

[98] Gen. Ord. 17. See Removal of trustees, Sec. 145, *ante.*

trustee is appointed, but where no creditors appear at the first meeting and no trustee is appointed the court can probably allow the exemptions on satisfactory proof.[98*]

If it becomes necessary to appraise exempt property for the purpose of setting it off it may be appraised like other property of the bankrupt by three disinterested appraisers appointed by the court.[99] In some cases the trustee has appointed appraisers who have appraised the property claimed to be exempt and reported to the court. In other cases the trustee has followed the practice of the state in this respect. In one case it was held that there was no authority for an appraisement and that the allotment must be made by the trustee without the assistance of appraisers.[100] When, however, a homestead has been set off under a state law, the court of bankruptcy may adopt it without a new appraisement.[101] When the property can not be divided it may be sold and the exemption allowed out of the proceeds.[102] Where the exempted property has been sold by the trustee the proceeds may be given to the bankrupt.[103] If any controversy arises with the bankrupt with reference to what property is exempt the court should decide the controversy. A practical method for the determination of disputes arising from valuation of property claimed to be exempt is to order the property in question sold, and the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state

[98*] *In re* Smith, 93 Fed. Rep. 791, 1 Am. B. R. 266; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730.

[99] B. A. 1898, Sec. 70*b*.

In re McCutchen, 100 Fed. Rep. 779, the court directed the appraisers to be appointed, one to be selected by the bankrupt, one by the trustees and one by the creditors.

[100] *In re* Grimes, 96 Fed. Rep. 529.

[101] *In re* Hall, No. 5921, Fed. Cas., s. c. 2 Hughes, 411; *In re* Vogler, No. 16986, Fed. Cas., s. c. 2 Hughes, 297; *In re* Rhodes, 109 Fed. Rep. 117.

A new allotment may be ordered. *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729.

[102] *In re* Brown, No. 1980, Fed. Cas., s. c. 3 N. B. R. 250.

[103] *In re* Jones, No. 7445, Fed. Cas., s. c. 2 Dill. 343; *In re* Welch, No. 17366, Fed. Cas., s. c. 5 Ben. 230; *In re* Ellis, No. 4400, Fed. Cas., s. c. 1 N. B. R. 555.

In some States where the exempt property had not actually been set aside before sale, the bankrupt is not entitled to claim from fund. *In re* Haskin, 109 Fed. Rep. 789; *In re* Woodward, 95 Fed. Rep. 955, 2 Am. B. R. 692.

laws.[104] Homesteads where practicable should be set apart in kind, so where the value of the homestead is in excess of the exemption allowed the bankrupt should be allowed to keep the property on paying the difference.[105] The court of bankruptcy is expressly given power to determine all claims of bankrupts to their exemptions.[106] This would appear to furnish all machinery necessary for determining and setting apart exemptions in the court of bankruptcy independent of the state courts.

Where exempt property has been set apart to the bankrupt the court will not order the bankrupt to restore the property in order that it may be sold for the benefit of a mortgagee.[107] Where the bankrupt claims property as a homestead and proceedings are taken before the referee to subject it to the payment of a prior debt the bankrupt should be allowed an opportunity to set up defenses against such debt.[108]

§ 187. What property is exempt generally.

No property is specifically exempted by the bankrupt statute from being applied to the payment of the bankrupt's debts. The property exempted is only such as is exempted in behalf of a debtor under the law of the state in which the bankrupt has had his domicile for the greater portion of the six months immediately preceding the filing of the petition.[109] An abstract of the exemption laws of the several states and territories is contained in the next section following.

There are, however, several questions with reference to exemptions generally which will arise in bankruptcy proceedings. Some of these questions may be briefly alluded to at this point.

[104] *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262; *In re* Richard, 94 Fed. 633, 2 Am. B. R. 506; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171, 3 N. B. N. 447; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432, 2 N. B. N. 981; *In re* Brown, 100 Fed. Rep. 441; *In re* Diller, 100 Fed. Rep. 931.

[105] *In re* Manning, 123 Fed. Rep. 180.

[106] B. A. 1898, Sec. 2, clause 11.

[107] *In re* Hatch, 102 Fed. Rep. 280, 4 Am. B. R. 349.

[108] *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53.

[109] B. A. 1898, Sec. 6; *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760, 2 N. B. N. 1101.

In Property Fraudulently Conveyed.—The inquiry may be made as to whether a bankrupt is entitled to claim an exemption in property which was conveyed or encumbered with liens in fraud of creditors prior to the commencement of bankruptcy proceedings, and which the trustee has subsequently recovered for the benefit of the estate. There is a conflict of opinion on this point. The better rule seems to be that he may claim a homestead exemption in such lands.[110]

In Property Purchased on the Eve of Bankruptcy.—So also the decisions are conflicting as to whether property which would ordinarily be exempt from seizure on attachment or execution is liable to be administered for the payment of the debts of the bankrupt when such property was purchased on the eve of bankruptcy with the proceeds of other property not exempt.[111] *Quære*, Does the same rule apply to property purchased after the petition is filed and before the adjudication, since the title remains in the bankrupt until that time?

In Partnership Property.—The general rule is that there is no separate exemption to the individual members of a firm out of undivided partnership property.[112] The exemp-

[110] See Waiver to exemption in property fraudulently conveyed, Sec. 184, and cases there cited in the notes.

[111] Holding that the bankrupt is not entitled to his exemption in such property, see *In re* Boothroyd, No. 1652, Fed. Cas., s. c. 14 N. B. R. 223; *In re* Parker, No. 10724, Fed. Cas., s. c. 5 Sawy. 58; *In re* Wright, No. 18067, s. c. 3 Biss. 359; Brackett v. Watkins, 21 Wend. 68; Pratt v. Burr, No. 11372, Fed. Cas., s. c. 5 Biss. 36; *In re* Lammer, No. 8031, Fed. Cas., s. c. 7 Biss. 269; *In re* Sauthoff, No. 12380, Fed. Cas., s. c. 8 Biss. 35; Long v. Murphy, 27 Kan. 375.

Contra, *In re* Henkel, No. 6362, Fed. Cas., s. c. 2 Sawy. 305; Kelly v. Sparks, 54 Fed. Rep. 70; Comstock v. Bechtel, 63 Wis. 656; Jacoby v. Distilling Co., 41 Minn. 227, at p. 230; O'Donnell v. Segar, 25 Mich. 366. See also *In re* Irwin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35; Huenergardt v. Brittain Dry Goods Co. (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 8 Am. B. R. 341.

[112] *In re* Beauchamp, 101 Fed. Rep. 106, 4 Am. B. R. 151; *In re* Lentz, 97 Fed. Rep. 486, 2 N. B. N. 190; *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268; *In re* Demarest, 110 Fed. Rep. 638, 6 Am. B. R. 232; *In re* Blodgett, No. 1555, Fed. Cas., s. c. 10 N. B. R. 145; *In re* Tonne, No. 14005, Fed. Cas., s. c. 13 N. B. R. 170; *In re* Corbett, No. 3220, Fed. Cas., s. c. 5 Sawy. 206; *In re* Price, No. 11410, Fed. Cas., s. c. 6 N. B. R. 400; *In re* Croft, No. 3404, Fed. Cas., s. c. 8 Biss. 188; *In re* Handlin, No. 6018,

tion is several, personal and individual, as well in regard to the property to which it applies as to the right conferred. The impracticability of granting the exemption out of undivided partnership property grows out of the nature of such property and the relations of partners to each other and to the creditors. Property belonging to a firm can not be said to be the separate property of any member of it. One partner has no exclusive interest in it. It belongs to the other partner or partners as much as it does to him, and can not in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him in the winding up of the business and the settlement of his separate account.

In some states separate exemptions to individual partners are allowed out of the firm property under state law. In such states the bankruptcy courts will allow similar exemptions.[113]

§ 188. Exemption laws of the several states and territories.

The court of bankruptcy must look to the laws of the several states and territories for the description of the person who

Fed. Cas., s. c. 3 Dill. 290; *In re* Hughes, No. 6842, Fed. Cas., s. c. 8 Biss. 107; Pond v. Kimbal, 101 Mass. 105; *In re* Stewart, No. 13420, Fed. Cas., s. c. 13 N. B. R. 295; *In re* Boothroyd, No. 1652, Fed. Cas., s. c. 14 N. B. R. 223.

See *contra, In re* Young, No. 18148, Fed. Cas., s. c. 3 N. B. R. 440; *In re* Richardson, No. 11776, Fed. Cas., s. c. 11 N. B. R. 114; *In re* Rupp, No. 12141, Fed. Cas., s. c. 4 N. B. R. 95. But *In re* Rupp was overruled *In re* Corbett, *supra; In re* Camp, 91 Fed. Rep. 745, under the law of Georgia.

See also *In re* Parks, No. 10765, Fed. Cas., s. c. 9 N. B. R. 270, where a house was built with partnership funds set apart for that purpose. See also *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435.

In Burns v. Allen, 67 N. C. 140, it was held that an exemption might be claimed by one partner out of partnership property with the consent of the co-partners, but not without such consent.

[113] *In Wisconsin. In re* Friedrich, 100 Fed. Rep. 284, s. c. 40 C. C. A. 378, affirming 95 Fed. Rep. 282. *In North Carolina. In re* Wilson, 101 Fed. Rep. 571, 4 Am. B. R. 260; *In re* Stevenson, 93 Fed. Rep. 789, 2 Am. B. R. 230; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57. *In Georgia. In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165.

See also last note above.

may claim exemption and for the amount and species of the property to be exempted. For the convenience of attorneys an abstract of the exemption laws in the several states and territories has been made from the several statutes. The exemptions to which a bankrupt is entitled in the several states and territories are as follows:

ALABAMA.[114]—The homestead of every resident of the state, with the improvements, not exceeding in value $2,000 and in area 160 acres, during his life and occupancy, and after his decease during the life of his widow and minority of his children, is exempt from levy or sale under process for collection of debts contracted after the 23d day of April, 1873.[115]

Liens of any laborer, mechanic, material man for work or labor done or materials furnished, or in favor of any vendor for unpaid purchase money, attach to the homestead.[116] The provisions of section 2033 do not affect any deed, mortgage or lien on the homestead lawfully created.[117]

The burial-place of a resident of the state for himself and family and a church pew occupied by him for the use of himself and family are exempt from levy and sale under execution or any other process.[118]

Personal property of a resident of the state, to be selected by him, to the amount of $1,000, and in addition thereto necessary and proper wearing apparel for himself and family, family pictures and books used in the family, are exempt from levy and sale under execution or other process for the collection of debts contracted after the 23d day of April, 1873.[119]

The wages, salaries or other compensation of laborers resi-

[114] The exemption laws of this State are dealt with in *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Moore, 112 Fed. Rep. 289, 7 Am. B. R. 285; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529; *In re* Garden, 93 Fed. Rep. 423, 1 Am. B. R. 582.

[115] Civil Code of Ala., Sec. 2033; Const., Art. X, Secs. 2 and 3.

[116] Civil Code of Ala., Sec. 2035; Const., Art. X, Secs. 2 and 4.

[117] Civil Code of Ala., Sec. 2035; Const., Art. X, Secs. 2 and 4.

[118] Civil Code of Ala., Sec. 2036.

[119] Civil Code of Ala., Sec. 2037; Const., Art. X, Sec. 1; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529

dent in the state for personal service to the amount of $25 per month are exempt under writs of garnishment.[120]

Partnership property is not the subject of homestead or exemption as against copartners or partnership creditors.[121]

Property of counties and municipal corporations is exempt.[122]

Growing or ungathered crops are exempt from execution or other legal process, except such as are levied for the purpose of enforcing liens on the crop for rent, advances or labor, as prescribed by law.[123]

Damages recovered by a servant or employee are not subject to payment of debts.[124]

Insurance on life of husband or father, the annual premiums on which do not exceed $500 per year, are exempt from liability from his debts.[125]

Proceeds of life insurance are exempt from creditors, both of the assured and the beneficiary.[126]

The interest of resident members of mutual aid associations therein and of resident beneficiaries is exempt from all process for the collection of debts or the enforcement of liabilities.[127]

No property owned by a defaulter in not working a public road is exempt from execution issued on a judgment found on such default.[128]

There is no exemption from levy and sale for payment of taxes.[129]

The statute provides for exemptions from administration and payment of debts of a decedent.[130]

Any person may by an instrument in writing waive his right to an exemption.[131]

ALASKA.— Books, pictures and musical instruments to the value of $75; necessary wearing apparel to the value of $100, and $50 additional for each member of family; tools, implements, team (team is construed to mean not more than one

[120] Civil Code of Ala., Sec. 2038; Laws of 1898-9, p. 37.
[121] Civil Code of Ala., Sec. 2039.
[122] Civil Code of Ala., Sec. 2040.
[123] Civil Code of Ala., Sec. 1891.
[124] Civil Code of Ala., Sec. 1751.
[125] Civil Code of Ala., Sec. 2535.
[126] Civil Code of Ala., Sec. 2607.
[127] Civil Code of Ala., Sec. 1121.
[128] Civil Code of Ala., Sec. 2486.
[129] Civil Code of Ala., Sec. 4013.
[130] Civil Code of Ala., Sec. 2104.
[131] Civil Code of Ala., Sec. 2069-2077; *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Moore, 112 Fed. Rep. 289, 7 Am. B. R. 285; *In re* Garden, 93 Fed. Rep. 423, 1 Am. B. R. 582.

yoke of oxen or span of horses or mules), harness or library necessary for trade or profession to value of $400, and sufficient food to support team for sixty days; if owned by householder, ten sheep with year's fleece or yarn or cloth manufactured therefrom; two cows, five swine, household goods and utensils to the value of $300, also sufficient food to support such animals three months and family for six months; seat or pew of family in place of public worship, and all property of the territory or any county, incorporated city, town or village therein or municipal corporation of like character. No article of property or article received in exchange therefor is exempt from execution issued on judgment for its price.[132]

There is no homestead law in this territory.[133]

Arizona.—Personal property not to exceed in value the sum of $500, to be selected by the head of the family, is reserved to every family exempt from process for the payment of debts.[134]

If the debtor refuse to make a selection the goods may be sold and the sale is valid against any claim for exemption.[135]

The earnings of the debtor for personal services for 30 days next preceding the date of the levy, when it appears that such earnings are necessary for the use of a family supported in whole or part by his labor, are exempt.[136]

The property of counties and municipal corporations held only for public purposes is exempt.[137]

Every person who is the head of a family residing within the territory may hold exempt from process real property in

[132] Sec. 279, Civil Code of Oregon; also Hill's Ann. Laws, Sec. 282. The act of Congress of May 17, 1884, Sec. 7, 23 Stat. at L. 24, 2 Supp. 432, provides "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district (Alaska) so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

[133] The Homestead Exemption law of Oregon is embodied in the act of February 23, 1893. This law was not in force at the time of the adoption of the Oregon laws, as the laws of Alaska on May 17, 1884.

[134] Rev. Stat. Arizona, 1901, Sec. 2725.

[135] Rev. Stat., Arizona 1901, Sec. 2727.

[136] Rev. Stat., Arizona 1901, Sec. 2732.

[137] Rev. Stat., Arizona 1901, Sec. 2733.

one compact body, to be selected by him or her, not exceeding in value $2,500, over and above all liens and encumbrances thereon.[138] The claim of homestead may be made by the wife of the debtor if he fail to do so. If the person entitled to the homestead fails or refuses to designate the property on being requested the claim of homestead thereon is void.[138*] A married man shall not sell or lease the homestead or create any lien thereon without being joined by the wife.[139] Land other than that upon which claimant resided may be held as homestead.[140] Mortgage liens which have attached to land before it was claimed as homestead are not affected by a subsequent claim.[141]

ARKANSAS.[142]—The homestead of any resident of the state, who is married or the head of a family, is not subject to any judgment lien or sale under execution, or other process, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of any express trust for moneys due from them in their fiduciary capacity.[143]

Homestead outside of any city, town or village, owned and occupied as a residence, shall consist of not exceeding 160 acres, with improvements thereon, to be selected by the owner, not exceeding in value $2,500, and in no event shall such

[138] Rev. Stat., Arizona 1901, Sec. 2714 and Sec. 2717.

[138*] Rev. Stat., Arizona 1901, Sec. 2715.

[139] Rev. Stat., Arizona 1901, Sec. 2716.

[140] Rev. Stat., Arizona 1901, Sec. 2724.

[141] Rev. Stat., Arizona 1901, Sec. 2723.

[142] The exemption laws of this state are dealt with in *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 16; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; *In re* Morrison, 110 Fed. Rep. 734, 6 Am. B. R. 488; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432.

[143] Digest, Stat., Ark., Sec. 3710; Const., Art. IX, Sec. 3; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re* Irwin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 416; *In re* Morrison, 110 Fed. Rep. 734, 6 Am. B. R. 488.

homestead be reduced to less than 80 acres without regard to value.[144]

Homestead in any city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre, with improvements, to be selected by the owner, not to exceed in value $2,500, and in no case to be reduced to less than one fourth of an acre without regard to value.[145]

No conveyance, mortgage or other instrument affecting the homestead of any married man shall be valid except for taxes, laborers' and mechanics' liens and purchase money unless the wife joins in the execution of such instrument and acknowledges it.[146]

The right of homestead is not forfeited by debtor's commission to select it as exempt before sale on execution; if husband fails to claim homestead the wife may claim it; if debtor does not reside on his homestead, and has more land than he is entitled to claim, he or his wife must select same before sale.[147]

Personal property of any resident of the state, unmarried and not the head of a family, in specific articles, selected by him, not exceeding in value $200, in addition to wearing apparel, is exempt from process for the collection of any debt by contract, but no property is exempt from execution for debts contracted for the purchase money therefor while in hands of the vendee.[148]

Personal property of any resident of the state, married or the head of a family, selected by him, in specific articles, not exceeding $500, in addition to wearing apparel and that of his family, is exempt from process on debt by contract.[149]

The wages of laborers and mechanics for 60 days are exempt if the defendant shall file an affidavit that said wages are less than the amount exempt under the state constitution, and he does not own sufficient other personal property, which, to-

[144] Digest, Stat., Ark., Sec. 3711; Const., Art. IX, Sec. 4.

[145] Digest, Stat., Ark., Sec. 3712; Const., Art. IX, Sec. 5.

[146] Digest, Stat., Ark., Sec. 3713.

[147] Digest, Stat., Ark., Sec. 3714.

[148] Digest, Stat., Ark., Sec. 3715; *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760.

[149] Digest, Stat., Ark., Sec. 3716; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557.

gether with said 60 days' wages, would exceed in amount the limits of said constitutional exemption.[150]

The statutes of this state provide for the homestead of widow and children of decedents.[151]

California.[152] — The homestead consists of the interest of the claimant in the dwelling-house in which the claimant resides and the land on which the same is situated, selected as provided by law.[153]

If the claimant be married the homestead may be selected from the community property or the separate property of the husband, or it may be selected from the separate property of the wife with her consent; when the claimant is not married, but is the head of a family within the meaning of section 1261, the homestead may be selected from any property.[154] Homestead can not be selected from the separate property of the wife without her consent, shown by her making or joining in making the declaration of homestead.[155]

The homestead is exempt from execution, except as provided by law.[156]

The homestead is subject to execution or forced sale on judgments obtained before the declaration of homestead was filed for record and which constitute liens upon the premises; on debts secured by mechanics', contractors', subcontractors', artisans', architects', builders', laborers' of every class, material men's or vendors' liens upon the premises; on debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant; on debts secured by mortgages on the premises executed and recorded before declaration of homestead recorded.[157]

The homestead of a married person is conveyed or encum-

[150] Digest, Stat., Ark., Sec. 3717.

[151] Digest, Stat., Ark., Sec. 3694 and 3695.

[152] The exemption laws of this state are treated in *In re* Fly, 110 Fed. Rep. 141, 6 Am. B. R. 550; *In re* Hindman (C. C. A. 9th Cir.), 104 Fed. Rep. 331, 5 Am. B. R. 20; *In re* Scheld (C. C. A. 9th Cir.), 104 Fed. Rep. 870, 5 Am. B. R. 102; *In re* Diller, 100 Fed. Rep. 931, 4 Am. B. R. 45; *In re* Peterson, 95 Fed. Rep. 417, 2 Am. B. R. 630.

[153] Civil Code, Cal., Sec. 1237; 1901 Laws, Cal. 398.

[154] Civil Code, Cal., Sec. 1238.

[155] Civil Code, Cal., Sec. 1239.

[156] Civil Code, Cal., Sec. 1240; 1901 Laws, Cal. 399.

[157] Civil Code, Cal., Sec. 1241.

bered by an instrument executed and acknowledged by both husband and wife.[158]

The homestead may be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged, or by a subsequent declaration of homestead, duly executed and acknowledged (1st) by the husband and wife, if the claimant is married; (2nd) by the claimant, if unmarried.[159]

A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.[160]

The trustee in bankruptcy may apply to the superior court of the county in which the homestead is situated for the appointment of appraisers when a judgment has been docketed against the claimant, and the court will order the homestead set off and the rest of the property disposed of.[161]

Money paid to a claimant when homestead is sold is entitled for six months thereafter to same protection against legal process which the law gives to the homestead.[162]

Homestead may be selected and claimed by the head of a family, not to exceed $5,000 in value; by any other person, not to exceed $1,000.[163]

Head of a family includes husband, when claimant is married, and every person, who has residing on the premises and under his care, his or her minor child, minor grandchild, or the minor child of a deceased wife or husband, a minor brother or sister or their minor child, a father, mother, grandfather or grandmother of the claimant or of his deceased wife or husband, an unmarried sister or any other relative mentioned above, who have attained majority and are unable to support themselves.[164]

The selection of a homestead must be executed and acknowledged in the same manner as a grant of real property and filed for record.[165]

The declaration of homestead must contain a statement that

[158] Civil Code, Cal., Sec. 1242.
[159] Civil Code, Cal., Sec. 1243; 1901 Laws, Cal. 399.
[160] Civil Code, Cal., Sec. 1244.
[161] Civil Code, Cal., Sec. 1245-1259, 1901 Laws, Cal. 399.
[162] Civil Code, Cal., Sec. 1257.
[163] Civil Code, Cal., Sec. 1260.
[164] Civil Code, Cal., Sec. 1261.
[165] Civil Code, Cal., Sec. 1262.

the person making it is the head of a family, and, if the claimant is married, the name of the spouse; or, if made by the wife, that her husband has not made it, and that she makes it for their joint benefit; that the person making it resides on the premises and claims them as homestead, together with a description and an estimate of the cash value.[166]

The declaration must be recorded in the office of the recorder of the county in which the land is situated.[167]

A person other than the head of a family may select a homestead, but the declaration must be executed, acknowledged and recorded in the same manner as deeds and must contain everything required by the 2d, 3d and 4th subdivisions of section 1263.[168]

From and after the declaration is filed for record the land therein described is a homestead.[168]

If either the husband or wife becomes hopelessly insane the husband or wife may get permission of the court to mortgage or convey the homestead.[169]

The following property is exempt from execution, unless issued upon judgment recovered for its price, or upon judgment of foreclosure of mortgage thereof: Chairs, tables, desks and books, to the value of $200; necessary household, table and kitchen furniture, including one sewing-machine, stove, stovepipes, and furniture, wearing apparel, beds, bedding and bedsteads, hanging pictures, oil paintings and drawings, drawn or painted by any member of the family, family portraits and their necessary frames, provisions and fuel actually provided for individual or family use sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month; also one piano, one shotgun and one rifle; farming utensils or implements of husbandry, not exceeding in value the sum of $1,000;[170] also two oxen, or two horses, or two mules, and their harness, one cart, or buggy and two wagons, and food for such oxen, horses or mules for one month; also seed, grain

[166] Civil Code, Cal., Sec. 1263; 1901 Laws, Cal. 400.

[167] Civil Code, Cal., Sec. 1264.

[168] Civil Code, Cal., Sec. 1266; 1901 Laws, Cal. 400.

[169] 1901 Laws, Cal. 400, Sec. 1267-1269.

[170] *In re* Fly, 110 Fed. Rep. 141, 6 Am. B. R. 550

or vegetables actually provided, reserved or on hand, for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of $200; seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, where the same is necessary in his business; the tools or implements of a mechanic or artisan necessary to carry on his trade;[171] the notarial seal, records and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor or dentist necessary to the exercise of his profession, with his professional library and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers and music teachers, and their necessary office furniture, including one safe and one typewriter; also the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps and office furniture of a searcher of records necessary to be used in his profession; also the typewriters or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also one bicycle, when the same is used by its owner for the purpose of carrying on his regular business or when the same is used for the purpose of transporting the owner to and from his place of business; the cabin or dwelling of a miner, not exceeding in value the sum of $500; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on any mining operations, not exceeding in value $500, and two horses, mules or oxen, with their harness, and food for such horses, mules or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump or hoisting gear, and also his mining claim, actually worked by him, not exceeding in value the sum of $1,000;[172] two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which cartmen, draymen, truckmen, hucksters, peddlers,[173] hackmen, teamsters,

[171] *In re* Peterson, 95 Fed. Rep. 417, 2 Am. B. R. 630.

[172] *In re* Diller, 100 Fed. Rep. 931, 4 Am. B. R. 45.

[173] *In re* Hindman (C. C. A. 9th Cir.), 104 Fed. Rep. 331, 5 Am. B. R. 20

or other laborer, habitually earn their living, and one horse, with vehicle, harness, etc., used by a physician, surgeon, constable or minister of the gospel in the legitimate practice of his profession or business, with food for the same for one month; one fishing-boat and net, not exceeding the total value of $500, the property of any fisherman, by lawful use of which he earns a livelihood; poultry not exceeding in value $75; seamen's and sea-going fishermen's wages and earnings not exceeding $100. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears that such earnings are necessary for the use of his family, residing in the state, supported wholly or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, or have been incurred at a time when the debtor had no family residing in the state supported in whole or in part by his labor, the one half of such earnings are subject to execution, garnishment or attachment to satisfy debts so incurred. The shares held by a member of a homestead association duly incorporated, not exceeding in value $1,000, if the person holding the shares is not the owner of a homestead under the laws of the state. All the nautical instruments and wearing apparel of any master, officer or seaman of any steamer or other vessel. All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of the state. Arms, uniforms and accouterments required by law to be kept by any person, and also one gun to be selected by the debtor. All courthouses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the jail and public offices belonging to any county of the state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city or dedicated by such town or city to health,

ornament or public use, or for the use of any fire or military company organized under the laws of the state. All material not exceeding $1,000 in value purchased in good faith for use in the construction, alteration or repair of any building, mining claim or other improvement, as long as in good faith the same is about to be applied to the construction, alteration or repair of such building, mining claim or other improvement.[174] All machinery, tools and implements.

COLORADO.[175] — Every householder in the state, the head of a family, is entitled to a homestead not exceeding in value $2,000 exempt from execution and attachment arising from any debt, contract or civil obligation incurred after February 1, 1868.[175*] To entitle the claimant to homestead he must cause the word "homestead" to be entered of record on the margin of his recorded title, which entry shall be signed by him and attested by the clerk and recorder of the county in which the premises are situated, together with the date;[176] provided, that where the husband is the owner the wife may cause the entry to be made, and where the wife is the owner the husband may cause the entry to be made.[177] Homestead is exempt only when occupied by the owner or his family.[178] A surviving widow, husband or minor child of a decedent is entitled to homestead, but in case there is no surviving widow, husband or minor child the homestead is liable for debts of deceased.[179] The homestead may consist of any real estate not exceeding in value $2,000.[180] A homestead may be mortgaged or conveyed, but such mortgage or conveyance does not bind the wife who is occupying same with the husband, unless she voluntarily and separately from the husband sign and acknowledge the mortgage and be fully apprised of her rights.[181] If the owner of the premises be the wife of a married man occupying the premises with her no such mortgage or conveyance shall be binding against him unless he sign and acknowledge the same.[182] In case of the sale of a homestead a subsequent

[174] Civil Code of Proc., Cal., Sec. 690; 1901 Laws, Cal. 21. See also p. 153.

[175] The exemption law of this state is treated in *In re* Schechter, 9 Am. B. R. 729.

[175*] Ann. Stat., Colo., Sec. 2132.

[176] Ann. Stat., Colo., Sec. 2133.

[177] 1903 Laws, Colo. 246.

[178] Ann. Stat., Colo., Sec. 2134.

[179] Ann. Stat., Colo., Sec. 2135.

[180] Ann. Stat., Colo., Sec. 2136.

[181] Ann. Stat., Colo., Sec. 2137.

[182] 1903 Laws, Colo. 247.

homestead acquired by the proceeds thereof is exempt.[183] Necessary wearing apparel, one bicycle and one sewing-machine are exempt.[184] The following property, when owned by the head of a family residing with the same, is exempt: Family pictures, school-books and library, a pew in a place of worship, burial sites, household goods, necessary provisions and fuel for debtor and his family for six months, tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding $200 in value, the library and implements of any professional man, not exceeding $300, working animals to the value of $200, one cow and calf, ten sheep and necessary food for six months, one farm wagon, cart or dray, one plough, one harrow and other farming implements, including harness and tackle for team, not exceeding $50 in value.

Any chattel mortgage upon and any sale of household goods used by the family, and incumbrance or conveyance of any homestead, when given or made by husband or wife residing with the other, is not to be valid unless executed or made by both husband and wife jointly.[185]

There is no exemption from sale for payment of taxes. No article exempted by statute from the payment of debts is exempt from attachment or sale on execution for purchase money for said article.

The tools, implements, working animals, books and stock in trade, not exceeding $200 in value, of any mechanic, miner or other person not the head of a family, used to carry on his trade or business while a *bona fide* resident of the state, is exempt.[186]

Whenever the head of a family dies, deserts or ceases to reside with the same, the family is entitled to all of his exemptions.[187]

A debtor removing property from the state loses all exemptions, except those pertaining to necessary wearing apparel or beds and bedding.[188]

[183] Ann. Stat., Colo., Sec. 2139.
[184] Ann. Stat., Colo., Sec. 2561; 1899 Laws, Colo. 179.
[185] 1903 Laws, Colo. 153.
[186] Ann. Stat., Colo., Sec. 2562.
[187] Ann. Stat., Colo., Secs. 2563 and 2569.
[188] Ann. Stat., Colo., Sec. 2565.

Sixty dollars of an amount due for wages or earnings is exempt, provided the debtor, at the time of the levy under execution, attachment or garnishment, is the head of a family or the wife of a head of a family, and the family is dependent in whole or in part on such earnings.[189]

Pension money received by a resident of the state from the U. S. Government, in possession or deposited or loaned, is exempt.[190]

The widow's special allowance, she residing within the state, is exempt from payment of husband's debts.[191]

Property of cemetery corporations and lots owned by the members thereof, used for the purpose of sepulture, are exempt, except for the purchase price thereof.[192]

Connecticut.— Any person owning and actually occupying as a dwelling any building, together with any real estate owned, occupied and used in connection therewith, not to exceed $1,000 in value, may hold the same exempt from execution. The declaration of homestead must be executed and recorded like a deed of land. Homestead may be released provided the husband or wife of the claimant join in the release. The release is to be executed and recorded like a deed of land. After the decease of the owner the sale of the property for any debt except expenses for his funeral or last sickness is subject to the right of occupation by the widow or husband of the decedent for life and by his children during minority. Such right of occupation is exempt from execution for any debt of such widow, husband or children. The husband or widow may release this right of occupation and the guardian of a minor child may do so with the consent of the probate court. No person shall have a homestead exemption in more than one dwelling at the same time.[193]

The following property is exempt: Of the property of any one person, his necessary apparel and bedding and household furniture, arms, military equipment, uniforms or musical instruments owned by any member of the militia for military purposes, any pension money received from the United States

[189] Session Laws, Colo., 1894, p. 49; see Ann. Stat., Colo., Sec. 2567.
[190] Ann. Stat., Colo., Sec. 2568.
[191] Ann. Stat., Colo., Sec. 1534.
[192] Ann. Stat., Colo., Sec. 654.
[193] Gen. Stat., Conn., Sec. 4065.

while in the hands of the pensioner, implements of the debtor's trade, his library, not exceeding $500 in value, one cow, not exceeding $150 in value, ten sheep, not exceeding in value $150, two swine and 200 lbs. pork, poultry, not exceeding $25 in value; of the property of any one person having a wife or family, 25 bushels charcoal, two tons of other coal, 200 lbs. wheat flour, two cords of wood, two tons of hay, 200 lbs. each of beef and fish, five bushels each of potatoes and turnips, ten bushels each of Indian corn and rye and the meal or flour manufactured therefrom, 20 lbs. each of wool and flax, or the yarn or cloth made therefrom; the horse of any practicing physician or surgeon, not exceeding $200 in value, and his saddle, bridle, harness, buggy and bicycle; one boat, owned by one person and used by him in the business of planting or taking oysters or clams or taking shad, together with the sails, tackle, rigging and implements used in said business, not exceeding in value $200; one sewing-machine, being the property of any one person using it or having a family; one pew, being the property of any person having a family who ordinarily occupy it and lots in any burying-ground.[194]

Husband's interest in wife's estate is exempt during life of wife or child, the issue of the marriage, except as to debts contracted for support of such wife or child.[195]

If property exempt to a certain amount is sold, money received by debtor from such sale is exempt.[196]

Levy of execution may be made upon the body of debtor in certain cases.[197]

Wages, not exceeding $50, including wages due a minor child of debtor, are exempt and not liable to be taken by foreign attachment or execution, but if the debt is for defendant's personal board, wages are not so exempt. The exemption provided for in this section does not apply to any debt for the debtor's personal board. Benefits allowed by any association of the state toward the support of any of its members incapacitated by sickness or infirmity from attending to his usual business are exempted and not liable to be taken by foreign attachment or execution. Moneys due a debtor from

[194] Gen. Stat., Conn., Sec. 907.
[195] Gen. Stat., Conn., Sec. 908.
[196] Gen. Stat., Conn., Sec. 910.
[197] Gen. Stat., Conn., Sec. 918-920.

an insurance company on policies on exempt property are exempt to the same extent as the property so insured.[198]

A policy of life insurance for the benefit of a married woman shall inure to her separate use, or in case of her death before payment, to the use of her children. But if the amount of the annual premium exceed $300 the amount of the excess with interest shall inure to the benefit of the creditors of the person paying the premium.[199]

DELAWARE.— Bibles, family pictures, wearing apparel, tools of trade, etc., to the value of $75 in New Castle and to the value of $50 in Kent. An additional exemption of $200 in New Castle to heads of families, and in Kent an additional exemption of $150, to consist of household goods only. No exemption in Sussex.[200]

DISTRICT OF COLUMBIA.— The property of the head of a family or a householder is exempt as follows: All wearing apparel belonging to all persons and to all heads of families being householders; all household gear, not exceeding $300 in value; provisions for three months; fuel for three months; mechanics' tools and implements of debtor's trade or business amounting to $200 in value, and $200 worth of stock for carrying on business; the library and implements of a professional man or artist to the value of $300; one horse, mule, or yoke of oxen; one cart, wagon or dray, and harness therefor; farming utensils with food for such team for three months, and if debtor is a farmer, any other farming tools of the value of $100; family pictures and the family library, not exceeding $400 in value; one cow, one swine, six sheep. These exemptions not valid as against a debt for wages of servants, common laborers or clerks, except the exemption of wearing apparel, beds and bedding, household furniture and provisions for the debtor and his family.[201]

No conveyance of or incumbrance upon exempted articles valid unless signed by wife of married debtor.[202]

Earnings not in excess of $100 per month of married resi-

[198] Gen. Stat., Conn., Sec. 909.

[199] Gen. Stat., Conn., Sec. 4548.

[200] Rev. Code, Del., 1852, as amended, laws of 1893, pp. 828, *et seq.*

[201] Comp. Stat., Dist. Col., Chap. XXI, Sec. 13.

[202] Comp. Stat., Dist. Col., Chap. XXI, Sec. 14.

dents of the district, or of those who have to provide for the support of a family in the district for two months next preceding the issuance of process, are exempt.[203]

FLORIDA.— A homestead to the extent of 160 acres, or the half of one acre within an incorporated city or town, owned by the head of a family residing within the state, together with $1,000 worth of personal property and the improvements on the real estate, are exempt. Said real estate is inalienable without the joint consent of husband and wife when that relation exists.[204] A homestead is obtained by making a statement in writing containing a description of the property claimed, declaring the same to be homestead. Such statement must be signed by the person making it and recorded in the office of the county judge.[205]

No property is exempt from sale for taxes or assessments, or for the payment of obligations contracted for purchase of said property, or for the erection or repair of improvements on real estate exempted, or for house, field or other labor performed on the same.

Exemptions in city or town do not extend to more than the residence and business house of the owner.[206]

Homestead may be selected after the levy of an execution.[207]

A person occupying a dwelling on land not his own may claim such house as his homestead.[208]

Exemptions extend to the widow and heirs of the party entitled to exemption.[209]

The exemptions provided for in the constitution of the state adopted in 1868 apply to all debts contracted and judgments rendered since the adoption thereof and prior to the adoption of the constitution of 1885.[210]

Homestead may be alienated by deed or mortgage. The wife must join if there is one. It may be devised if there are no children.[211]

Homestead shall not be reduced in amount by reason of its

[203] Comp. Stat., Dist. Col., Chap. XXI, Sec. 15.
[204] Const., Art. X, Sec. 1; *In re* Carpenter, 109 Fed. Rep. 558.
[205] Rev. Stat., Fla., Sec. 1998.
[206] Const., Art. X, Sec. 1.
[207] Rev. Stat., Fla., Sec. 1999.
[208] Rev. Stat., Fla., Sec. 2002.
[209] Const., Art. X, Sec. 2.
[210] Const., Art. X, Sec. 3.
[211] Const., Art. X, Sec. 4.

being subsequently included within the limits of an incorporated city or town without the consent of the owner.[212]

Money or other thing due for personal labor can not be attached or garnished.[213]

Proceeds of life insurance policy are not liable to legal process in favor of creditor of decedent unless the policy declares it was effected for his benefit.[214]

GEORGIA.[215] — Every head of a family, guardian or trustee of a family of minor children, every aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family, may hold exempt realty or personalty, or both, to the value of $1,600, except for taxes, for purchase money, for labor done thereon, for material purchased therefor, or for the removal of encumbrances thereon.[216]

When a person desires to exempt personalty and such personalty consists of cash it must be invested, under the direction of the ordinary, in such articles of personalty as the claimant may desire.[217]

The applicant for benefit of exemption must apply to the ordinary of county of residence by petition.[218] The petition must contain a minute and accurate description of all the claimant's property.[219]

[212] Const., Art. X, Sec. 5.

[213] Rev. Stat., Fla., Sec. 2008.

[214] Rev. Stat., Fla., Sec. 2347.

[215] The exemption laws of this state are treated in *In re* Butler, 120 Fed. Rep. 100, 9 Am. B. R. 539; Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513, affirming *In re* Talbott, 116 Fed. Rep. 417, 8 Am. B. R. 427; *In re* West, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re* Thompson, 115 Fed. Rep. 924, 8 Am. B. R. 283; *In re* Boorstin, 114 Fed. Rep. 696, 8 Am. B. R. 89; *In re* Williamson, 114 Fed. Rep. 190, 8 Am. B. R. 42; *In re* Stephens, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re* Swords, 112 Fed. Rep. 661, 7 Am. B. R. 436; Woodruff v. Cheeves (C. C. A. 5th Cir.), 105 Fed. Rep. 601, 5 Am. B. R. 296, reversing *In re* Woodruff, 96 Fed. Rep. 317, 2 Am. B. R. 678; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165.

[216] Const. of 1877, Art. IX, Secs. 1 and 2; Code Ga., Sec. 2827; *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262.

[217] Code Ga., Sec. 2841.

[218] Code Ga., Sec. 2828.

[219] Code Ga., Secs. 2828, 2830; *In re* West, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re* Stephens, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re* Williamson, 114 Fed. Rep. 190,

Homestead may be in counties other than the county of the residence of applicant.[220]

When husband and wife are in a state of separation and the minor children reside with or are under the control of wife, the wife is the head of the family.[221]

If husband refuses to claim homestead exemptions, wife may.[222]

When the beneficiaries desire, exempt property may be sold for reinvestment.[223]

All produce, rents or profits arising from homesteads are exempt, except as is provided in the constitution of the state, and shall be for the support and education of the families claiming the homesteads.[224]

A debtor who does not wish to claim a homestead may take advantage of section 2866 of the civil code, but no debtor who avails himself of the benefits of said section can claim homestead, nor can a person who claims homestead avail himself of section 2866, unless the homestead and exempted property so elected is lost by virtue of a sale under an outstanding claim.[225]

The applicant for homestead is permitted to select the property to be exempted, not to exceed the amount allowed by law.[226]

Any debtor may, except as to wearing apparel and $300 worth of household and kitchen furniture and provisions, waive the exemption given by the constitution and laws, by a waiver, general or specific, in writing, which waiver may be stated in the contract of indebtedness or cotemporaneously or subsequently in a separate paper.[227]

In case of such waiver and a levy of execution the debtor

8 Am. B. R. 42; *In re* Boorstin, 114 Fed. Rep. 696, 8 Am. B. R. 89; *In re* Thompson, 115 Fed. Rep. 924, 8 Am. B. R. 283; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120.

[220] Code Ga., Sec. 2829.

[221] Code Ga., Sec. 2842.

[222] Code Ga., Sec. 2843.

[223] Code Ga., Secs. 2844, 2847.

[224] Code Ga., Sec. 2848.

[225] Code Ga., Sec. 2854.

[226] Code Ga., Sec. 2862.

[227] Code Ga., Sec. 2863; Woodruff v. Cheeves (C. C. A. 5th Cir.), 105 Fed. Rep. 601, 5 Am. B. R. 296, reversing *In re* Woodruff, 96 Fed. Rep. 317, 2 Am. B. R. 678; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798.

and his wife may select $300 worth of household and kitchen furniture and provisions.[228]

The following property of every head of a family is exempt from process, nor can any valid lien be created thereon except as hereinafter pointed out: Fifty acres of land and five additional acres for each child under 16 years of age; the land shall include the dwelling-house, if the value thereof and improvements does not exceed $200, provided the land is not within the limits of a municipal corporation and does not include any cotton or woolen factory, saw or grist mill, or any other machinery propelled by water or steam, the value of which exceeds $200, provided also that said land does not derive its chief value from other cause than its adaptation to agricultural purposes; or in lieu of the above land, real estate in a city, town or village, not exceeding $500; one farm horse or mule, or in lieu thereof one yoke of oxen, one cow and calf, ten head of hogs and $50 worth of provisions and $5 worth additional for each child; 50 bushels corn, 1,000 lbs. fodder, one one-horse wagon, one table and a set of chairs sufficient for the use of the family, and household and kitchen furniture, not to exceed $150; beds, bedding and common bedsteads sufficient for the family; one loom, one spinning-wheel, two pairs of cards and 100 lbs. lint cotton; common tools of trade of debtor and his wife; equipment and arms of a militia soldier and a trooper's horse; ordinary cooking utensils and table crockery; wearing apparel of debtor and family; family bible, religious works and school books; family portraits; the library of a professional man in actual practice or business, not exceeding $300 in value, to be selected by him; one family sewing-machine, this exemption to exist whether person owning said machine is the head of a family or not, and shall be good against all debts except the purchase money.[229]

Property exempt under section 2866 of the code is not exempt as to the purchase money, or state, county and municipal taxes.[230]

Crops paid by a tenant to his landlord as rent are discharged from the lien of a judgment, decree or other process against the tenant.[231]

[228] Code Ga., Sec. 2864.
[229] Code Ga., Sec. 2866.
[230] Code Ga., Sec. 2873.
[231] Ga. L., 1884-5, p. 91.

IDAHO.— The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated.[232]

A married claimant may select homestead from community property, the separate property of the husband, or from the separate property of the wife with her consent; when claimant is unmarried, but the head of a family, the homestead may be selected from any property.[233]

Homestead can not be selected from the separate property of a wife without her consent, shown by her making declaration.[234]

The homestead is exempt from execution or forced sale, except as follows:[235] On judgments before the declaration of homestead was filed for record, and which constitute liens; or in action in which an attachment was levied on premises before the filing of the declaration; on debts secured by mechanics', laborers' or vendors' liens upon the premises; on debts secured by mortgages upon premises executed and acknowledged by husband and wife or by an unmarried claimant; on debts secured by mortgage on the premises executed and recorded before declaration filed for record.[236]

A homestead may be conveyed or incumbered, but the instrument must be executed and acknowledged by both husband and wife.[237]

A homestead may be abandoned by a declaration of abandonment, by a grant or conveyance by the husband and wife if claimant is married, by the claimant, if unmarried.[238] A declaration of abandonment is effectual only from the time when it was filed for record.[239]

When a homestead is sold for any reason under legal proceedings, the money paid to claimant is entitled for six months thereafter to the same protection against legal process which the law gives to homestead.[240]

Homesteads may be selected and claimed by any head of a

[232] Rev. Stat., Idaho, Sec. 3035.
[233] Rev. Stat., Idaho, Sec. 3036.
[234] Rev. Stat., Idaho, Sec. 3037.
[235] Rev. Stat., Idaho, Sec. 3038.
[236] Rev. Stat., Idaho, Sec. 3039.
[237] Rev. Stat., Idaho, Sec. 3040.
[238] Rev. Stat., Idaho, Sec. 3041.
[239] Rev. Stat., Idaho, Sec. 3042.
[240] Rev. Stat., Idaho, Sec. 3055.

family, not exceeding in value $5,000; by any other person, not exceeding in value $1,000.[241]

The phrase "head of a family" includes husband or wife, every person who has residing with him on the premises and under his care a minor child, or the minor child of a deceased husband or wife, a minor brother or sister or their minor child, a father, mother, grandfather or grandmother of himself or of a deceased husband or wife, an unmarried sister or any other relatives mentioned above who have attained majority and are unable to support themselves.[242]

The word "homestead" includes the dwelling-house in which claimant lives and the land on which the same is located, the proceeds thereof in case of a voluntary sale, and the insurance thereon in case of a loss.[243]

The following property of an actual resident of the state, in addition to homestead, is exempt: Chairs, tables, desks and books, to the value of $200; necessary household, table and kitchen furniture, including one sewing-machine, stoves, stovepipe and stove furniture, beds, bedding and bedsteads, not exceeding $300 in value; wearing apparel, hanging pictures, paintings or drawings by any member of the family, family portraits, provisions for family for six months; two cows with their sucking calves, two hogs with their sucking pigs; farming utensils to the value of $300; four oxen, or four horses, or four mules, to be selected and their harness; one cart or wagon; food for said animals for six months; a water right, not to exceed 160 inches of water, used for the irrigation of lands actually cultivated; crops growing or grown on 50 acres; tools of a mechanic or artisan necessary to carry on his trade, not exceeding $500 in value; notarial seal and records of a notary public; necessary instruments and chest of surgeon, physician, surveyor and dentist, and their professional libraries; the professional libraries and office furniture of attorneys at law and judges, and libraries of ministers of the gospel; the cabin of a miner, not exceeding in value $500, also his sluices, etc., and tools, not exceeding in value $200; one saddle animal,

[241] Rev. Stat., Idaho, Sec. 3058.
[242] Rev. Stat., Idaho, Sec. 3059.
[243] Rev. Stat., Idaho, Sec. 3060. Sess. Laws, Idaho, 1897, p. 9, and 1899, p. 404.

one pack animal, with equipments belonging to a miner actually engaged in prospecting, not exceeding in value $250; two oxen, two horses or two mules and their harness, and one cart, wagon, dray or truck, by which the owner makes his living; one horse, with vehicle and harness, etc., used by physician, surgeon or minister of the gospel in making professional visits, with food for such oxen, horses or mules for six months; the earnings of a debtor for personal services rendered 30 days next preceding the issuance of process, when it appears that such earnings are necessary for support of family residing in the state; shares held by a member of a homestead or building association incorporated under the laws of the state, not exceeding $1,000 in value, if person holding same is not the owner of a homestead; proceeds of a life insurance policy, represented by an annual premium not exceeding $250; implements used by fire company organized under the laws of the state and the uniforms of members; arms, uniforms and equipments required to be kept by law; one gun; public buildings and appurtenances, furniture, books, papers; cemeteries, public squares, parks and places, and the lots thereto appertaining. No property mentioned in this section is exempt from execution issued on a judgment recovered for its price or upon a mortgage thereon.[244]

No personal property of either husband or wife, that is exempt, shall be mortgaged without the joint concurrence of both.[245]

Property of a married woman is exempt from debts of husband.[246]

ILLINOIS.— A householder having a family is entitled to a homestead of $1,000 in the farm or lot of land and the buildings thereon owned or rightly possessed by lease or otherwise and occupied as a residence; such homestead is exempt from process for the payment of debts.[247]

Homestead exemption continues after his death for benefit of surviving husband or wife so long as he or she continues to

[244] Rev. Stat., Idaho, Sec. 4480, as amended, Sess. L., Idaho, 1899, p. 356.

[245] 1899 Laws, Idaho, 403.

[246] Rev. Stat., Idaho, Sec. 4479.

[247] Starr & Curtis' Ann. Stat., Ill. 1896, p. 1865.

occupy such homestead, and until the youngest child becomes 21 years of age; in case husband or wife deserts the family, the exemption continues in favor of the one occupying the premises as a resident.[248]

No property is exempt from sale for nonpayment of taxes or assessments, or a debt or liability incurred for the purchase or improvement thereof.[249]

A release, waiver or conveyance of homestead may be made in writing, subscribed by householder and his or her husband or wife and acknowledged, as is required in conveyances of real estate; when said release, etc., is taken as a mortgage or security, the same is operative only as to such specific release, etc.[250]

In case of a divorce the court granting same may dispose of the homestead according to the equities of the case.[251]

When a homestead is conveyed such conveyance does not subject the premises to any lien to which it would not be subject in the hands of the owner, and the proceeds of such sale to the extent of $1,000, are exempt from process for one year, and if reinvested in a homestead, the same is entitled to the same exemption as the original homestead.[252] Whenever a building exempt as a homestead is insured and a loss occurs, the proceeds of the insurance policy are exempt to the same extent as the building would have been.[253]

The following personal property is exempt: The necessary wearing apparel, bibles, school books and family pictures of every person; $100 worth of other property, to be selected by the debtor, and in addition, when the debtor is the head of a family and resides with the same, $300 worth of other property, to be selected by the debtor; such selection and exemption shall not be allowed from any money, salary or wages.[254] Money due debtor from sale of exempted personal property is exempt

[248] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1871.

[249] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1873.

[250] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1874.

[251] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1882.

[252] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1882.

[253] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1883.

[254] Laws, Ill., 1897, p. 218.

from process to same extent as such property would be exempt if same had not been sold.[254]

When the head of a family dies, deserts or does not reside with the same, the family is entitled to the same exemptions as are conferred upon a head of a family residing with it.[255]

No personal property is exempt when the debt is for wages of laborer or mechanic.[256]

In actions brought to recover wages due a laborer or servant, if it appears that the horse or team of such laborer or servant was necessary to the performance of said labor, said services shall be included in said wages and become part of judgment for said wages, and from said judgment nothing is exempt.[257]

The wages for services of a defendant, the head of a family and residing with the same, to the amount of $8 per week are exempt from garnishment; all above $8 per week is liable to garnishment if the person bringing suit shall first make a demand in writing for the excess above $8.[258]

The same exemption of wages from garnishment is allowed to a nonresident as is allowed to him by the law of the state of his residence.[259]

Pension moneys of firemen are exempt from process.[260]

The money or benefit due any certificate holder, or any beneficiary named therein, in an accident insurance company is exempt from process.[261]

Benefit and relief funds are exempt from process.[262]

The arms and equipments of members of the national guard are exempt.[263]

Indian Territory.— By decisions the same exemptions apply as are granted by the laws of Arkansas.

Indiana.[264] — An amount of property not in excess of $600

[255] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1892.

[256] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1892.

[257] Starr & Curtis' Ann. Stat., Ill., 1896, p. 1894.

[258] Laws, Ill., 1897, p. 231.

[259] Starr & Curtis' Ann. Stat., 1896, p. 1895.

[260] Starr & Curtis' Ann. Stat., 1896, p. 845.

[261] Starr & Curtis' Ann. Stat., 1896, p. 2277.

[262] Starr & Curtis' Ann. Stat., 1896, p. 2282.

[263] Starr & Curtis' Ann. Stat., 1896, p. 3816.

[264] The exemption law of this state is treated in *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639.

in value, owned by any resident householder is not liable to sale on process for any debt founded on contract after the taking effect of an act as to exemptions in force May 31, 1879.[265]

The property, real or personal, may be selected by debtor at the time he claims the exemption.[266]

The wife may claim exemptions in the absence of husband.[267]

No mortgage of exempted real estate executed by a married man is valid unless wife joins.[268]

Exemptions are not allowed against laborers' or mechanics' liens, nor against a lien for the purchase money of exempted real estate, nor is any property exempt under exemption act from taxation.[269]

The exemptions provided for in this act do not apply to any debt or contract existing at the time it takes effect. All householders owing debts founded on contract existing at that time are entitled to exemptions, provided for in an act entitled "An act to exempt property from sale in certain cases," approved February 17, 1852, and the amendments and supplements thereto.[270]

Household goods not exceeding $100 in value are exempt from levy or sale for payment of delinquent taxes.[271]

Iowa.[272] — Homestead of every family is exempt where there is no special statutory declaration to the contrary.[273]

A widow or widower, though without children, while continuing to occupy real estate as a homestead at the death of husband or wife, shall be deemed a family; in case of divorce

[265] Ann. Ind. Stat., Sec. 715.

[266] Ann. Ind. Stat., Sec. 716.

[267] Ann. Ind. Stat., Sec. 727.

[268] Ann. Ind. Stat., Sec. 728.

[269] Ann. Ind. Stat., Sec. 729.

[270] Ann. Ind. Stat., Sec. 730.

[271] Ann. Ind. Stat., Supp., 1897, Secs. 6525 and 6525*a*.

[272] The exemption laws of this state are treated in *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. —; *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165, reversing *In re* Steele, 98 Fed. Rep. 78, 3 Am. B. R. 549; *In re* Hatch, 102 Fed. Rep. 280, 4 Am. B. R. 349; *In re* Pope, 98 Fed. Rep. 722, 3 Am. B. R. 525; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 189; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300.

[273] Code, Iowa, Sec. 2072; *In re* Rafferty, 7 Am. B. R. 415; *In re* Pope, 98 Fed. Rep. 722, 3 Am. B. R. 525.

the right of occupancy shall continue to the party in whose favor the divorce is granted.[274]

No conveyance or incumbrance or contract to convey or incumber a homestead is valid if owner is married, unless husband and wife join in the execution of the same joint instrument.[275]

The homestead is subject to mechanics' liens for work, labor or materials done or furnished exclusively for the improvement of the same.[276]

Homestead is liable for debts contracted prior to its acquisition and for debts created by written contract by persons having the power to convey, and expressly stipulating that it is liable therefor, but in such cases only for the deficiency remaining in the one case after exhausting the other property of debtor liable to execution, and in the other case only after exhausting all other property pledged by the same contract.[277]

Homestead must embrace the house used as a home; if he has two or more houses thus used he may select the one he will retain; it may contain one or more contiguous lots, with buildings or other appurtenances habitually and in good faith used as part of the same homestead.[278]

If the homestead is within a city or town, it must not exceed one half acre in extent, otherwise it must not contain more than 40 acres; but if in either case its value is less than $500, it may be enlarged until it reaches that amount; it must not embrace more than one dwelling-house or any other buildings, except such as are appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his business and not exceeding $300 in value is appurtenant thereto.[279]

Homestead should be platted and recorded.[280]

The owner of a homestead may from time to time change the limits as well as the plat and description or vacate it; conveyances or liens prior to the change are unaffected; the rights of husband or wife or children are unaffected; the new

[274] Code, Iowa, Sec. 2973; *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. —.

[275] Code, Iowa, Sec. 2974.

[276] Code, Iowa, Sec. 2975.

[277] Code, Iowa, Sec. 2976.

[278] Code, Iowa, Sec 2977.

[279] Code, Iowa, Sec. 2978.

[280] Code, Iowa, Sec. 2979.

homestead is exempt to the same extent as the old one would have been.[281]

Upon the death of husband or wife the survivor may continue to occupy the whole homestead until disposed of according to law; the setting off of the distributive share in the real estate of the deceased is a disposal; the survivor may elect to retain homestead in lieu of such share for life; if there is no survivor the homestead descends to the issue according to rules of descent, unless otherwise directed by will, and is held by such issue exempt from antecedent debts of their parents or their own, except those contracted by the owner thereof, contracted prior to its acquisition.[282]

If there is no survivor or issue the homestead is liable for debts as if not held as homestead.[283]

Homestead may be devised subject to the rights of surviving husband or wife.[284]

Homestead purchased with proceeds of sale of homestead of intestate is exempt from liability for all debts from which the former homestead would have been exempt.[285]

Homestead bought with pension money is exempt, and such exemption applies to debts of pensioner contracted prior to purchase.[286]

Public buildings or any other public property necessary for carrying on public business is exempt; the property of a private citizen can not be taken to pay a public debt.[287]

A resident of the state and the head of a family is entitled to the following exemptions: All wearing apparel of himself and family kept for actual use and suitable to their condition, and the trunks and other receptacles necessary to contain the same; one musket, or rifle and shotgun; all private libraries, family bibles, portraits, pictures, musical instruments and paintings not kept for the purpose of sale; a seat or pew occupied by the debtor or his family in any house of public worship; an interest in a public or private burying-ground, not exceeding one acre for any defendant; two cows and two calves;

[281] Code, Iowa, Sec. 2981; *In re* Johnson, 118 Fed. Rep. 312, 9 Am. B. R. 257.

[282] Code, Iowa, Sec. 2085.

[283] Code, Iowa, Sec. 2986.

[284] Code, Iowa, Sec. 2987.

[285] Code, Iowa, Sec. 3375.

[286] Code, Iowa, Sec. 4010.

[287] Code, Iowa, Sec. 4007.

fifty sheep and the wool therefrom, and the material manufactured from such wool; six stands of bees, five hogs, and all pigs under six months; the necessary food for all animals exempt from execution for six months; one bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture not exceeding two hundred dollars in value; all spinning-wheels and looms, one sewing-machine and other instruments of domestic labor kept for actual use; the necessary provisions and fuel for the use of the family for six months; the proper tools, instruments or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor; if the debtor is a physician, public officer, farmer, teamster, or other laborer, a team consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with the proper harness or tackle, by the use of which he habitually earns his living, otherwise one horse; if the debtor be a printer, there shall also be exempt a printing-press and the types, furniture and material necessary for the use of such printing-press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars; poultry to the value of fifty dollars; and the same to any woman, whether the head of a family or not; and if the debtor is a seamstress, one sewing-machine.[288]

Pension money received by a resident of the state from the United States, whether pensioner is the head of a family or not, is exempt.[289]

The earnings of a debtor, a resident of the state and the head of a family, for his personal services or those of his family, at any time within 90 days next preceding the levy, are exempt from liability for debt.[290]

The word "family" does not include strangers or boarders lodging with the family.[291]

An unmarried person, not the head of a family, and nonresidents, may hold exempt their own ordinary wearing apparel and trunk necessary to contain same.[292]

[288] Code, Iowa, Sec. 4008.
[289] Code, Iowa, Sec. 4009.
[290] Code, Iowa, Sec. 4011.
[291] Code, Iowa, Sec. 4012.
[292] Code, Iowa, Sec. 4013.

Where debtor is the head of a family and has started to leave the state, he can hold exempt, the ordinary wearing apparel of himself and family and such other property as he may select to the value of $75. Any person coming into the state with intention of remaining is considered a resident.[293]

Failure to claim exemption does not waive same unless there is a failure to claim when it is required in writing by the officer about to make the levy.[294]

The proceeds of an endowment policy payable to assured on attaining a certain age is exempt; indemnity under an accident policy is exempt to the assured, or in case of death, to the husband or wife and children; the avails of such policies of life or accident insurance, not in excess of $50, payable to the surviving widow, are exempt from liability for debts of such beneficiary contracted prior to the death of the assured.[295]

The arms and equipments of members of the national guard are exempt.[296]

The avails of any life or accident insurance in a mutual aid or benevolent society, upon the death or disability of any member, are not subject to debts of deceased except by special contract; damages recovered for death by wrongful act, if deceased leaves a husband, wife, child or parent, are not liable for payment of debts.[297]

Exempt personal property of deceased, when there is a widow, after being inventoried and appraised, is set apart to widow and is exempt in her hands.[298]

Any money judgment rendered in replevin proceedings for exempted property is to the same extent exempt as the property.[299]

KANSAS.— A homestead to the extent of 160 acres of farming land, or of one acre within an incorporated town, or city, occupied as a residence by the family of the owner, together with improvements thereon, is exempt from process; it can not be alienated without the joint consent of husband and wife, where the relation exists. No property is exempt from

[293] Code, Iowa, Sec. 4014.
[294] Code, Iowa, Sec. 4017.
[295] Code, Iowa, Sec. 1805; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 189.
[296] Code, Iowa, Sec. 2209.
[297] Code, Iowa, Sec. 3313.
[298] Code, Iowa, Sec. 3312.
[299] Code, Iowa, Sec. 4181.

sale for taxes, or from purchase money for said premises for improvements thereon. A lien thereon may be given by consent of both husband and wife.[300]

Homestead is exempt from distribution.[301]

Every person residing in the state, and being the head of a family, is entitled to the following exemptions: The family bible, school books and family library; family pictures; musical instruments used by the family; a pew in a church; a lot in a burying-ground; wearing apparel of himself and family; beds, bedsteads and bedding used by himself and family; one cooking stove and appendages, all other cooking utensils and all other stoves and appendages necessary for the use of himself and family; one sewing-machine, all spinning-wheels and looms, and all other implements of industry and all other household furniture not herein enumerated, not exceeding in value $500; two cows, ten hogs, one yoke oxen, one horse or mule, or in lieu thereof a span of horses or mules; 20 sheep and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for stock mentioned above for one year; one wagon, cart or dray; two plows, one drag and other farming utensils, including harness and tackle for teams, not exceeding in value $300; the grain, meat, vegetables, groceries and other provisions on hand, necessary for the support of the debtor and his family for one year, and also all the fuel on hand for one year; the necessary tools and implements of any mechanic, minor or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade, not exceeding $400 in value; the library, implements and office furniture of any professional man.[302]

The earnings of a debtor resident of the state for his personal services at any time within three months next preceding the issuing of process is exempt, when it appears that such earnings are necessary in whole, or part, for the support of a family, provided the debtor notifies the plaintiff in writing at the time of filing the affidavit.[303]

[300] Const., Kan., Art. XV, Sec. 9; Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Sec. 1, p. 608.

[301] Gen. Stat., Kan., 1897, Vol. II, Chap. 109, Sec. 1, p. 558, *et seq.*

[302] Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Sec. 3, p. 608.

[303] Gen. Stat., Kan., 1897, Vol. II,

The following property of any person residing in the state not the head of a family is exempt: Wearing apparel, pew in a church, and a lot in a burying-ground; the necessary tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade as provided by law, the library, implements and office furniture of any professional man.[304]

There is no exemption as against the wages of clerk, mechanic, laborer or servant.[305]

Money received by a debtor as a pensioner of the United States within three months next preceding issuing of process when it appears that such money is necessary for the support in whole, or part, of debtor's family.[306]

It is unlawful for either husband or wife to create a lien by chattel mortgage, or otherwise, on exempted personal property without the joint consent of both; this not to apply to mortgages or liens existing on personal property in force May 25, 1889.[307]

KENTUCKY.— In addition to personal property exempted by law, so much land, including dwelling-house and appurtenances, not exceeding in value $1,000, owned by debtors who are actual *bona fide* housekeepers with a family, resident in the commonwealth, is exempt from process for debts created since June 1, 1866, except to foreclose a mortgage given by the owner of a homestead or for purchase money therefor; this exemption not to apply to sales under process if the debt existed prior to the purchase of the land, or for the erection of the improvements thereon.[308]

No mortgage, release, or waiver of such exemption is valid unless the same is in writing, subscribed by defendant and his wife and acknowledged and recorded in the same manner as conveyances of land, and such exemption continues after

Chap. 118, Sec. 4, p. 610; Gen. Stat., Kan., 1897, Vol. II, Chap, 95, Secs. 508, 509, p. 235.

[304] Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Sec. 5, p. 611.

[305] Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Sec. 7, p. 611.

[306] Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Sec. 8, p. 612.

[307] Gen. Stat., Kan., 1897, Vol. II, Chap. 118, Secs. 8 and 9, p. 612.

[308] Ky. Stat., Sec. 1702; *In re* Carmichael, 108 Fed. Rep. 789, 5 Am. B. R. 551, 3 N. B. N. 404.

the death of the debtor for the benefit of the widow and children, but is estimated in allotting dower.[309]

A person with a family resident in this state has exempt from execution, attachment, distress for rent or fee-bill, two beasts, or one work beast and one yoke of oxen, two plows and gear, one wagon and set of gear, or cart or dray, two axes, three hoes, one spade, one shovel, two cows and calves, bed, bedding, and furniture sufficient for family use, one loom, spinning-wheel and pair of cards, all the spun yarn and manufactured cloth, manufactured by the family necessary for family use, carpeting for all family rooms in use, one table, books not to exceed $50 in value, two saddles and appendages, two bridles, six chairs, or so many as do not exceed $10 in value, one cradle, all poultry on hand, ten head sheep not to exceed $25 in value, wearing apparel, sufficient provisions, including breadstuff and animal food, to sustain the family for one year; if not on hand, other personal property, wages, money or growing crop not to exceed in value $40 for each member of the family, provender suitable for live stock, if there is any, not to exceed in value $70; if such provender is not on hand, such other property as shall not exceed such sum in value; washing apparatus not to exceed in value $50, one sewing-machine, all family portraits and pictures, one stove and appendages and other cooking utensils not exceeding in value $25.[310] The work beast must not exceed in value $150, a cow and calf $60.[311] A mechanic's tools to the value of $100 are exempt, but he is allowed only one work beast if this exemption is claimed.[312]

The libraries of ministers, the professional libraries of attorneys, the professional libraries and instruments of physicians and surgeons, not to exceed the value of $500, are exempt, but such persons shall be entitled to only one work beast and no wagon, cart or dray.[313]

Wages not to exceed $50 are exempt, but the exemption of $50 not to apply to debts for food, raiment (fuel, medicine) or house-rent for the family.[314]

[309] Ky. Stat., Sec. 1706.
[310] Ky. Stat., Sec. 1697.
[311] Ky. Stat., Sec. 1698.
[312] Ky. Stat., Sec. 1699.
[313] Ky. Stat., Sec. 1700.
[314] Ky. Stat., Sec. 1701.

Wages earned out of the state and payable out of the state are exempt where the cause of action arose out of the state, and it is the duty of the garnishee in such cases to plead such exemption unless the defendant is actually served with process.[315]

LOUISIANA.— The homestead, *bona fide*, owned and occupied by the debtor, consisting of lands not exceeding 160 acres, buildings and appurtenances, whether rural or urban, of every head of a family or person having a person or persons dependent on him or her for support. Also two work horses, one wagon or cart, one yoke of oxen, two cows and calves, 25 head of hogs or 1,000 pounds bacon or its equivalent in pork, whether these exempted objects be attached to homestead or not, and on a farm the necessary corn or fodder for the current year and the necessary farming implements, to the value of 2,000 are exempt from process. In case the homestead exceeds $2,000 in value, the beneficiary is entitled to that sum when sold under legal process for more than said sum. No husband can have the benefit of a homestead whose wife owns and is in the actual enjoyment of property to the amount of $2,000. The benefit of the above exemptions may be claimed by the surviving spouse or minor children of a deceased beneficiary.[316]

Rights to homesteads or exemptions under laws, contracts, or obligations existing at the time of the adoption of the constitution of 1898 are not affected by its adoption or laws passed in pursuance thereof.[317]

The exemptions provided for in the constitution of 1898 do not apply to the following debts: For the purchase price of property, for labor, money and material furnished for building, repairing, or improving homesteads; for liabilities incurred by any public officer or fiduciary, or attorney at law, for money collected or received on deposit; for taxes or assessments; for rent which bears a privilege upon said property. No court or ministerial officer of the state shall enforce any process against property exempt as homestead except the

[315] Ky. Stat., Sec. 1701*a*.
[316] Const., La., 1898, Art. 244.
[317] Const., La., 1898, Art. 245.

debts above mentioned, unless the property exempted exceeds $2,000 in value.[318]

Homestead may be sold, but no sale shall impair the rights of creditors; homestead may be waived, the wife joining if she be not separated "*a mensa et thoro*"; a written waiver must be recorded in the office of the recorder of mortgages of beneficiary's parish. The waiver may be general or special, and has effect from the time of record.[319]

The articles of the constitution of 1898 relating to homestead and exemption take effect January 1, 1899. In the parish of Orleans, the homestead to be valid must be recorded.[320]

MAINE.— A lot of land, dwelling-house and out-buildings thereon, the property of a householder in actual possession and not the owner of an exempted lot purchased from the state are exempt from process as provided by law.[321]

The householder must have his claim for exemption recorded in the registry with a description of homestead, and so much thereof as does not exceed $500 in value is exempt from debts subsequently contracted.[322]

His widow and children may occupy during widowhood and minority; the homestead is not exempt from mechanics' liens.[323]

The following personal property is exempt from attachment and execution: *First,* The debtor's wearing apparel, household furniture necessary for himself, wife and children, not exceeding $100 in value, and one bed, bedstead and necessary bedding for every two such persons. *Second,* All family portraits, all bibles and schoolbooks in actual use in the family, one copy of the statutes of the state, and a library not exceeding $150 in value. *Third,* All his interest in one pew in a meeting-house where he and his family statedly worship. *Fourth,* One cooking-stove, and all iron stoves used exclusively for warming buildings; charcoal, and not exceeding twelve cords of wood conveyed to his house for the use of

[318] Const., La., 1898, Art. 245.
[319] Const., La., 1898, Art. 246.
[320] Const., La., 1898, Art. 247.
[321] Rev. Stat., Me., 1883, Chap. 81, Sec. 63, p. 684.
[322] Rev. Stat., Me., 1883, Chap. 81, Sec. 64, p. 684.
[323] Rev. Stat., Me., 1883 Chap. 81, Sec. 66, p. 684.

himself and family; all anthracite coal, not exceeding five tons; all bituminous coal, not exceeding fifty bushels; and ten dollars' worth of lumber, wood or bark. *Fifth*, All produce of farms until harvested; one barrel of flour; corn and grain necessary for himself and family, not exceeding thirty bushels; all potatoes raised or purchased for himself and family; and all flax raised on a half acre of land and all articles manufactured therefrom for the use of himself and family. *Sixth*, The tools necessary for his trade or occupation, and material and stock designed and procured by him and necessary for carrying on his trade or business, and intended to be used or wrought therein, not exceeding $50 in value; and one sewing-machine, not exceeding $100 in value, for actual use by himself or family. *Seventh*, One pair of working cattle, or, instead thereof, one pair of mules or one or two horses, not exceeding in value $300, and a sufficient quantity of hay to keep them through the winter season. If he has more than one pair of working cattle, or more than one pair of mules, or if the two horses exceed in value $30, he may elect which pair of cattle or mules or which horse shall be exempted. If he has a pair of mules or one or two horses so exempt, he may also have exempt for each of said horses or mules one harness, not exceeding $20 in value, and one horse-sled, not exceeding the same value; but if he has at the same time an ox-sled, he may elect which sled shall be exempt. *Eighth*, Domestic fowl not exceeding $50 in value; two swine, one cow, and one heifer under three years old, or if he has no oxen, horse or mule, two cows, and he may elect the cow or cows and heifer if he has more than are exempt, ten sheep and the wool from them, and the lambs raised from them until they are one year old, and a sufficient quantity of hay to keep said cattle, sheep and lambs through the winter season. *Ninth*, One plow, one cart or truck-wagon, or express wagon, one harrow, one yoke with bows, ring and staple, two chains, one ox-sled and one mowing-machine. *Tenth*, One boat, not exceeding two tons burthen, usually employed in the fishing business, belonging wholly to an inhabitant of this state.[324]

[324] Stat., Me., 1885-1895, Freeman's Supp., Chap. 81, Sec. 62, p. 434.

Two shares of each minor shareholder in loan and building associations are exempt.[325]

Money due on life and accident insurance policies is exempt from the claims of creditors during the life of the assured when the annual premium does not exceed $150 per year; when it exceeds that sum and the premium is paid by the debtor, his creditors have a lien on the policies for such sum over $150 per year as the debtor has paid for two years, subject to any pledge or assignment made in good faith.[326]

Benefits provided for by life and casualty insurance companies organized on the assessment plan, are not subject to debts of a policy or certificate-holder, or of any beneficiary named therein.[327]

The property of public cemetery corporations and the shares of stock therein are exempt from attachment.[328]

Lands of not more than one fourth of an acre recorded and appropriated by individuals for family burying-ground are exempt from attachment and execution.[329]

Lots in public or private cemeteries are exempt from process.[330]

MARYLAND.— One hundred dollars' worth of property is exempt from execution issued on judgments, except on judgments for breach of promise to marry or for seduction.[331]

Each defendant in execution may select property as exempt to value of $100.[332]

All wearing apparel, mechanical text-books and books of professional men, tools of mechanics, and all tools or other mechanical instruments or appliances, moved or worked by hand or foot, necessary to the practice of any trade or profession and used in the practice thereof, are exempt from execution, in addition to $100; but this section does not apply to

[325] Stat., Me., 1885-1895, Freeman's Supp., Chap. 47, Sec. 150, p. 284.

[326] Rev. Stat., Me., 1883, Chap. 49, Sec. 94, p. 461.

[327] Stat., Me., 1885-1895, Freeman's Supp., Chap. 49, Sec. 9, p. 320.

[328] Rev. Stat., Me., 1883, Chap. 55, Sec. 11, p. 506.

[329] Rev. Stat., Me., 1883, Chap. 15, Sec. 7, p. 227.

[330] Rev. Stat., Me., 1883, Chap. 15, Sec. 8, p. 227.

[331] Pub. Gen. L., Md., 1888, Art. 83, Sec. 8, p. 1272; *In re* Beauchamp, 101 Fed. Rep. 106, 4 Am. B. R. 151.

[332] Pub. Gen. L., Md., 1888, Art. 83, Sec. 9, p. 1272.

any books, tools, mechanical instruments kept for sale or barter.[333]

The preceding sections relating to exemptions do not impair the lien of any vendor for the purchase money of land, nor of any mortgagee, nor of any mechanic or other person for any debt contracted for or in aid of the erection of any building, nor shall they apply to any levy on property for nonpayment of taxes.[334]

Exemptions apply only to actual *bona fide* residents of the state.[335] Claim for exemption may be waived.[336]

The following property is exempt from distress for rent: Every spinning-wheel, loom, sewing-machine, stove, piano, organ, or other musical instrument rented, hired or loaned to the tenant, and every horse, carriage and harness, whip and robe, saddle and bridle, not the property of the tenant, in any livery stable, or which may be stored with any keeper of any livery stable, or in any other place, outhouse or barn of the tenant; and all property of any boarder or sojourner at any hotel, tavern, public or private boarding-house, and any vehicle not the property of the tenant in any shop for repairs.[337]

Massachusetts.[338]— Every householder having a family is entitled to an estate of homestead to the value of $800 in the farm lot of land and the buildings thereon owned or rightly possessed by lease or otherwise, and occupied by him as a residence; such estate is exempt from process and from the laws of conveyance, descent and devise, except as provided by law.[339]

To acquire such estate it must be set forth in the deed by which the property is acquired, that it is to be held as homestead; homestead may be created in property already acquired by a declaration to that effect, duly executed and recorded in

[333] Pub. Gen. L., Md., 1888, Art. 83, Sec. 11, p. 1272.

[334] Pub. Gen. L., Md., 1888, Art. 83, Sec. 12, p. 1273.

[335] Pub. Gen. L., Md., 1888, Art. 83, Sec. 13, p. 1273.

[336] Pub. Gen. L., Md., 1888, Art. 83, Sec. 14, p. 1273.

[337] Pub. Gen. L., Md., 1888, Art. 53, Sec. 17, p. 897.

[338] The exemption laws of this state are treated in *In re* Coller, 111 Fed. Rep. 503, 7 Am. B. R. 131; *In re* Anderson, 110 Fed. Rep. 141, 6 Am. B. R. 555; *In re* Turnbull, 106 Fed Rep. 667, 5 Am. B. R. 549.

[339] Rev. Laws, Mass. 1902, Chap. 131, Sec. 1, p. 1261.

the registry for deeds for the county or district where the property is situated; the acquisition of a new estate of homestead defeats any such estate previously existing.[340]

Rights of homestead under former laws are saved; no new declaration necessary; no person can hold property exempted as homestead to the value of more than $800.[341]

The homestead estate is not exempt from levy for taxes, nor from levy for a debt contracted for the purchase price thereof, nor for a debt contracted before declaration of homestead was recorded, nor a debt contracted before the homestead was acquired; buildings on land not owned by debtor are liable for the ground rent.[342]

No estate of homestead shall affect a mortgage, lien or other incumbrance previously existing.[343]

A conveyance of property in which an estate of homestead exists does not release homestead rights, unless the wife of the owner, if he has one, joins in the deed of conveyance for the purpose of releasing such right; but a deed without such release passes all interest beyond the estate of homestead.[344]

The homestead estate continues after the death of a householder for the benefit of the widow and minor children until the youngest child is 21 years old and until the marriage or death of the widow.[345]

The widow and the guardian of the minor children may join in the sale of a homestead estate, or if there are no minor children the widow may sell, or if there is no widow the guardian of the minor children may sell it, and the purchaser shall enjoy the premises for the time the widow and children, or either of them, might have enjoyed it if there had been no sale.[346]

Homestead estate may be set off in case of insolvency of owner.[347]

The following articles of the debtor are exempt from execu-

[340] Rev. Laws, Mass. 1902, Chap. 131, Sec. 2, p. 1261.

[341] Rev. Laws, Mass. 1902, Chap. 131, Sec. 3, p. 1261.

[342] Rev. Laws, Mass. 1902, Chap. 131, Sec. 4, p. 1261.

[343] Rev. Laws, Mass. 1902, Chap. 131, Sec. 5, p. 1261.

[344] Rev. Laws, Mass. 1902, Chap. 131, Sec. 7, p. 1262.

[345] Rev. Laws, Mass. 1902, Chap. 131, Sec. 8, p. 1262.

[346] Rev. Laws, Mass. 1902, Chap. 131, Sec. 10, p. 1262.

[347] Rev. Laws, Mass. 1902, Chap. 131, Sec. 12, p. 1262.

tion, viz.: The necessary wearing apparel of himself, wife and children;[348] one bed, bedstead and necessary bedding for every two persons; one iron stove used for warming the dwelling-house, and $20 worth of fuel procured and designed for the use of the family; $300 worth of other household furniture, necessary for him and his family; bibles, schoolbooks, and library used by him and his family, not exceeding $50 in value; one cow, six sheep, one swine and two tons of hay; $100 worth of tools, etc., necessary for carrying on his trade or business;[349] $100 worth of materials and stock, designed and procured by him and necessary for carrying on his trade or business, and intended to be used or wrought therein; $50 worth of provisions for the family; one family pew, which may be sold for the nonpayment of a tax thereon; the boat, fishing tackle and nets of a fisherman actually used by him in the prosecution of his business, to the value of $100; [the uniform of an officer or soldier of the militia and the arms and accouterments required to be kept by him;[350]] rights of burial and tombs while in use as repositories for the dead; one sewing-machine, not exceeding $100 in value, in actual use by debtor or his family; shares in cooperative associations formed under chapter 110, not exceeding $20 in value in the aggregate.[351]

Money or other benefit provided by an assessment insurance company is exempt from debts of certificate-holder or any beneficiary therein.[352]

Savings institutions may receive on deposit funds in trust for parks, shade trees, etc., and such funds are exempt from attachment or levy.[353]

Money or benefits due from fraternal benefit associations are not liable to process to pay any debt of a certificate-holder or any beneficiary named therein.[354]

Funds of any railroad relief society, associated with any

[348] *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549.

[349] *In re* Coller, 111 Fed. Rep. 503, 7 Am. B. R. 131.

[350] See Rev. Laws, Mass. 1902, Chap. 16, Sec. 85, p. 300.

[351] Rev. Laws, Mass. 1902, Chap. 177, Sec. 34, p. 1598; *In re* Anderson, 110 Fed. Rep. 141, 6 Am. B. R. 555.

[352] Rev. Laws, Mass. 1902, Chap. 121, Sec. 18, p. 1182.

[353] Rev. Laws, Mass. 1902, Chap. 113, Sec. 42, p. 1078.

[354] Rev. Laws, Mass. 1902, Chap. 119, Sec. 17, p. 1175.

railroad corporation, are not liable to process because of any debt of the railroad corporation or of any member of the society.[355]

The property of a married woman is exempt from execution on the debts of her husband.[356]

Wages for personal labor or services to the amount of $20 if the claim is not for necessaries and to the amount of $10 if the claim is for necessaries, are not subject to garnishment.[357]

MICHIGAN.— A homestead not exceeding 40 acres and the dwelling-house thereon and its appurtenances, to be selected by the owner, not included in any recorded town, etc., plat, or, instead thereof, at the option of the owner, a quantity of land, not exceeding one lot, within a recorded town, etc., plat, and the dwelling-house thereon and appurtenances, owned and occupied by a resident of the state, is not subject to sale under process for any debt growing out of contract made after July 3, 1848. The homestead is exempt as long as it is occupied by the widow or minor children of any deceased person who was when living, entitled to a homestead, not exceeding $1,500 in value.[358]

Such exemption does not extend to any mortgage lawfully obtained thereon; but a mortgage or other alienation by the owner, if a married man, is not valid without the signature of the wife to the same, unless such mortgage is given to secure the payment of purchase money.[359]

Any person owning and occupying any house on land not his own, and claiming the same as homestead, is entitled to same as homestead.[360]

The homestead is not exempt from process for the collection of taxes.[361]

The following property is exempt: All spinning-wheels, weaving-looms, with the apparatus and stoves put up and kept for use in any dwelling-house; a seat, pew or slip, oc-

[355] Rev. Laws, Mass. 1902, Chap. 125, Sec. 19, p. 1214.

[356] Rev. Laws, Mass. 1902, Chap. 153, Sec. 7, p. 1360.

[357] Rev. Laws, Mass. 1902, Chap. 189, Sec. 27, p. 1654

[358] How. Ann. Stat., Mich., 1882, Secs. 7721 and 7728. In case of death of owner, see Secs. 7729*a*-7729*c*, Supplement.

[359] How. Ann. Stat., Mich., 1882, Sec. 7722.

[360] How. Ann. Stat., Mich., 1882, Sec. 7726.

[361] How. Ann. Stat., Mich., 1882, Sec. 7727.

cupied by a person or family in a place of worship; cemeteries, tombs and burial rights in use as repositories for the dead; arms and accouterments required to be kept by law; all wearing apparel of every person or family; the library and schoolbooks of every individual and family, not exceeding $150 in value, and all family pictures; to each householder ten sheep, with their fleeces and the yarn or cloth manufactured therefrom; two cows, five swine and provisions and fuel for comfortable subsistence of such householder or family for six months; to each householder all household goods, furniture and utensils, not exceeding $250 in value; $250 worth of tools, implements, materials, stock, apparatus, team and vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged; food for six months for all exempted animals; mortgages, bills of sale or liens created on exempted property, except tools, etc., used in business, etc., are void unless signed by wife of party, if married, making same.[1]

The word "team" means either one yoke, a horse or a pair of horses, as the case may be.[2]

All property mentioned in subdivision 8 of section 7686 is not exempt from process on judgments rendered for the purchase money, and any sale of such property after commencement of a suit to recover the purchase price after filing notice is null and void [3]

All sewing-machines owned by individuals and kept for actual use of themselves or families, not exceeding one machine for each family are exempt from process; any chattel mortgage, bill of sale or lien created on such machine is void unless signed by the wife of party owning the same, if he be married.[4]

The following personal property only, not exceeding $500 in value, is exempt from sale under execution upon a judgment obtained in a court of the state for work, labor or services other than professional services: Spinning-wheels, weav-

[1] How. Ann. Stat., Mich., 1882, Sec. 7686.

[2] How. Ann. Stat., Mich., 1882, Sec. 7715.

[3] Supp. How. Ann. Stat., Mich., 1883-1890, Sec. 7716. See also How. Ann. Stat. 1882, Sec. 7716.

[4] Pub. Acts, Mich., 1893, p. 45.

ing-looms, with the apparatus and stoves put up and kept for use in any dwelling-house; cemeteries, tombs and rights of burial in use as repositories for the dead; the library and schoolbooks of every individual and family and all family pictures; one cow, and provisions and fuel for the comfortable subsistence of every person and family for one month, and household goods, furniture and utensils.[1]

Assignees of labor claims are entitled to all the benefits thereof.[2]

Fire engines and apparatus for extinguishment of fires, buildings, ground, fixtures and waterworks are exempt.[3]

The capital stock to the extent of $25 belonging to a stockholder of a cooperative association who is a householder and has a family is exempt.[4]

When under the rules of a mutual benefit association, money becomes payable to a member thereof, such money is free from all claims of creditors of such person.[5]

Shares held by any member of mutual building and loan associations who is a householder are exempt to the extent of $1,000, provided the owner thereof has not a homestead.[6]

Articles of machinery, materials for manufacturing, or manufactured articles, belonging to any manufacturing corporation, are free from seizure by execution or distress for any debts or claims for rent or services, except such execution or claim is against the corporation.[7]

The library of literary and scientific associations is exempt from execution, except for purchase money; no chattel mortgage or other incumbrance thereon is valid.[8]

Land of private cemetery associations is exempt.[9]

A married woman may insure the life of her husband for her own benefit, and the money payable under such policy is

[1] Supp. How. Ann. Stat., Mich., 1883–1890, Sec. 7717*a*.

[2] Supp. How. Ann. Stat., Mich., 1883–1890, Sec. 7717*f*.

[3] How. Ann. Stat., Mich., 1882, Sec. 3089.

[4] How. Ann. Stat., Mich., 1882, Sec. 3938.

[5] Supp. How. Ann. Stat., Mich., 1883–1890, Sec. 3960*e* 8.

[6] Supp. How. Ann. Stat., Mich., 1883–1890, Sec. 3981*p*.

[7] Supp. How. Ann. Stat., Mich., 1883–1890, Sec. 4161*d* 1.

[8] How. Ann. Stat., Mich., 1882, Sec. 4421.

[9] How. Ann. Stat., Mich., 1882, Sec. 4789.

free from claims of the representative of her husband or his creditors, provided the annual premium does not exceed $300.[1]

No property, except such as is exempted by the constitution of the state, is exempt from process upon a judgment obtained before a justice of the peace for work, labor or services done or performed by any woman when such sum does not exceed $25.[2]

Money due a defendant, who is a householder and the head of a family, for personal labor to the extent of $25 is not subject to garnishment proceedings.[3]

Funds due a certificate-holder of fraternal benefit association, or a beneficiary named therein, are not subject to debts of such holder or beneficiary.[4]

MINNESOTA.—A homestead consisting of any quantity of land, not exceeding 80 acres, and the dwelling-house thereon and appurtenances, to be selected by the owner, and not included in the platted portion of any incorporated town, etc., or, instead thereof, at the option of the owner, one lot of the original plat or any subdivision of such plat as the same exists at the time of commencement of suit or death under which homestead is claimed; or, in case the buildings occupy parts of two or more lots at the time exemption is claimed, a quantity of land not exceeding in area one of the original lots in the same block, if within the corporate limits of any incorporated village, etc., having over 5,000 inhabitants; or one half acre if within any platted part of any incorporated town, etc., having a population of less than 5,000, and the dwelling-house and appurtenances thereon, owned and occupied by any resident of the state, is exempt from process; the homestead is exempt during the time it is occupied by the widow or minor children of any person who was entitled to homestead when living; whenever a married man shall abscond from the state or desert his wife or minor children, they may continue to occupy such homestead with the same right therein as any owner of a homestead; homestead is not subject to process

[1] How. Ann. Stat., Mich., 1882, Sec. 6300. See also Sec. 4238.

[2] How. Ann. Stat., 1882, Sec. 7091.

[3] How. Ann. Stat., 1882, Sec. 8032 and 8096.

[4] Pub. Act, Mich., 1893, p. 193.

issued against the husband or wife, or against the husband and wife; they have not the right to convey the homestead.[1]

Exemptions do not extend to any mortgage lawfully obtained on homestead; a mortgage or alienation of homestead of a married man without the signature of the wife is invalid, unless given for purchase money; exemption does not extend to any contract for a lien, or upon which a lien would arise, for work done or material furnished in the erection or repair of a dwelling or other building on homestead land.[2]

Any person owning and occupying any house on land not his own and claiming the same as a homestead is entitled to hold it exempt.[3]

The owner of homestead may sell, convey or remove from the same, and such sale, conveyance or removal shall not render such homestead liable to process against the owner; nor shall any judgment or decree be a lien on the homestead except judgments on foreclosure of mortgages.[4]

Removal from and ceasing to occupy land as a homestead for a period of more than six consecutive months forfeits the right to claim such land as homestead, unless the debtor shall file in the office of the register of deeds of the county wherein such land is located a notice executed as a deed, designating and claiming such homestead, and in no case can the right exist for a longer period than five years from the filing of such notice, unless it has been occupied as a residence during some portion of said period by the debtor or his family.[5]

The following property is exempt from process: *First*, the family bible. *Second*, family pictures, schoolbooks or library and musical instruments for the use of family. *Third*, a seat or pew in any house or place of public worship. *Fourth*, a lot in any burial ground. *Fifth*, all wearing apparel of the debtor and his family; all beds, bedsteads and bedding kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; all other household furniture not herein enumerated, not exceeding $500 in value; all money arising from insurance on exempted property. *Sixth*, three cows,

[1] Minn. Stat., 1894, Sec. 5521.
[2] Minn. Stat., 1894, Sec. 5522.
[3] Minn. Stat., 1894, Sec. 5526.
[4] Minn. Stat., 1894, Sec. 5528.
[5] Minn. Stat., 1894, Sec. 5529.

ten swine, one yoke of oxen and a horse, a span of horses or mules, 20 sheep and the wool from the same, either raw or manufactured into yarn or cloth; the necessary food for the stock above mentioned for one year; provided, growing, or both as debtor may choose; one wagon, cart or dray, one sleigh, two ploughs, one drag and other farming utensils, including tackle for teams, not exceeding $300 in value. *Seventh,* the provisions for the debtor and his family for one year, either provided, growing, or both, and fuel for one year. *Eighth,* one watch, the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade, and in addition thereto stock in trade, including goods manufactured in whole or part by him, not exceeding $400 in value; the library and implements of any professional man; all which articles hereinbefore intended to be exempt are to be chosen by the debtor, his agent, clerk or legal representative; in addition to the articles enumerated in this section, all the presses, stones, type, cases and other tools and implements used by any copartnership or any printer, publisher or editor, or by persons hired by him to use them, not to exceed in value the sum of $2,000, together with stock in trade not to exceed $400 in value. *Ninth,* one sewing-machine, one bicycle, and one typewriting-machine.[1] *Tenth,* necessary seed grain for one season, to be selected by him, not, however, in any case to exceed the following kinds and amounts, viz.: 100 bushels wheat, 50 bushels oats, 100 bushels potatoes, 10 bushels corn and 100 bushels barley, and binding material sufficient for use in harvesting the crop raised from the seed grain above specified.[2] *Eleventh,* the wages of any laboring man or woman, or of his or her minor child, not exceeding $25, due for services rendered by him or them for any person for and during 90 days preceding the issuing of process.[3] *Twelfth,* the library, philosophical and

[1] L. Minn., 1897, p. 6; amending Minn. Stat., Sec. 5459; L. Minn. 1899, p. 19.

[2] L. Minn., 1897, p. 12; amending Minn. Stat., Sec. 5459; L. Minn. 1899, p. 310.

[3] See Minn. Stat., Sec. 5314; amending Minn. Stat., Sec. 5459.

chemical or other apparatus used in instruction, belonging to and in use in any university, college, seminary of learning or school for instruction of youth in the state indiscriminately open to the public.[4] *Thirteenth,* all moneys derived or received by any surviving wife or child from any form of life insurance upon the life of any deceased husband or father, not exceeding $10.000;[5] the exemptions provided for and embraced in subdivisions 6, 7, 8, 9, 10 and 11 extend only to debtors having an actual residence in the state.[6]

No mortgage, pledge or other incumbrance of property which may be held exempt under subdivisions 1, 2, 5 and 9 given or made by a married man or woman, shall be valid unless it be by written instrument executed and acknowledged, and unless the husband and wife, if both are living, concur in and sign and acknowledge the same joint instrument.[7]

Property of cemetery associations is not liable to be sold in payment of debts of individual proprietors, so long as the property is appropriated to the use of a cemetery.[8]

The public property of villages of over 3,000 inhabitants is exempt from process.[9]

The arms and equipment of members of the national guard are exempt.[10]

Funds set apart by benevolent associations, to be paid to families of deceased members, are exempt.[11]

The money or other benefit to be paid by a cooperative life, etc., association is not liable to process to pay debts of members.[12]

Police and fire department relief associations are not subject to garnishee proceedings to collect debts of persons entitled

[4] L. Minn., 1897, p. 262; amending Minn. Stat., Sec. 5459.

[5] L. Minn., 1897, p. 620; amending Minn. Stat., Sec. 5459.

[6] Minn. Stat., 1894, Sec. 5459.

[7] L. Minn., 1901, p. 13.

[8] Minn. Stat., 1894, Secs. 3107, 3134.

[9] Minn. Stat., 1894, Sec. 1416.

[10] L. Minn., 1897, Chap. 118, Sec. 98, p. 227.

[11] Minn. Stat., 1894, Sec. 3295. See also L. Minn. 1903, p. 526.

[12] Minn. Stat., 1894, Sec. 3312; L. Minn., 1901, p. 249.

See in connection with 5 and 6 an act approved April 25, 1895, L. Minn., 1895, Chap. 175, p. 392, 429, on subject of exemption.

to assistance under the articles of incorporation or by-laws thereof.[13]

The wages of any person, or of his minor children, in any sum not exceeding $25 due for services rendered during 30 days preceding the issuing of process are exempt.[14]

The earnings of any minor child of any debtor within the state are not liable to attachment, garnishment, etc., in any action against such debtor, except the debt is contracted for the special benefit of such minor.[15]

Wages due a nonresident of the state, earned outside the state, are entitled to the same protection in the courts of the state, as are accorded to the debtor by the laws of the state of his residence;[16] provided, that in no case shall such nonresident be allowed a greater exemption than is allowed a resident, if the plaintiff is a resident.[17]

The property mentioned in section 5459 is not exempt from process in an action for the purchase money for the same property.[18]

When exempted personal property is wrongfully seized, any judgment recovered therefor is exempt.[19]

An estray, though an exempted animal, is not exempt from sale under process on a judgment for necessary food and attention.[20]

Mississippi.— Every citizen of the state, male or female, being a householder and having a family, may hold exempt from process the land and buildings owned and occupied as a residence by him or her, not exceeding in quantity 160 acres, nor in value, exclusive of improvements save as hereinafter provided, $2,000.[21]

Every citizen of the state being a householder and having a family residing in a city, etc., may hold exempt from

[13] Minn. State., 1894, Sec. 5313.
[14] Minn. Stat., 1894, Secs. 5314, 5491. See Sec. 5459 (11).
[15] Minn. Stat., 1894, Sec. 5461. See Secs. 5459 (11) and 5314.
[16] L. Minn., 1895, Chap. 353, p 756.
[17] L. Minn, 1901, p. 572.
[18] Minn. Stat., 1894, Sec. 5460.
[19] Minn. Stat., 1894, Sec. 5462.
[20] Minn. Stat., 1894, Sec. 6804.
[21] Code, Miss., 1892, Sec. 1970.

process land and buildings owned and occupied as a residence, save as hereinafter provided, not to exceed in value $2,000, and personal property, to be selected by him, not to exceed in value $250, or the articles specified as exempt to the head of a family.[22]

Homestead is obtained by making a declaration thereof, acknowledged or proved as a deed, and deposited in the office of the clerk of the chancery court.[23]

The declaration for not more than 160 acres and not exceeding in value $3,000, or if the homestead is in a city, etc., not exceeding in value $3,000, after being filed, is notice and binds claimant, his wife and creditors until nullified, and entitles him to hold the same exempt to the extent of such value.[24]

Property shall not be exempt from process when the purchase money in whole or part forms the debt upon which the judgment is founded; nor shall any property be exempt from sale for any labor done thereon or materials furnished therefor, nor when the judgment is for labor performed or upon a forfeited recognizance or bail bond.[25]

Ceasing to reside on homestead renders it liable for the payment of debts, unless the removal therefrom is temporary, or by reason of some casualty or necessity, and there is an intention to reoccupy.[26]

The exempt property, real or personal, may be disposed of by the owner, but the disposal does not render it liable to the debts of the owner; any debtor leaving the state may take with him personal property exempt from execution.[27]

A conveyance of or incumbrance upon the homestead of a married man, living with his wife, is invalid unless signed by the wife.[28]

When the wife owns the homestead and occupies the same

[22] Code, Miss., 1892, Sec. 1971.
[23] Code, Miss., 1892, Sec. 1972.
[24] Code, Miss., 1892, Sec. 1973.
[25] Code, Miss., 1892, Sec. 1980.
[26] Code, Miss., 1892, Sec. 1981.
[27] Code, Miss., 1892, Sec. 1982.
[28] Code, Miss., 1892, Sec. 1983.

with her family, it is exempt from process to the same extent as to any other householder having a family.[29]

And conveyance of or incumbrance upon the wife's homestead is not valid unless signed and acknowledged by the owner and husband, if living with his wife.[30]

Exemptions as to homestead are allowed in favor of residents of the state only.[31]

The following personal property is exempt from seizure under execution or attachment, to wit: *First,* the tools of a mechanic, necessary for carrying on his trade. *Second,* the agricultural implements of a farmer, necessary for two male laborers. *Third,* the implements of a laborer, necessary in his usual employment. *Fourth,* the books of a student, required for the completion of his education. *Fifth,* the wearing apparel of every person. *Sixth,* the libraries of all persons, not exceeding $250 in value; the instruments of surgeons and dentists, not exceeding $250 in value. *Seventh,* the arms and accouterments of each person of the militia of the state. *Eighth,* all globes, books and maps, used by the teachers of schools, academies and colleges.

The following property of each head of a family, to be selected by the debtor: Two working-horses or mules and one yoke of oxen, two cows and calves, 20 head of hogs, 20 sheep or goats, all poultry, all colts under three years old raised in the state by debtor, 250 bushels corn, 10 bushels wheat or rice, 500 lbs. pork, bacon or other meat, 100 bushels cotton seed, one wagon, one buggy or cart and one set harness; 500 bundles of fodder and 1,000 lbs. hay; 40 gal. sorghum or molasses; 1,000 stalks sugar cane; one sugar mill and equipments, not exceeding $150 in value; one bridle and saddle, and one side saddle; one sewing-machine; household and kitchen furniture, not exceeding in value $200.

The following property is exempt from garnishment or other legal process, viz.: The wages of every laborer or per-

[29] Code, Miss., 1892, Sec. 1984.
[30] Code, Miss., 1892, Sec. 1985.
[31] Code, Miss., 1892, Sec. 1986.

son working for wages, being the head of a family, to the amount of $100, and all other persons to the amount of $20; the proceeds of insurance on exempted real or personal property and the proceeds of the sale of such property.[32]

The proceeds of life insurance policies, to the amount of $10,000, are exempt from liability for the debts of the insured.[33]

The proceeds of a life insurance policy, not exceeding $5,000, payable to the executors or administrators, enures to the heirs or legatees free from liability for the debts of decedent; but if the life of the deceased be insured for the benefit of his heirs or legatees at the time of his death otherwise, and they collect the same, the sum collected shall be deducted from the $5,000, and the excess of the latter only is exempt.[34]

The exemptions of personal property above enumerated are allowed in favor of residents of the state only.[35]

Damages recovered for death caused by unsafe machinery, etc., are not subject to the payment of debts or liabilities of the deceased.[36]

Missouri.[37] — The homestead of every housekeeper or head of a family, consisting of a dwelling-house and appurtenances, and the land used in connection therewith, which is used as a homestead, is, together with the rents, issues and products thereof, exempt from process; such homestead in the country must not exceed in quantity more than 160 acres, in value more than $1,500; in cities having a population of 40,000 or more the homestead must not include more than 18 square rods, or exceed in value $3,000; in cities having a population of 10,000 and less than 40,000, the homestead must include not more than 30 square rods or exceed in value $1,500; in

[32] Code, Miss., 1892, Sec. 1963.
[33] Code, Miss., 1892, Sec. 1964.
[34] Code, Miss., 1892, Sec. 1965.
[35] Code, Miss., 1892, Sec. 1986.
[36] Code, Miss., 1892, Sec. 663; as amended, Chap. 86, L. Miss., 1896, Sec. 3, p. 96.
[37] The exemption laws of this state are treated in *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451; *In re* Stout, 109 Fed. Rep. 794, 6 Am. B. R. 505.

cities and incorporated towns and villages having a population less than 10,000 the homestead must not include more than five acres or exceed in value $1,500. The husband alone can not sell or incumber homestead property, but it may be done by the joint act of husband and wife.[38]

Personal property, the product of a homestead, is exempt from process.[39]

Homestead vests in the widow and children of a deceased owner thereof, subject only to debts legally charged thereon during the life of the owner, until the youngest child reaches majority and until the death of the widow; the children have the right of joint occupancy with the widow until they arrive at majority, and the widow has said right during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband.[40]

Homestead is subject to process arising out of causes of action arising at the time of its acquisition.[41]

If another homestead is acquired, as provided in section 5441, the prior homestead is liable for the debts of the owners, but the other homestead is not liable for the causes of action to which the prior homestead would not have been liable, provided that such other homestead has been acquired with the consideration derived from sale of such prior homestead, or with other means not derived from the property of the householder or head of a family.[42]

The following property, when owned by the head of a family, is exempt from process: *First,* ten head of choice hogs, ten head of choice sheep and the product thereof in wool, yarn or cloth, two cows and calves, two plows, one ax, one hoe, one set of plow gears, and all necessary farm implements for the use of one man. *Second,* two work animals

[38] Rev. Stat., Mo., 1889, Sec. 5435, as amended, L. Mo., 1895, p. 185.

As to exemption under R. S. of Mo. 1899, Sec. 3162, see *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451.

[39] Rev. Stat., Mo., 1889, Sec. 5438 and Sec. 5435.

[40] Rev. Stat., Mo., 1889, Sec. 5439; as amended, L. Mo., 1895, p. 186.

[41] Rev. Stat., Mo., 1889, Sec. 5441.

[42] Rev. Stat., Mo., 1889, Sec. 5442.

and $25 worth of feed for the stock above exempted. *Third*, spinning-wheels and cards, one loom and apparatus necessary for manufacturing cloth in a private family. *Fourth*, all the spun yarn, thread and cloth, manufactured for family use. *Fifth*, any quantity of hemp, flax and wool, not exceeding 25 lbs. each. *Sixth*, all wearing apparel of the family, four beds, with usual bedding, and such other kitchen and household utensils, not exceeding in value $100, as may be necessary for the family. *Seventh*, the necessary tools and implements of trade of any mechanic while carrying on his trade. *Eighth*, all arms and equipments required by law to be kept. *Ninth*, $100 worth of provisions on hand for family use. *Tenth*, the bibles and other books used in a family, lettered grave stones, one pew. *Eleventh*, lawyers, physicians, ministers of the gospel and teachers may select such books as are necessary to their profession, in lieu of property herein allowed, and doctors of medicine may select their medicines.[1]

The following property owned by a person other than the head of a family is exempt: Wearing apparel and the necessary tools and implements of trade of any mechanic, while carrying on his trade.[2]

Public buildings and the lots on which they stand, and all burying-grounds, are exempt from process.[3]

Public fire engines and apparatus are exempt.[4]

Each head of a family, at his election, in lieu of property mentioned in the first and second subdivisions of section 4903, may select and hold exempt from process any other property, real, personal or mixed, or debts and wages, not exceeding $300 in value.[5]

The wife may hold exempt the articles specified in the first, second, third, fourth, fifth, sixth, ninth and tenth clauses of section 4903, when the husband has absconded or absented himself from his place of abode, or, in lieu of the property mentioned in the first and second subdivisions of section 4903, the property enumerated in section 4906.[6]

No property is exempt from sale under process, when the debt, not exceeding in amount $90, is for personal services

[1] Rev. Stat., Mo., 1889, Sec. 4903.
[2] Rev. Stat., Mo., 1889, Sec. 4902.
[3] Rev. Stat., Mo., 1889, Sec. 4904.
[4] Rev. Stat., Mo., 1889, Sec. 4905.
[5] Rev. Stat., Mo., 1889, Sec. 4906.
[6] Rev. Stat., Mo., 1889, Sec. 4908.

rendered by a house servant or common laborer, provided the suit to recover the same is instituted within six months next after the last services have been rendered.[1]

Wages due laborers or house servants, to an amount not exceeding $100 to each employee, for work or labor performed within six months, are preferred claims.[2]

Personal property is in all cases subject to an execution on a judgment for its purchase price, except when same has been sold to an innocent purchaser for value and without notice.[3]

No property or wages, declared by statute to be exempt, are subject to attachment, except in the case of a nonresident defendant or of a defendant about to remove from the state with intent to change his domicile.[4]

The money or other aid provided or rendered by any assessment insurance company is not subject to process to pay any debt or liability of a policy or certificate-holder therein, or of any beneficiary named in such policy or certificate.[5]

Insurance money due a married woman is exempt.[6]

MONTANA.—A homestead not exceeding 160 acres used for agricultural purposes and the dwelling-house and appurtenances, to be selected by the owner, and not included in any town, etc., plot, or, instead, land not exceeding one fourth of an acre being within a town, etc., plot, with the dwelling-house and appurtenances, not exceeding $2,500 in value, owned and occupied by a resident, is not subject to process.[7]

Such exemption does not affect any laborer's or mechanic's lien, or extend to any mortgage lawfully obtained. The alienation of or incumbrance upon any homestead of a married man is void unless wife joins in the execution of the conveyance; this exemption does not apply to debts contracted prior to the passage of this act.[8]

[1] Rev. Stat., Mo., 1889, Secs. 4910 and 4912.

[2] Rev. Stat., Mo., 1889, Sec. 4911.

[3] Rev. Stat., Mo., 1889, Sec. 4914.

[4] Rev. Stat., Mo., 1889, Sec. 539.

[5] Rev. Stat., Mo., 1889, Sec. 5867.

[6] Rev. Stat., Mo., 1889, Sec. 5851 and 5854.

[7] Comp. Stat., Mont., 1887, 1st Div., Sec. 322.

[8] Comp. Stat., Mont., 1887, 1st Div., Sec. 323.

A person owning and occupying a dwelling-house on land not his own, rightfully possessed by him and claiming the house as homestead, is entitled to hold it exempt.[1]

Homestead is exempt after death of owner from the payment of his debts, when his infant children survive him.[2]

A debtor's homestead exemption is not affected by removal or sale; the act does not relate to judgments or decrees for the foreclosure of mortgages.[3]

The exemptions contained in Chap. I, Title IX, 1st Div., only apply to married men or the head of a family.[4]

Exemptions are as follows: All clothing of the debtor and family, and chairs, tables, desks and books, to the value of $200; also all necessary household, table and kitchen furniture, which includes every article in use for the comfort of the debtor or his family, and provisions and fuel actually provided for individual or family use, sufficient for three months; one sewing-machine, not exceeding the value of $100, in actual use by the debtor or his family. Also one horse, two cows, with their calves, two swine and fifty domestic fowl. In addition to the above there is exempt to a farmer his farming utensils, not exceeding $600 in value, two oxen, or two horses or mules, and their harness, two cows, one cart or wagon, and food for such stock for three months; $200 worth of seed, grain or vegetables, actually provided for the purpose of sowing or planting. The proper tools, instruments, or books of any mechanic, physician, dentist, lawyer or clergyman. To a miner, his dwelling, not exceeding in value $500, and all his tools and machinery necessary for carrying on his avocation, not to exceed in value $500, and also one horse, mule, or two oxen, and their harness, with their food for three months, in case such stock is used necessarily in connection with any species of hoisting gear upon the mine. One horse, mule, or two oxen, vehicle and harness, by which the debtor habitually earns his living, and one horse, with vehicle and harness, of physician or clergyman, used in making professional visits, with food for such

[1] Comp. Stat., Mont., 1887, 1st Div., Sec. 326.

[2] Comp. Stat., Mont., 1887, 1st Div., Sec. 327.

[3] Comp. Stat., Mont., 1887, 1st Div., Sec. 328.

[4] Comp. Stat., Mont., 1887, 1st Div., Sec. 330.

stock for three months; all arms, uniforms, etc., required by law to be kept by any person; all property generally held by the county or town for the benefit of the county or the public, except as against a vendor's lien or a mortgage; the wages of the debtor, earned at any time within the thirty days next preceding the levy, provided they are necessary for the use of his family residing in the state, supported wholly or in part by his labor. None but *bona fide* residents can claim the benefits of this section.[1]

None of the property herein mentioned is exempt from attachment or execution for the wages of any clerk, mechanic, laborer or servant.[2]

NEBRASKA.—A homestead, not exceeding in value $2,000, consisting of the dwelling-house in which claimant resides and its appurtenances, and the land on which the same is situated, not exceeding 160 acres, to be selected by the owner, and not in any incorporated city or village, or instead thereof a quantity of contiguous land not exceeding two lots within any incorporated city or village, is exempt from process.[3]

The homestead is subject, however, to process in satisfaction of judgments on debts secured by mechanics', laborers' or vendors' liens upon the premises and on debts secured by mortgage on the premises executed by husband and wife or an unmarried claimant.[4] If claimant is married, the homestead may be selected from the separate property of the husband or from the separate property of the wife, with her consent; when claimant is not married, but is the head of a family, homestead may be selected from any of his or her property.[5] The homestead of a married person can not be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.[6] When homestead is sold under legal proceedings, the money paid to the claimant is entitled to exemption for six months.[7]

[1] Comp. Stat., Mont., 1887, 1st Div., Sec. 321.

[2] Comp. Stat., Mont., 1887, 1st Div., Sec. 330.

[3] Comp. Stat., Neb., 1897, Sec. 3256.

[4] Comp. Stat., Neb., 1897, Sec. 3258.

[5] Comp. Stat., Neb., 1887, Sec. 3257.

[6] Comp. Stat., Neb., 1897, Sec. 3259.

[7] Comp. Stat., Neb., 1897, Sec. 3268.

The phrase "head of a family" includes the husband when the claimant is a married person, every person who has residing on the premises with him or her and under his care and maintenance, either (1) his or her minor child, or the minor children of his or her deceased wife or husband; (2) a minor brother or sister, or their deceased minor child; (3) a father, mother, grandfather or grandmother; (4) the father, mother, grandfather or grandmother of a deceased husband or wife; (5) an unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and can not support themselves.[1]

Money realized from the sale of a homestead, not exceeding the amount of homestead exemption, is exempt for six months.[2]

In case of death of an owner of a homestead, it is not subject to payment of debts contracted by or existing against either husband or wife previous to or at the time of death, except as such debts exist by virtue of chapter 36 of the compiled statutes.[3]

All heads of families who have no homestead may hold exempt from process $500 in personal property.[4]

A person a resident of the state and the head of a family may hold the following property exempt: The family bible, family pictures, schoolbooks and library for the use of the family; a pew in a place of worship; a lot in a burial ground; all necessary wearing apparel of debtor and his family; all beds, bedsteads and bedding necessary for the use of the family; all stoves and appendages put up or kept for the use of debtor and family, not to exceed four; all cooking utensils and all other household furniture not herein enumerated, to be selected by the debtor, not exceeding in value $100; one cow, three hogs and all pigs under six months old; and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses in lieu thereof; ten sheep and the wool therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this

[1] Comp. Stat., Neb., 1897, Sec. 3270.

[2] Comp. Stat., Neb., 1897, Sec. 3271.

[3] Comp. Stat., Neb., 1897, Sec. 3272.

[4] Comp. Stat., Neb., 1897, Sec. 6111.

section for three months; one wagon, cart or dray, two plows, one drag; the necessary gearing for the exempted team; other farming implements, not exceeding $50 in value; the provisions necessary for the support of debtor and family for six months, and six months' fuel; tools and instruments of any mechanic, miner or other person used and kept for the purpose of carrying on his trade or business; the library and implements of a professional man. All the exempted articles are to be chosen by the debtor.[1]

No property in the state is exempt from process for clerks', laborers' or mechanics' wages, nor for money collected by an attorney at law; no property of the value of more than $500 is exempt from any debt contracted for the necessaries of life for the debtor or his family, or for anyone dependent upon him for support; nothing herein contained exempts in the aggregate more than $500 worth of personal property to both husband and wife.[2]

The wages of mechanics, clerks and laborers, the heads of families, for sixty days, whether due or not, except the wages of persons who have or are about to abscond, are exempt from process.[3]

In addition to the exemptions allowed by the code, the pension money of every resident of the state, disabled while a soldier, sailor or marine in the service of the United States, hereafter received or property hereafter purchased therewith, not exceeding $2,000 in value, is exempt from process.[4]

Property of cities governed by chapter 12*a* is not subject to process for collection of debts.[5]

Burial lots sold by cemetery associations for the sole purpose of interments, if used exclusively for such purpose, are exempt.[6]

Property and appliances for the extinguishment of fires, kept and used by incorporated cities or villages, and fire companies are exempt from process; this does not apply to volun-

[1] Comp. Stat., Neb., 1887, Sec. 6116.

[2] Comp. Stat., Neb., 1887, Sec. 6117.

[3] Comp. Stat., Neb., 1887, Sec. 6118. See Sec. 6120.

[4] Comp. Stat., Neb., 1897, Sec. 6119.

[5] Comp. Stat., Neb., 1897, Sec. 742.

[6] Comp. Stat., Neb., 1897, Sec. 1725.

tary liens nor affect any remedy existing or judgment rendered upon any contract at time of passage of the a [1]

Public libraries are exempt.[2] The property of the husband is not liable for the antenuptial debts of the wife.[3]

No property of any convict is exempt from execution issued for fines and costs in criminal cases, except in cases where such convict is sentenced to the penitentiary for more than two years or to suffer death, in which cases he is allowed the same exemptions as in civil cases.[4]

The money or other aid due any certificate-holder (or any beneficiary named therein) in any fraternal beneficiary association is not liable to be seized to pay the debts of such person.[5]

NEVADA.—The homestead, together with the dwelling-house thereon and appurtenances, to be selected by the husband and wife or either of them, or other head of a family, not exceeding $5,000 in value, is exempt from process for debts contracted after November 13, 1861, except process to enforce the payment of purchase money for the premises, or for improvements thereon, or for taxes thereon, or for the payment of any mortgage thereon executed by both husband and wife, when the relation exists; the declaration of homestead must be in writing, and when made by married person or persons must state that fact, or, if not married, that he or she is the head of a family, and that they, or either of them, are at the time residing with their family or with the persons under their care on the premises; that they claim the property and intend to use it as a homestead, and a description of the premises; said declaration must be executed and recorded like a deed to land; from the time of filing said declaration of record the husband and wife hold as joint tenants; if the property declared upon as homestead is the separate property of either spouse, both must join in the declaration; if such property retains its character of separate property until the death of one or the other of said spouses, then the homestead

[1] Comp. Stat., Neb., 1897, Sec. 3158.

[2] Comp. Stat., Neb., 1897, Sec. 3589.

[3] Comp. Stat., Neb., 1897, Sec. 3665.

[4] Comp. Stat., Neb., 1897, Sec. 7252.

[5] Comp. Stat., Neb., 1897, Sec. 3494*g*.

right ceases, and the property belongs to the party (or heirs) to whom it belonged before it was filed upon as homestead; tenants in common may declare for homestead rights upon their respective estates.[1]

Such exemption does not extend to any mechanic's, laborer's or vendor's lien lawfully obtained; no mortgage or alienation made for the purpose of securing a loan or indebtedness upon homestead property is valid for any purpose; a mortgage or alienation to secure purchase money is valid, if the signature of the wife is obtained to the same and acknowledged separately from her husband; homestead is not deemed to be abandoned without a declaration thereof in writing, executed by both husband and wife, or head of a family, and recorded as the declaration of homestead was recorded; the acknowledgment of the declaration of abandonment of the wife must be taken separate from the husband; if the wife is not a resident of the state her signature and acknowledgment shall not be necessary to the validity or alienation of said homestead before it becomes the homestead of the debtor.[2]

When homestead is sold under legal proceedings, the money paid to debtor is entitled to the same protection against process as the original homestead premises.[3]

The homestead and other property exempt by law, upon the death of either spouse, is set apart as the sole property of the surviving spouse and minor children; if there is no surviving spouse or minor children the property is subject to administration; the exemption made by this act does not extend to unmarried persons, except when they have the care of minor brothers or sisters, or of brothers' or sisters' minor children, or of a father, or mother, or grandparents, or unmarried sisters living in the house with them; and in all such cases the exemption ceases when the terms on which it is granted cease; and upon the death of such unmarried person the property is subject to administration; no exemption

[1] Gen. Stat., Nev., 1885, Sec. 539; Const., Nev., Art. IV, Sec. 30.

[2] Gen. Stat., Nev., 1885, Sec. 540.

[3] Gen. Stat., Nev., 1885, Sec. 541.

to the surviving spouse is allowed where the homestead declaration has been filed upon the separate property of either husband or wife.[4]

Where the sum exempted is stated, the same is so much money in gold coin.[5]

No conveyance of a homestead is valid unless executed and acknowledged by both husband and wife.[6]

On the death of the husband the widow or minor children are entitled to possession of the homestead.[7]

The following property is exempt from execution except upon a judgment for the purchase money or upon a mortgage thereon: Chairs, tables, desks and books to the value of one hundred dollars; necessary household and kitchen furniture, wearing apparel, etc.; and provisions and firewood actually provided, sufficient for one month, farming utensils, or implements of husbandry, and seed provided for planting within the ensuing six months, not exceeding the value of two hundred dollars; two horses, two oxen, or two mules, and two cows, and food for one month for such animals, and one cart or wagon; the tools of a mechanic necessary in his trade; the instruments and libraries of a surgeon, physician, surveyor or dentist; the professional library of an attorney and counsellor, or minister of the gospel; the dwelling of a miner, not exceeding in value five hundred dollars, also his tools necessary to carry on his mining operations, not exceeding in value five hundred dollars, and two horses, two oxen, or two mules, their harness and food for one month for such animals, when they are necessary in his mining operations; two oxen, two horses, or two mules, and their harness and one cart or wagon, by the use of which a teamster or laborer habitually earns his living; one horse, harness, and vehicle, of a physician or surgeon, or minister of the gospel, and food for such animal for one month; one sewing-machine in actual use in the

[4] Gen. Stat., Nev., 1885, Sec. 542.
[5] Gen. Stat., Nev., 1885, Sec. 547.
[6] Gen. Stat., Nev., 1885, Sec. 504.
[7] Stat., Nev., 1897, Chap. 106, Sec. 100, p. 134.

debtor's family, not exceeding in value one hundred and fifty dollars; all fire engines and property of fire companies; all arms, etc., required by law to be kept by any person; all public property of state, counties, towns, etc.[8]

Wages of a debtor, not exceeding $50 for the calendar month during or immediately preceding that in which process is issued, are exempt when it appears that such earnings are necessary in whole or part for the use of a family supported in whole or part by the debtor's labor, provided, if it appears that the judgment debtor or his assignee has received part payment for such personal services during such calendar month, then only the difference between the amount of such payment and $50 is exempt.[8*]

The wages of miners, mechanics, salesmen, clerks or laborers are preferred claims.[9]

Horses and equipments of officers of mounted companies and all company property of uniformed companies are exempt.[10]

Lands and property of cemetery associations can not be applied in payment of debts of individual proprietors, so long as used for cemetery purposes.[11]

All lots, buildings or other public school property are exempt.[12]

Mineral, geological and paleontological specimens collected and classified are exempt.[13]

The money, benefit or aid paid or provided by contracts issued by mutual insurance companies on the assessment plan is exempt from the debts of any contract holder or beneficiary named therein.[14]

New Hampshire.— Every person is entitled to $500 worth of his homestead, or his interest therein, as a homestead right.[15]

[8] Gen. Stat., Nev., 1885, Sec. 3243.

[8*] Gen. Stat., Nev., 1897, p. 22.

[9] Gen. Stat., Nev., 1885, Secs. 3829-3831.

[10] Stat., Nev., 1885, Sec. 711.

[11] Gen. Stat., Nev., 1885, Sec. 1054. See also Sec. 1056.

[12] Gen. Stat., Nev., 1885, Sec. 1328.

[13] Gen. Stat., Nev., 1885, Secs. 4986-4988.

[14] Stat., Nev., 1801, Sec. 9, p. 133.

[15] Pub. Stat., N. H., 1901, Chap. 138, Sec. 1, p. 439.

The owner, the husband or wife of the owner and the minor children, if any, are entitled to occupy the homestead during the life of the owner; after his decease the surviving husband or wife and the minor children, if any, are entitled to occupy the homestead right during the minority of the children; subject to the foregoing provisions, the surviving husband or wife is entitled to the homestead right during the lifetime of the survivor.[16]

The homestead right during its continuance is not exempt in the following cases: (1) in the collection of taxes; (2) in the enforcement of liens of mechanics or others for debts created in the construction, repair or improvement of the homestead; (3) in the enforcement of mortgages made a charge thereon according to law; (4) in the levy of executions provided by chapter 138.[17]

No deed shall convey or incumber the homestead right, except a mortgage for the purchase money, unless executed by the owner and wife or husband.[18]

No devise of the homestead shall affect the estate of the surviving wife or husband or minor children in the homestead right.[19]

The following goods and property are exempt: Wearing apparel of debtor and family; comfortable beds, bedsteads and bedding necessary for debtor and family; household furniture to the value of $100; one cooking-stove and necessary furniture; one sewing-machine, kept for use by debtor or his family; provisions and fuel to value of $50; uniforms, arms and equipments of the militia; bibles, schoolbooks and library to the value of $200; tools of debtor's occupation to the value of $100; one hog, one pig and the pork therefrom; six sheep and the fleeces therefrom; one cow; a yoke of oxen and a

[16] Pub. Stat., N. H., 1901, Chap. 138, Sec. 2, p. 440.

[17] Pub. Stat., N. H., 1901, Chap. 138, Sec. 3, p. 440. Pub. Stat., N. H., 1901, Chap. 233, Sec. 1, p. 733.

[18] Pub. Stat., N. H., 1901, Chap. 138, Sec. 4, p. 440.

[19] Pub. Stat., N. H., 1901, Chap. 138, Sec. 5, p. 440.

horse for farming or teaming purposes or actual use; four tons hay; $50 worth of poultry; debtor's interest in a pew, or lot or right of burial in any cemetery.[20]

The money, rights and credits of a defendant are exempt from trustee process in the following instances: (1) Wages for labor performed by the defendant after the service of the writ; (2) wages of the defendant earned before the service of the writ to the amount of $20, except in actions brought to recover for necessaries furnished to the defendant or his family; (3) wages for personal services of the wife and minor children of defendant; (4) pension money from the United States before it has come into the actual possession of defendant; (5) funds held by the trustee as clerk, cashier or other employee of defendant which was received in the actual course of employment; (6) jury or witness fees due a defendant.[21]

A policy of insurance for the benefit of a married woman, effected either by herself or husband, is exempt from the claims of creditors of person effecting the same.[22]

Money due for the relief of firemen is exempt.[23]

The money, aid or benefit, etc., provided or rendered by any fraternal benefit association is not liable to process to be applied to payment of debts of a certificate-holder therein or of a beneficiary named in such certificate.[24]

Insurance on exempt property is exempt;[25] so also are damages recovered for the conversion of exempt property.[26]

New Jersey.[27] — In addition to property exempt by law, the lot and buildings thereon, occupied as a residence and

[20] Pub. Stat., N. H., 1901, Chap. 220, Sec. 2, p. 701.

[21] Pub. Stat., N. H., 1901, Chap. 245, Sec. 20, p. 761.

[22] Pub. Stat., N. H., 1901, Chap. 171, Sec. 1, p. 573.

[23] Pub. Stat., N. H., 1901, p. 569 L., N. H., 1899, Chap. 64, Sec. 3, p. 301.

[24] L., N. H., 1895, Chap. 86, Sec. 10, p. 444; Pub. Stat., N. H., 1901, p. 581.

[25] L., N. H., 1899, Chap. 27, p. 263.

[26] L., N. H., 1901, Chap. 55, p. 545.

[27] The exemption law of this state is treated in *In re* Demerest, 110 Fed. Rep. 638, 6 Am. B. R. 232.

owned by a debtor being a householder, not exceeding in value $1,000, is exempt from process; the exemption continues after the death of the householder for the benefit of the widow and family, some or one of them continuing to occupy such homestead until youngest child becomes twenty-one years of age and until the death of the widow; no release or waiver of such exemption is valid.[28]

To entitle property to such exemption the conveyance of the same must show that it is designed as homestead, or, if already purchased or the conveyance does not show such designation, a notice that the property is designed as a homestead, with a description thereof, must be executed by the owner and filed for record; such notice and description must be published once a week for six weeks in a public newspaper in the county in which the property is located; the property is liable for taxes, for any labor done thereon or materials furnished therefor, for a debt contracted for the purchase price thereof or prior to the record of the deed of notice.[29]

In case homestead is sold under legal proceedings, the proceeds thereof to the amount of $1,000 are paid to the execution debtor, which is exempt for one year.[30]

Property declared to be homestead can not be aliened or encumbered by the owner nor leased for more than one year; any alienation or encumbrance by the owner is void unless made with the full consent of wife or husband of the owner, by deed duly acknowledged, for a full fair consideration, and the same, or $1,000 thereof, be invested in a new homestead.[31]

Goods and chattels, shares of stock or interest in any corporation, and personal property of every kind, not exceeding

[28] Gen. Stat., N. J., 1895, Vol. III, Sec. 63, p. 2997.

[29] Gen. Stat., N. J., 1895, Vol. III, Sec. 64, p. 2997.

[30] Gen. Stat., N. J., 1895, Vol. III, Sec. 67, p. 2997.

[31] Gen. Stat., N. J., 1895, Vol. III, Sec. 69, p. 2998.

in value (exclusive of wearing apparel) $200, and all the wearing apparel, the property of any debtor having a family residing in this state, as well after as before death, are exempt from process except the same be issued on a judgment founded on contract made before the 14th of March, 1851. Provided, this exemption does not apply to process founded upon a judgment for the purchase price of property or for the collection of taxes.[1]

The household goods and furniture of every kind, not exceeding $200 in value, of every absconding debtor having a family residing in the state, are exempt, except the writ is issued on a debt for which said household goods have been sold.[2]

Personal property of a nonresident of the state, being in the state, is not liable to attachment at the suit of a nonresident, when the said property is exempt by the law of the state of which said debtor and creditor are residents.[3]

Two hundred dollars' worth of personal property (exclusive of wearing apparel) is exempt from distress as rent.[4]

In assignments for the benefit of creditors $200 worth of personal property and wearing apparel is to be reserved to debtor.[5]

In case of death of debtor having a family residing in the state his wearing apparel and $200 worth of goods and chattels are not liable to payment of his debts.[6]

The arms and accouterments of a member of the national guard are exempt from execution.[7]

The wages, salaries or other compensation for work, labor, etc., due a nonresident employee are not liable to attachment at the suit of a nonresident creditor.[8]

Married woman may insure the life of her husband and the proceeds are free from claim of her husband's creditors.[9]

[1] Gen. Stat., N. J., 1895, Vol. II, Sec. 35, p. 1421. See Gen. Stat., N. J., 1895, Vol. II, Sec. 12, p. 1417.

[2] Gen. Stat., N. J., 1895, Vol. II, Sec. 42, p. 1424.

[3] Gen. Stat., N. J., 1895, Vol. I, Sec. 12, p. 100.

[4] Gen. Stat., N. J., 1895, Vol. I, Sec. 24, p. 1213.

[5] Gen. Stat., N. J., 1895, Vol. I, Sec. 9, p. 79.

[6] Gen. Stat., N. J., Vol. II, Sec. 52, p. 2366.

[7] Gen. Stat., N. J., Vol. II, Sec. 74, p. 2269.

[8] Gen. Stat., N. J., Vol. I, Sec. 103, p. 116.

[9] Gen. Stat., N. J., Vol. II, Sec. 29, p. 2018.

The money, aid, etc., provided by a fraternal beneficiary association is not liable to process to pay the debts of any certificate-holder or of any beneficiary named in such certificate.[1]

Lands and property of cemetery associations are not liable to be sold on execution.[2]

NEW MEXICO.—Husband and wife, widow or widower, living with an unmarried daughter or unmarried minor son, may hold exempt from process a family homestead to the value of $1,000; the wife may make the demand if husband fails, but neither can make demand if the other has a homestead; the provisions of this section do not extend to a judgment rendered on a mortgage executed by the debtor and his wife, nor to impair the lien by mortgage or otherwise of the vendor for purchase money, nor the lien of any mechanic, laborer or other person for materials furnished or labor performed in the erection, repair or improvement of a dwelling-house on homestead land.[3]

A person owning a dwelling-house on land not his own is entitled to benefits of section 1747.[4]

Any resident of the territory, who is the head of a family and not the owner of a homestead, may hold exempt $500 worth of real or personal property, in addition to chattel property exempt by law, to be selected by him at any time before sale.[5]

Every person who has a family, and every widow, may hold the following property exempt from process, to wit: Wearing apparel of such person or family; beds, bedding and bedsteads necessary for the use of the same; one cooking-stove and pipe; one stove and pipe used for warming the dwelling, and fuel sufficient for sixty days, actually provided and designated for the use of such person and family; one cow, or, if the debtor owns no cow, household furniture, to be selected, not exceeding $40 in value; two swine or the pork therefrom, or, if the debtor owns no swine, household

[1] Gen. Stat., N. J., Vol. I, Sec. 60, p. 162.

[2] Gen. Stat., N. J., Vol. I, Secs. 8 and 9, p. 350.

[3] Comp. L., N. M., 1897, Sec. 1747.

[4] Comp. L., N. M., 1897, Sec. 1748.

[5] Comp. L., N. M., 1897, Sec. 1753.

furniture, not exceeding $15 in value; six sheep and the wool therefrom and cloth and other articles manufactured therefrom, or, in lieu thereof, household furniture not exceeding $20 in value; food for such animals for sixty days; bibles, hymnbooks, psalmbooks, testaments, school and miscellaneous books used in the family, and all family pictures; provisions for the use of the debtor and family, to be selected, not exceeding $50 in value, and other articles of household and kitchen furniture, or either, necessary for such person or family, not exceeding $200 in value; one sewing, one knitting-machine, one gun or pistol, and the tools and implements of the debtor necessary for carrying on his trade or business, to be selected by him, not exceeding $150 in value; the personal earnings of the debtor for sixty days next preceding his application for such exemption, when it appears that such earnings are necessary for the support of such debtor, his wife or family; provided, that such exemption shall not apply to debts incurred for manual labor or for necessaries furnished to the debtor or his family; all articles, specimens and cabinets of natural history or science, except when the same are kept for exhibition for pecuniary gain.[1]

Every person who is engaged in the business of draying or carrying property from place to place with one horse and wagon for a livelihood has, in addition to exemptions specified in section 1737, one horse, harness, dray or wagon exempt; every head of a family engaged in the business of agriculture has, in addition to the exemptions provided for in section 1737, two horses or one yoke of cattle, with necessary gearing for same, and one wagon exempt from execution; every head of a family who is engaged in the practice of medicine has exempt, in addition to the exemptions specified in section 1737, one horse, one saddle and bridle, and also books, medicines and instruments pertaining to his profession, not exceeding $100 in value.[2]

Every unmarried woman may hold the following property exempt: Wearing apparel, to be selected by her, to the value of $150; one sewing-machine; one knitting-machine; if engaged in teaching music, one piano or organ; a bible, hymn-

[1] Comp. L., N. M., 1897, Sec. 1737.

[2] Comp. L., N. M., 1897, Sec. 1738.

book, psalmbook, album and any other books, not exceeding in value $50.[1]

Any person, the head of a family, engaged in the practice of the law has exempt, in addition to the foregoing exemptions, books pertaining to his profession, not exceeding in value $500.[2]

Any beneficiary fund, not exceeding $5,000, appropriated by any benevolent association to the family of any deceased member can not be taken to pay the debts of such deceased member.[3]

The regalia, insignia, etc., of any benevolent society in the territory is exempt.[4]

Property of a municipal corporation or fire company used to extinguish fires is exempt, but a valid lien may be contracted thereon by bill of sale or mortgage.[5]

The owner of improvements on public lands of the United States holds the same exempt from execution, and there can be no valid sale thereof by the owner who is the head of a family and married, without the consent of the wife.[6]

The arms, uniforms and equipments of the national guard, required to be kept by law, are exempt.[7]

New York.[8] — A lot of land with the buildings thereon, not exceeding $1,000 in value, owned and occupied as a residence by a householder having a family, and heretofore designated as an exempted homestead, as prescribed by law, or hereafter designated for that purpose, is exempt from process issued on a judgment recovered for a debt contracted April 30, 1850, unless the judgment was recovered wholly for a debt contracted before the designation of a homestead, or for the purchase money thereof.[9]

[1] Comp. L., N. M., 1897, Sec. 1739.

[2] Comp. L., N. M., 1897, Sec. 1740.

[3] Comp. L., N. M., 1897, Sec. 1741.

[4] Comp. L., N. M., 1897, Sec. 1742.

[5] Comp. L., N. M., 1897, Sec. 1743.

[6] Comp. L., N. M., 1897, Sec. 3745.

[7] Comp. L., N. M., 1897, Sec. 2266.

[8] The exemption laws of this state are treated in *In re* Ellithorpe, 111 Fed. Rep. 163, 7 Am. B. R. 18; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111.

[9] Bliss, N. Y., Ann. Code, 1895,

In order to designate a homestead, a conveyance thereof, stating that it is designated to be held as a homestead, must be recorded; or a notice containing a full description, and stating that it is designed to be so held and executed as a deed, must be recorded.[10]

A lot of land, with the buildings thereon, owned by a married woman, and occupied by her as a residence, may be designated as a homestead, and is exempt under the same circumstances and to the same exceptions as the homestead of a householder having a family.[11]

The homestead exemption exists after the death of a person in whose name the property was exempted, as follows: If the decedent was a woman, it continues for the surviving children during the minority of the youngest child; if the decedent was a man, it continues for the benefit of the widow and surviving children until the majority of the youngest surviving child and until the death of the widow; but the exemption ceases earlier if the property ceases to be occupied as a residence, except as provided in section 1401.[12]

The right to homestead exemption is not affected by a suspension of the occupation as a residence for a period not exceeding one year, which occurs in consequence of injury to, or destruction of, the dwelling-house upon the premises.[13]

The owner of exempted real property may, by a properly executed notice, cancel the exemption; the cancellation takes effect when the same is recorded; the husband and wife may jointly convey or mortgage exempted real estate.[14]

The following personal property, when owned by a householder, is exempt from process, and each movable article thereof continues to be exempt, while the family, or any of them, are removing from one residence to another: All spinning-wheels, weaving-looms and stoves put up or kept for use

Sec. 1397, p. 1974; see Sec. 1389 as to special exemptions not affected by Title II, Art. 1.

[10] Bliss' N. Y. Ann. Code, 1895, Sec. 1388, p. 1975.

[11] Bliss' N. Y. Ann. Code, 1895, Sec. 1390, p. 1975.

[12] Bliss' N. Y., Ann. Code, 1895, Sec. 1400, p. 1975.

[13] Bliss' N. Y. Ann. Code, 1895, Sec. 1401, p. 1075.

[14] Bliss' N. Y. Ann. Code, 1895, Sec. 1404, p. 1076.

in a dwelling-house; one sewing-machine with appurtenances; the family bible, the family pictures and schoolbooks used by or in the family; other books, not exceeding in value $50, kept and used as part of the family library; a pew; ten sheep with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour, groceries and vegetables actually provided for family use, and necessary fuel, oil and candles for the use of the family for sixty days; all wearing apparel, beds, etc., necessary for debtor and family; all necessary cooking utensils; one table; six chairs; six knives; six forks; six spoons; six plates; six tea cups; six saucers; one sugar dish; one milk pot; one tea pot; one crane and its appendages; one pair andirons; one coal scuttle; one shovel; one pair tongs; one lamp and one candlestick; the tools and implements of a mechanic necessary to the carrying on of his trade, not exceeding $25 in value.[15]

In addition to the exemptions allowed in section 1390, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding $250 in value, together with food for the team for ninety days, when owned by a householder or a person having a family for which he provides, are exempt except as against a claim for work performed in the family as a domestic or for purchase money.[16]

When the debtor is a woman, she is entitled to the same exemptions, subject to the same exceptions, as a householder.[17]

Military pay, rewards, pensions, arms, uniforms, etc., are exempt.[18]

Lands set apart as a family burying-ground are exempt under certain conditions.[19]

[15] Bliss' N. Y. Ann. Code, 1895, Sec. 1390, p. 1966; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111.

[16] Bliss' N. Y. Ann. Code, 1895, Sec. 1391, p. 1966.

[17] Bliss' N. Y. Ann. Code, 1895, Sec. 1392, p. 1972.

[18] Bliss' N. Y. Ann. Code, 1895, Sec. 1393, p. 1973; *In re* Ellithorpe, 111 Fed. Rep. 163, 7 Am. B. R. 18.

[19] Bliss' N. Y. Ann. Code, 1895, Sec. 1395, p. 1974.

A right of action for taking or injuring exempt personal property is exempt for one year from the collection thereof.[20]

North Carolina.[21] — Every homestead and the dwellings and buildings used therewith, not exceeding in value $1,000, to be selected by the owner, or, in lieu thereof, at the option of the owner, any lot in a city, etc., with the dwellings and buildings used thereon, owned and occupied by a resident of the state, and not exceeding $1,000 in value, is exempt from process; no property is exempt from sale for taxes or for the purchase price thereof.[22]

The homestead, after the death of the owner, is exempt from the payment of any debt during the minority of any of his children.[23]

The homestead is subject to laborers' and mechanics' liens for work done for the owner on the homestead premises.[24]

After the death of the owner of a homestead, leaving no children, but leaving a widow, the same is exempt from the payment of his debts during her widowhood, unless she be the owner of a homestead in her own right.[25]

The husband may insure his life for the benefit of his wife

[20] Bliss' N. Y. Ann. Code, 1895, Sec. 1394, p. 1974.

[21] The exemption laws of this state are treated in *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57; *In re* Dinglehoef, 109 Fed. Rep. 866, 6 Am. B. R. 242; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Wilson, 101 Fed. Rep. 571, 4 Am. B. R. 260; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730; *In re* Woodward, 95 Fed. Rep. 955, 2 Am. B. R. 692; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; *In re* Stevenson, 93 Fed. Rep. 789, 2 Am. B. R. 230.

[22] Const., N. Car., 1876, Art. X, Sec. 2. Code Civil Pro., 1883, Sec. 501 (4).

Where a bankrupt's husband was never a resident of the state of North Carolina, and she was never therein except that they visited and boarded in the state a short time soon after their marriage, she is not a resident, or entitled to the exemption in that state. *In re* Dinglehoef, 109 Fed. Rep. 866, 6 Am. B. R. 242.

[23] Const., N. Car., 1876, Art. X, Sec. 3.

[24] Const., N. Car., 1876, Art. X, Sec. 44.

[25] Const., N. Car., 1876, Art. X, Sec. 5.

and children, and the proceeds thereof are free from his debts.[26]

The homestead may be disposed of by deed with the consent of the wife of the owner.[27]

The personal property of any resident of the state, to the value of $500, to be selected by him, is exempt, except as to taxes and obligations contracted for the purchase price.[28]

For exemptions from process on judgments for debts contracted or causes of action accruing prior to May 1, 1877, see Code of Civil Procedure of North Carolina of 1883, section 501, (1), (2) and (3).

North Dakota.— The homestead of every head of a family residing in the state, not exceeding in value $5,000, and if within a town plat, not exceeding two acres, and if not, not exceeding in the aggregate 160 acres, and consisting of a dwelling-house in which the claimant resides, and the appurtenances, and the land on which the same is situated, is exempt from process except as provided by law.[29]

If the homestead claimant is married, the homestead may be selected from the separate property of the husband or from the separate property of the wife, with her consent; if the claimant is unmarried, but the head of a family, the homestead may be selected from any of his or her property. The homestead must not embrace different lots, unless they are contiguous.[30]

The homestead is subject to process on debts secured by mechanics' or laborers' liens for work done or materials furnished exclusively for the improvement of the same; on debts

[26] Const., N. Car., 1876, Art. X, Sec. 7.

[27] Const., N. Car., 1876, Art. X, Sec. 8.

[28] Const., N. Car., 1876, Art. X, Secs. 1 and 2.

Bankrupt can not claim exemption in both individual estate and firm estate, *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73. See also as to exemptions in partnership property, *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57; *In re* Wilson, 101 Fed. Rep. 571, 4 Am. B. R. 260; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Stevenson, 93 Fed. Rep. 789, 2 Am. B. R. 230.

[29] Rev. Code, N. Dak., 1895, Sec. 3605.

[30] Rev. Code, N. Dak., 1895, Sec. 3606.

secured by mortgage on the premises executed by both husband and wife or an unmarried claimant, or debts created for the purchase thereof.[31]

The homestead of a married person can be conveyed or encumbered only by an instrument in which both husband and wife join.[32]

When homestead is sold under legal proceedings, the money accruing therefrom to the debtor to the amount of $5,000 is exempt.[33]

If homestead is conveyed as provided in section 3508, or sold as mentioned in section 3607, the price thereof or the proceeds beyond the amount necessary to satisfy such lien and not in excess of the homestead exemption is exempt.[34]

Any person who is the head of a family may make a declaration of homestead. The failure to make such declaration does not impair the right.[35]

The declaration of homestead must be executed and acknowledged in the same manner as a grant of real property is executed and acknowledged, and must be filed for record.[36]

It must contain a statement, showing that the claimant is the head of a family, or when the declaration is made by the wife, that the husband has not made such declaration for the joint benefit; that the person making it resides on and claims the premises as homestead; a description of the premises and an estimate of their cash value.[37]

The sale of a homestead does not prevent the acquisition of another.[38]

The head of family, as used in chapter 39, includes within its meaning the husband or wife when claimant is married; both husband and wife are not entitled, each, to a homestead;

[31] Rev. Code, N. Dak., 1895, Sec. 3607.

[32] Rev. Code, N. Dak., 1895, Sec. 3608.

[33] Rev. Code, N. Dak., 1895, Sec. 3617.

[34] Rev. Code, N. Dak., 1895, Sec. 3619.

[35] Rev. Code, N. Dak., 1895, Sec. 3620.

[36] Rev. Code, N. Dak., 1895, Secs. 3621 and 3623.

[37] Rev. Code, N. Dak., Sec. 3622.

[38] Rev. Code, N. Dak., Sec. 3624.

every person who has resided on the premises with him or her, his or her child, or the child of a deceased wife or husband; a minor brother or sister, or the minor child of such deceased person; a father, mother or grandparents; a father, mother or grandparents of a deceased husband or wife; an unmarried sister or any other relatives mentioned above who have attained majority and can not support themselves.[39]

Except as provided by law, the property mentioned in chapter 2 of the Code of Civil Procedure is exempt to the head of a family, as defined by chapter 39 of the Civil Code.[40]

The following property is absolutely exempt: All family pictures, a pew, a burial lot, the family bible and all schoolbooks used as a part of the family library, not exceeding $100 in value; all wearing apparel of debtor and family; provisions and fuel for the debtor and his family for one year; the homestead.[41]

In addition to the property mentioned in section 5517, the head of a family may select from all his personal property, personal property, not absolutely exempt, not to exceed in the aggregate $1,000, which is also exempt, and must be chosen and appraised.[42]

Instead of the exemption provided for in section 5518, the head of a family may select the following property, which is then exempt: All miscellaneous books and musical instruments, not exceeding $500 in value; all household and kitchen furniture, including beds, bedsteads and bedding used by the debtor and family, not exceeding $500 in value; three cows, ten swine, one yoke of cattle and two horses or mules, or two yokes of cattle, or two spans of horses or mules; one hundred sheep and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom; the necessary food for the animals heretofore mentioned for one year, one wagon, one sleigh, two plows, one harrow and farming utensils, including tackle for teams, not exceeding $300

[39] Rev. Code, N. Dak., 1895, Sec. 3625.

[40] Rev. Code, N. Dak., 1895, Sec. 5516.

[41] Rev. Code, N. Dak., 1895, Sec. 5517.

[42] Rev. Code, N. Dak., 1895, Sec. 5518, as amended in L., N. D., 1901, p. 87.

in value; tools of a mechanic used and kept for the purpose of carrying on his trade, and in addition, $200 worth of stock in trade; the library and instruments of any professional person not exceeding $600 in value.[43]

If debtor fails to make a claim for exemptions, his wife may; if she fails to make claim, one of the children of 16 years of age may do so.[44]

No personal property, except absolute exemptions, is exempt in an action for laborers' or mechanics' wages, or for a debt incurred for property obtained under false pretenses; no personal property is exempt from process in an action for the collection of a legally practicing physician's bills for professional services or medicine, except absolute exemptions and household and kitchen furniture, stoves, and two cows, the value of which, exclusive of absolute exemptions, does not exceed $500.[45]

No property is exempt in an action brought for the purchase price thereof.[46]

A partnership firm can claim but one exemption of $1,000 in value or alternative property, when so applicable, out of the partnership property. All partnership property claimed as exempt shall constitute a part of the exemptions of the several partners, the same being divided in proportion to the interests of the partners in the firm assets, and in no case can the aggregate exemptions of the several partners exceed the amount which would have been allowed them if the partnership had not existed.[47]

Except those made absolute, the exemptions provided for do not apply to the following: Corporations for profit, nonresidents, a debtor who is in the act of removing from the state with his family, or has absconded, taking his family with him.[48]

No property except the homestead and property absolutely

[43] Rev. Code, N. Dak., 1895, Sec. 5519.

[44] Rev. Code, N. Dak., 1895, Sec. 5523.

[45] Rev. Code, N. Dak., 1895, Sec. 5526.

[46] Rev. Code, N. Dak., 1895, Sec. 5527.

[47] Rev. Code, N. Dak., 1895, Sec. 5528; as amended L., N. D., 1901, p. 88.

[48] Rev. Code, N. Dak., 1895, Sec. 5529.

exempted is exempt from process for fines, penalties and costs of criminal prosecutions; no property except homestead and property absolutely exempted is exempt from process on a judgment for forfeitures of undertakings and bonds or a recognizance in criminal cases.[49]

The property of a cemetery corporation and the lots sold by it to individual proprietors are exempt.[50]

Ohio.— Husband and wife living together, a widow or widower living with an unmarried daughter or an unmarried minor son, may hold exempt from process a family homestead, not exceeding $1,000 in value; the husband, or, in case of his neglect, the wife, may make the demand therefor; but neither can make such demand if the other has a homestead.[51]

A person owning the superstructure of a dwelling-house, occupied by him or her as a family homestead, although the title to the land is in another, and also lessees, are entitled to the benefits of section 5435.[52]

On petition of personal representative to sell land to pay debts, when decedent has left a widow or a minor child unmarried and composing part of the family at the time of his death, the appraisers must set aside a homestead as provided in section 5438, and the same is, except as provided in section 6155, exempt so long as the widow remains unmarried, or any unmarried minor child of decedent resides thereon; when homestead is sold to pay any lien which precludes the allowance thereof, the residue of the proceeds, not exceeding $500, shall be paid to the widow, etc.[53]

The homestead exemption does not extend to a judgment rendered on a mortgage executed by a debtor and his wife, nor to a claim for manual labor less in amount than $100, nor to impair the lien, by mortgage or otherwise, of the vendor for the purchase money of the premises, nor to the lien of a mechanic or other person under any statute of the state for

[49] Rev. Code, N. Dak., 1895, Sec. 5530.

[50] Rev. Code, N. Dak., 1895, Sec. 3199.

[51] Rev. Stat., Ohio, 1897, Sec. 5435; *In re* Rhodes, 109 Fed. Rep. 117, 6 Am. B. R. 173.

[52] Rev. Stat., Ohio, 1897, Sec. 5436.

[53] Rev. Stat., Ohio, 1897, Sec. 5437; see Sec. 5440.

material furnished or labor performed in the erection of the dwelling-house thereon, nor for the payment of taxes.[54]

No sale of real estate made under a mortgage not executed by the wife of a married debtor can affect the homestead right.[55]

Dower is not affected by the homestead exemption.[56]

Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female having in good faith the care, maintenance and custody of any child or children of a deceased relative, resident of Ohio, and not the owner of a homestead, may in lieu thereof hold exempt from process real or personal property, to be selected by such person, not exceeding in value $500, in addition to the chattel property otherwise exempt by law; such selection and exemption can not be made by the debtor from any money, salary or wages due such person as against a debt due for necessaries furnished such debtor after the passage of this act, except to the extent of ninety per centum of such money, etc.[57]

Every person who has a family and every widow may hold exempt the following property from process for any debt, damage, fine or amercement, to wit: The wearing apparel of such person or family, beds, etc., for the use of the same; one cooking-stove and pipe; one stove and pipe, used for warming the dwelling, and fuel for sixty days, provided and designed for the use of such person and family; one cow, or, if the debtor owns no cow, household furniture, to be selected by him, not exceeding $35 in value; two swine or the pork therefrom, or, if the debtor owns no swine, household furniture not exceeding $15 in value, to be selected by him; six sheep and the wool therefrom, and the cloth or other articles manufactured therefrom, or in lieu thereof household furniture, to be selected by the debtor, not exceeding $15 in value,

[54] Rev. Stat., Ohio, 1897, Sec. 5434. See Secs. 3206*a* and 3185 as to labor and material liens.

[55] Rev. Stat., Ohio, 1897, Sec. 5442.

[56] Rev. Stat., Ohio, 1897, Sec. 5443.

[57] Rev. Stat., Ohio, 1897, Sec. 5441; as amended, 93 O. L., p. 318.

A divorced husband, living on a homestead with a minor child, for whose maintenance he is responsible, is entitled to hold the same as exempt on becoming a bankrupt. *In re* Rhodes, 109 Fed. Rep. 117.

and sufficient food for such animals for sixty days; the bibles, etc., and schoolbooks used in the family, and all family pictures; provisions actually provided and designed for the use of the debtor or family, not exceeding $50 in value, to be selected by the debtor, and other articles of household and kitchen furniture, or either, necessary for such person or family, to be selected by the debtor, not exceeding $50 in value; one sewing-machine, one knitting-machine, and the tools and implements of trade or business, whether mechanical or agricultural, to be selected by debtor, not exceeding $100 in value; the personal earnings of the debtor and minor children for three months, when it appears that such earnings are necessary for the support of such debtor or his family; such period of three months dates from the issuing of any attachment, etc., the rendition of any judgment, or the making of any order under which the attempt to subject such earnings is made; provided, that if the debt is one for necessaries furnished to the debtor, his wife or family, after the passage of this act, only 90 per centum of such earnings is exempt; and provided, that nothing herein contained shall render the personal earnings of such debtor's minor child subject to the payment of any such claim, etc.;[1] all specimens of natural history or science, except such as may be kept for exhibition for money or pecuniary gain.[2]

Every person who is the head of a family and engaged in the business of draying for a livelihood, in addition to the exemptions specified in section 5430, may hold exempt one horse, harness and dray; every head of a family who is engaged in the business of agriculture, in addition to the exemptions provided for in section 5430, may hold exempt one horse, one yoke of cattle, with necessary gearing for the same, and one wagon; every head of a family who is engaged in the practice of medicine, in addition to the exemptions provided for in section 5430, may hold exempt one horse, one saddle and bridle, also books, medicines and instruments pertaining to his profession, not exceeding $100 in value.[3]

[1] See Secs. 5453 and 6489; as amended, 93 O. L., p. 318 and 319.

[2] Rev. Stat., Ohio, 1897, Sec. 5430; as amended, 93 O. L., p. 316.

[3] Rev. Stat., Ohio, 1897, Sec. 5431.

Every unmarried woman may hold the following property exempt from process: Wearing apparel, to be selected by her, not exceeding in value $100; one sewing-machine, one knitting-machine, a bible, hymnbook, psalmbook and any other books, not exceeding in value $25.[1]

Any beneficiary fund, not exceeding $5,000, of any benevolent society, appropriated, set apart or paid, according to its rules, etc., to the family of any deceased member, is not liable to be taken to pay the debts of any deceased member.[2]

Property kept and used to extinguish fires is exempt.[3]

The regalia, insignia of office, etc., of any benevolent society in the state is exempt.[4]

The money or other benefit, etc., provided or rendered by any fraternal benefit association can not be taken to pay the debts of a certificate-holder or of any beneficiary named therein.[5]

Husband may insure his life for the benefit of wife and children, and the proceeds thereof are exempt from the claims of his creditors; the amount of premiums paid in fraud of creditors enures to their benefit out of the proceeds of the policy.[6]

Burial lots sold by cemetery association, if used exclusively for burial purposes, are exempt.[7]

Fireman's pension fund is exempt.[8]

All property vested in a board of education is exempt from process.[9]

Any association organized for the purpose of preserving and protecting bodies of the dead may hold one acre of ground exempt from process if used exclusively for such purpose.[10]

[1] Rev. Stat., Ohio, 1897, Sec. 5426.

A married woman is entitled to the benefits of all exemptions to heads of families, Sec. 5319.

[2] Rev. Stat., Ohio, 1897, Sec. 5427.

[3] Rev. Stat., Ohio, 1897, Sec. 5429.

[4] Rev. Stat., Ohio, 1897, Sec. 5428.

[5] Rev. Stat., Ohio, 1897, Sec. (3631—18).

[6] Rev. Stat., Ohio, 1897, Sec. 3628; as amended, 93 O. L., p. 131.

[7] Rev. Stat., Ohio, 1897, Sec. 3575.

[8] Rev. Stat., Ohio, 1897, Sec. (2477—14), (2477—31), (2477—50), (2477—62), (2477—80).

[9] Rev. Stat., Ohio, 1897, Sec. 3973.

[10] Rev. Stat., Ohio, 1897, Sec. 3884.

The property, both real and personal, of a defendant against whom a judgment is rendered under Title V, Chap. 5, is liable therefor without exemption.[1]

The real and personal property of every kind, without exception or exemption except under section 5430, is liable for all fines costs and damages assessed against a person for the sale of intoxicating liquors.[2]

A lot held by an individual in a cemetery is in no case subject to execution.[3]

The seal and register of a notary public is exempt.[4]

OKLAHOMA.—The homestead of the family, belonging to the head thereof residing in the territory, is exempt from all process for the payment of debts, except as hereinafter provided.[5]

The homestead of a family not in a town or city may consist of not more than 160 acres, which must be in one tract, with the improvements; the homestead in a city, town or village may consist of a lot or lots, not to exceed one acre, with the improvements; the same must be used for the purpose of a home for the family; a temporary renting of the homestead does not change its character when no other homestead has been acquired; the homestead may be mortgaged; the homestead exemption does not apply to a corporation for profit, to a nonresident, to a debtor in the act of removing his family from the territory, or who has absconded, taking with him his family.[6]

The following property is exempt to the head of a family in the territory from process, except as hereinafter provided: all household and kitchen furniture; lots in a cemetery held for the purpose of sepulture; all implements of husbandry used upon the homestead; all tools, apparatus and books belonging to and used in any trade or profession; the family library and all family portraits and pictures and wearing apparel; five milch cows and their calves under six months

[1] Rev. Stat., Ohio, 1897, Sec. 4275.

[2] Rev. Stat., Ohio, 1897, Sec. 4363.

[3] Rev. Stat., Ohio, 1897, Sec. 1469.

[4] Rev. Stat., Ohio, 1897, Sec. 113; as amended, 93 O. L., p. 405.

[5] Stat., Ok., 1893, Chap. XXXIV, Sec. 1, Par. 2844.

[6] Stat., Ok., 1893, Chap. XXXIV, Sec. 2, Par. 2845.

old; one yoke of work oxen, with necessary yokes and chains; two horses or two mules and one wagon, cart or dray; one carriage or buggy; one gun; ten hogs; twenty head of sheep; all saddles, bridles and harness necessary for the use of the family; all provisions and forage on hand or growing for home consumption and for the use of exempt stock for one year.[1]

The following property is exempt to persons who are not heads of families; it is subject to liens given by the owners: A lot in cemetery held for the purpose of a sepulcher; all wearing apparel; all tools, apparatus and books belonging to any trade or profession; one horse, bridle and saddle, or one yoke oxen; current wages for personal service.[2]

The exemption of the homestead does not apply where the debt is due for the purchase money of the homestead, for taxes due thereon, for work and material used in constructing improvements thereon, or for mortgage indebtedness; but such work and material or mortgage indebtedness must have been contracted for in writing, and the consent of the wife must have been given in the same manner as required by law in making conveyance of the homestead.[3]

The exemption of personal property does not apply when the debt is due for rents and advances made by a landlord to his tenant, or to other debts which are secured by a lien on the property.[4]

None of the personal property mentioned in this act is exempt from attachment or execution for wages of any clerk, mechanic, laborer or servant.[5]

The pension money of every resident of the territory who became disabled in the service of the United States is exempt.[6]

All conveyances affecting the title of homestead exempted by law to the head of a family are void unless the husband

[1] Stat., Ok., 1893, Chap. XXXIV, Sec. 1, Par. 2844.

[2] Stat., Ok., Chap. XXXIV, Sec. 3, Par. 2846.

[3] Stat., Ok., Chap. XXXIV, Sec. 4, Par. 2847.

[4] Stat., Ok., Chap. XXXIV, Sec. 5, Par. 2848.

[5] Stat., Ok., Chap. XXXIV, Sec. 6, Par. 2849.

[6] Stat., Ok., Chap. XXXIV, Sec. 7, Par. 2850.

and wife sign and acknowledge one and the same joint instrument.[1]

No land acquired under the provisions of Title XXXII, Chap. 5, of the Rev. Stat. of the United States is liable to the satisfaction of any debt contracted prior to issuing the patent therefor.[2]

The proceeds of the insurance on the life of the husband for the benefit of the wife and children are exempt from liability to pay the debts of the husband; if the premium is paid by any person with the intent to defraud his creditors, an amount equal to the premium so paid enures to the benefit of the creditors.[3]

No property is exempt from execution for fines for profane swearing and Sabbath breaking.[4]

The personal earnings of a debtor who is a resident of the territory at any time within three months next preceding the issuing of process can not be applied to the payment of his debts, when it appears by debtor's affidavit or otherwise that such earnings are necessary in whole or part for the support of his family; provided, that at the time of filing such affidavit he shall notify plaintiff in writing.[5]

For exemptions upon the decease of husband and wife, see Stat. Ok., 1893, Chap. XVIII, Secs. 1–9, par. 1300–1308.

OREGON.—The homestead of any family is exempt from judicial sale for the satisfaction of any liability or judgment contracted or obtained after February 21, 1893.[6]

Such homestead must be the actual abode of, and used by, such family or some members thereof.[7]

Such homestead can not exceed $1,500 in value, nor 160 acres in extent if not located in a town or city laid off in blocks or lots; if located in any such town or city, then it can not exceed one block, but in no case can such homestead be reduced to less than twenty acres, nor one lot, regardless of value.[8]

[1] Stat., Ok., Chap. XXI, Secs. 20 and 21, Par. 1627 and 1628.

[2] Rev. Stat., U. S., 2296.

[3] Rev. Stat., Ok., 1893, Chap. XLIV, Sec. 19, Par. 3080.

[4] Rev. Stat., Ok., 1893, Chap. XXV, Sec. 20, Par. 1886.

[5] Stat., Ok., 1893, Chap. LXVI, Sec. 506, Par. 4384; Chap. LXVII, Sec. 165, Par. 4803.

[6] Gen. L., Or., 1893. p. 93, Sec. 1.

[7] Gen. L., Or., 1893, p. 93, Sec. 2.

[8] Gen. L., Or., 1893, p. 93, Sec. 3.

This exemption does not apply to decrees for the foreclosure of mortgages properly executed; nor to mortgages of married people on homestead, executed by husband and wife.[1]

The homestead is exempt from process after the death of the owner, as against debts for which it could not have been sold during his life.[2]

The following property is exempt, if selected and reserved by the debtor at time of levy, or as soon thereafter, before sale, as known to him: Books, pictures and musical instruments of value of $75; necessary wearing apparel of any person to the value of $100, and $50 additional for each member of family; tools, implements, apparatus, team, vehicle, harness or library, necessary to carry on trade or profession, to the value of $400; food for team for sixty days; the word team does not include more than one yoke of oxen or span of horses or mules; if owned by householder and in actual use, or kept for use by and for his family, ten sheep and fleece for one year, or cloth and yarn made therefrom; two cows; five swine; household goods, furniture and utensils to the value of $300, and food for such animals for three months, and for household and family six months; a pew, property of the state, county, municipal corporation or any other public or municipal corporation of like character. No article of property or article received in exchange therefor is exempt from execution issued on judgment for its price. In all cases where advances of goods, wares, merchandise or money are made to, or labor performed for, any person engaged in an undertaking, trade, etc., to enable or assist such person to carry on such undertaking, trade, etc., or which shall be used or employed for such purpose, then no article of personal property, tool, implement or apparatus used or employed by such person in such undertaking, trade, etc., or money due such person growing out of or incident thereto, shall be exempt from execution on a judgment recovered for such advances or for such labor performed.[3]

The earnings of a debtor for personal services, at any time within thirty days next preceding the service of attachment,

[1] Gen. L., Or., 1893, p. 93, Sec. 4.
[2] Gen. L., Or., 1893, p. 94, Sec. 7.
[3] Gen. L., Or., 1903, p. 160.

etc., amounting to $75, are exempt when it appears that such earnings are necessary for the use of a family supported in whole or part by the debtor.[4]

Burial lots sold by a cemetery association for the sole purpose of interment are exempt from process against the purchaser, if used as such by him.[5]

PENNSYLVANIA.[6] — Property, real or personal, to the value of $300, exclusive of all wearing apparel of the defendant and his family, and all bibles and schoolbooks in use are exempt from process, except liens for purchase money of the real estate of insolvent debtors.[7]

The wife and family of debtor are entitled to retain for their own use free from attachment such articles as are by law exempted from levy and sale on execution.[8]

Persons entitled to exemption, provided for in an act entitled "An act to exempt property . . . . . or distress for rent," approved April 9, 1849, may elect to retain the same out of any bank notes, money, stocks, judgments or other indebtedness to such person.[9]

All sewing-machines belonging to seamstresses in the commonwealth, in addition to any articles exempt by law, are exempt from process.[10]

[4] Gen. L., Or., 1903, p. 26.

[5] Hill's Ann. L., Or., 1892, Chap. XXXV, Sec. 3326, as amended, L. Or., 1893, p. 149.

[6] The exemption laws of this state are dealt with in *In re* Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re* Yost, 117 Fed. Rep. 792, 9 Am. B. R. 153; *In re* Staunton, 117 Fed. Rep. 507, 9 Am. B. R. 79; *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Jackson, 116 Fed. Rep. 46, 8 Am. B. R. 594; *In re* Hoover, 113 Fed. Rep. 136, 7 Am. B. R. 330; *In re* Manning, 112 Fed. Rep. 948, 7 Am. B. R. 571; *In re* Haskin, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re* Black, 104 Fed. Rep. 289, 4 Am. B. R. 776; *In re* Meyers, 102 Fed. Rep. 869, 4 Am. B. R. 536; *In re* Brown, 100 Fed. Rep. 441, 4 Am. B. R. 46.

[7] Bright, Pur. Dig., 1883, p. 627, Sec. 24; *In re* Haskin, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re* Woodward, 95 Fed. Rep. 955, 2 Am. B. R. 693.

[8] Bright, Pur. Dig., 1883, p. 742, Secs. 23, 25. As to insolvents, see p. 899, Sec. 46 and 42 V, and p. 900, Sec. 49. For exemptions to widow and children of decedent, see p. 518, Sec. 64, *et seq.* For exemptions in cases of assignments for benefit of creditors, see p. 123, Sec. 23.

[9] Bright, Pur. Dig., 1883, p. 744, Sec. 29. *In re* Myers, 102 Fed. Rep. 869, 4 Am. B. R. 536.

[10] Bright, Pur. Dig., 1883, p. 744, Secs. 30 and 31.

All pianos, melodeons and organs leased or hired by persons residing in the commonwealth are exempt from process for rent due, in addition to articles exempt by law, provided the persons so leasing or hiring the said instruments give notice to the landlord of such hiring or leasing.[11] This exemption also applies to sewing-machines and typewriting-machines.[12]

No exemption is allowed upon a judgment for $100 or less for wages for manual labor.[13]

No exemption is allowed as against a judgment obtained for assigning or sending a claim to be collected against a resident of the commonwealth by proceedings in attachment in a foreign state.[14]

From and after April 4, 1889, there is no exemption allowed on a judgment for board for four weeks or less.[15]

The uniforms, arms, ammunition and accouterments of members of the national guards are exempt.[16]

Rhode Island.— The following property is exempt from process: Necessary wearing apparel of debtor and family; uniform, arms and equipments of militiamen;[17] one pew in church; one burial lot; working tools and the professional library of any professional man in actual practice, not exceeding $200; household furniture and family stores, not exceeding $300, of a housekeeper; books in use in the family, not exceeding $300; one cow and one and one half tons of hay, one hog, one pig, and the pork of the same, of a housekeeper; mariners' wages; debts secured by bills of exchange and promissory notes; ten dollars of wages, except it be for necessaries; wages of debtor's wife and minor children; such other property, real, personal or mixed, as is exempted by general or special acts, charters of incorporation, or by the policy of the law.[18]

[11] Bright, Pur. Dig., 1883, p. 744, Sec. 32.

[12] L. Penna., 1895, p. 282. For exemptions from distress for rent, see p. 1012, Sec. 5.

[13] Bright, Pur. Dig., Supp., p. 2202, Sec. 5.

[14] Bright, Pur. Dig., Supp., p. 2202, Sec. 7.

[15] Bright, Pur. Dig., Supp., p. 2505, Sec. 3.

[16] Bright, Pur. Dig., 1883, p. 1260, Sec. 84.

[17] Gen. L., R. I., 1896, Chap. 206, Sec. 109, p. 1099.

[18] Gen. L., R. I., 1896, Chap. 255, Sec. 5, p. 888.

South Carolina.[19] — The general assembly, acting under a provision in the state constitution, has enacted laws exempting from attachment and sale under any mesne or final process issued from any court to the head of any family residing in the state a homestead in lands, whether held in fee or in any lesser estate, not to exceed the value of one thousand dollars, with the yearly products thereof, and to every head of a family residing in the state, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars. No property, however, is exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of the homestead, or the erection of improvements thereon, and the yearly products of the homestead are not to be exempt from attachment by, or sale for, the payment of obligations contracted in the production of the same.[20]

If the husband be dead, the widow and children, if the father and mother be dead, the children, whether they be minors or not, are entitled to have the homestead exempted in the same manner as if the parents were living.[21]

No waiver of the right of homestead will defeat the right before assignment, except it be by deed of conveyance or by mortgage, and only as against the mortgage debt; and no judgment creditor or other creditor, whose lien does not bind the homestead, has any right or equity to require that a lien which embraces a homestead and other property shall first exhaust the homestead; provided, that after a homestead in lands has been set off and recorded the same can not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife.[22]

The personal property of the head of any family residing in the state, whether entitled to homestead exemption in lands

[19] The exemption laws of this state are dealt with in Cannon v. Dexter, etc., Mfg. Co. (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 9 Am. B. R. 724; McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 111, 7 Am. B. R. 641; *In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81.

[20] Const., S. C., Art. II, Sec. 32. Rev. Stat., S. C., 1893, Sec. 2126; as amended, L., S. C., 1896, p. 190.

[21] Rev. Stat., S. C., 1893, Sec. 2129.

[22] Rev. Stat., S. C., 1893, Sec. 2130; as amended, L., S. C., 1896, p. 191.

or not, to the extent of $500, is exempt; the personal property of any person not the head of a family, consisting of necessary wearing apparel and tools and implements, or other property, to the extent of $500, is also exempt.[23]

In case any woman, having a separate estate, is married to the head of a family who has not sufficient property to constitute a homestead, she is entitled to the homestead exemption, as provided for the head of a family, but there shall not be the allowance of more than $1,000 worth of real estate nor $500 worth of personal property to the husband and wife jointly.[24]

The exemptions, however, do not extend to an attachment, levy or sale in any mesne or final process, to secure or enforce the payment either of taxes or of obligations contracted for the purchase of the homestead or the erection or making of improvements or repairs thereon, or for the purchase of the said personal property. The yearly products of the homestead are subject to attachment, levy and sale to secure or enforce the payment of obligations contracted for provisions or other necessary articles purchased, or advances in money, or merchandise, procured to be used or expended in the production of the same, or of other obligations contracted in the production of the same, and of none other.[25]

South Dakota.— To all heads of families an *absolute* exemption, consisting of a homestead containing not to exceed 160 acres of land, with the improvements thereon, not exceeding $5,000 in value, or a house and lot and lots in any town or city, not exceeding one acre, to the same value, is allowed.[26]

In case the homestead is sold under legal proceedings the amount paid the judgment debtor is exempt for one year, and if reinvested in a homestead is entitled to the same exemption as the original homestead.[27]

[23] Rev. Stat., S. C., 1893, Sec. 2131; as amended, L., S. C., 1896, 192; Const., S. C., Art. 3, Sec. 28.

[24] Rev. Stat., S. C., 1893, Sec. 2132. *In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81.

[25] Rev. Stat., S. C., 1893, Sec. 2133; as amended, L., S. C., 1896, p. 192.

[26] Civil Code Pro., S. Dak., Sec. 323 (7); as amended, L., S. Dak., 1890, p. 201.

[27] Civil Code, S. Dak., Sec. 323

A conveyance or incumbrance of a homestead is invalid, if the owner is married and both husband and wife are residents of the state, unless both husband and wife concur in and sign the same joint instrument or separate instruments.[28]

The homestead is liable for taxes, and the purchase price and is subject to mechanics' lien for work, labor or material done or furnished for its improvement.[29]

The homestead must not embrace more than one dwelling-house and its appurtenances, but a shop, store or other building situated thereon and really used or occupied by the owner in the prosecution of his ordinary business may be deemed an appurtenance; if it embraces more than one lot they must be contiguous.[30]

The homestead can not include any gold or silver mine or mill or any smelter or machinery used or intended to be used for the reduction or milling of gold or silver ores.[31]

The following property is absolutely exempt: All family pictures; a pew; a burial lot; the family bible and all school-books used by the family, and all other books used as a part of the family library, not exceeding $200 in value; wearing apparel of debtor and family; provisions for the debtor and family necessary for one year, provided or growing, or both, and fuel for one year; the homestead.[32]

In addition to the property mentioned in section 323, the debtor, if the head of a family, may select from all other personal property not absolutely exempt goods, chattels, merchandise, money or other personal property not exceeding $750 in value; and if a single person, not the head of a family, personal property not exceeding $300 in value; this act does not affect existing contracts nor reduce exemptions thereon.[33]

Instead of the exemptions provided for in sections 323 and 324, the debtor, if the head of a family, may select the fol-

(8); as amended; L., S. Dak., 1890, p. 201.

[28] Pol. Code, S. Dak., Chap. 38, Sec. 3; as amended, L. S.. Dak., 1891, p. 190; L., S. Dak., 1891, p. 191.

[29] S. Dak. Stat.. 1899. Sec. 3364–5.

[30] S. Dak. Stat., 1899, Sec. 3366–9.

[31] S. Dak. Stat., 1899, Sec. 3380.

[32] Civil Code Pro., S. Dak.. Sec. 323; as amended, L., S. Dak., 1890, p. 200.

[33] Civil Code, S. Dak., Sec. 324; as amended, L., S. Dak., 1890, p. 202.

lowing property, which is then exempt: All miscellaneous books and musical instruments for the use of the family, not exceeding $200 in value; all household and kitchen furniture, including beds, bedsteads and bedding used by the debtor and family, not exceeding $200 in value; in case the debtor owns more than $200 worth of such property he must select therefrom such articles to the value of $200, leaving the remainder subject to process; two cows, five swine, two yoke of oxen or one span of horses or mules, 25 sheep and their lambs under six months old, and all the wool of the same, and all cloth or yarn manufactured therefrom; the necessary food for such animals for one year; one wagon, one sleigh, two plows, one harrow; farming machinery and utensils, including tackle for teams, not exceeding $1,250 in value; the tools and implements of any machine [mechanic], whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade, not exceeding $200 in value; the library and instruments of any professional person, not exceeding $300 in value.[34]

The wages due a nonresident of the state, earned and payable outside the state, are allowed the same protection from process in the courts of the state as are allowed by the state of the residence of such nonresident.[35]

Moneys received by a widow or children for insurance upon the life of any person who when living was the head of a family are exempt.[36]

The avails of any policy of insurance heretofore or hereafter issued upon the life of any person, and payable upon death to assigns, estate, executors or administrators of the insured, not exceeding $5,000, if the insured at the time of death reside or resided in the state and leave surviving a widow or husband or any minor child, enures to the benefit of such husband or wife or minor child free from the debts of such decedent.[37]

Neither the homestead nor any article of personal property can be claimed as exempt on an execution issued for judg-

[34] Civil Code, S. Dak., Sec. 325; as amended, L., S. Dak., 1890, p. 202.

[35] L., S. Dak., 1893, Chap. 97, Sec. 3, p. 165.

[36] L., S. Dak., 1890, p. 203.

[37] Sess. Laws, S. Dak., 1895, p. 93.

ment for the purchase price. None except absolute exemptions are allowed to a corporation for profit, to a nonresident, to a debtor in the act of removing with his family from the state, or who has absconded, taking his family, nor for laborers' or mechanics' wages or physicians' bills, nor for a debt incurred for property obtained under false pretenses, nor for fines, penalties or costs in criminal prosecutions. None except absolute exemptions and personal property to the value of $500 for forfeitures of undertakings or bonds.[38]

Upon the failure of the debtor to claim exemptions his wife may do so, and upon her failure one of the children of 16 years of age.[39]

TENNESSEE.— A homestead in the possession of each head of a family, and the improvements thereon, to the value in all of $1,000, is exempt from process during the life of such head of a family, to enure to the benefit of the widow and during the minority of their children occupying the same; the property can not be alienated without the joint consent of husband and wife, while the relation exists; this exemption does not operate against public taxes nor debts contracted for the purchase money of the homestead or improvements thereon.[40]

Each head of a family, owning real estate, may elect where the homestead shall be set apart, whether living on the same or not.[41]

The provisions of section 2935 apply to equitable estates, and the court may prescribe how a homestead therein shall be set apart.[42]

The provisions of section 2935 apply to leasehold property occupied by every housekeeper or head of a family in the state, when such leasehold estate is for more than two and not exceeding fifteen years.[43]

The homestead upon leasehold estates is not exempt from process for rent due thereon.[44]

[38] S. Dak. Stat., 1899, Sec. 6356–6360, 3365; L., S. Dak., 1903, p. 158.

[39] S. Dak. Stat., 1899, Sec. 6356.

[40] Const., Tenn., Art. XI, Sec. 11. Code, Tenn., 1884, Sec. 2935. As to effect of conveying homestead before bankruptcy on right to claim exemption see *In re* Tollelt (C. C. A. 6 Cir.), 106 Fed. Rep. 866, 5 Am. B. R. 404; 3 N. B. N. 454.

[41] Code, Tenn., 1884, Sec. 2936.

[42] Code, Tenn., 1884, Sec. 2937.

[43] Code, Tenn., 1884, Sec. 2938.

[44] Code, Tenn., 1884, Sec. 2939.

When lands in which a debtor is entitled to homestead are sold under order of court, $1,600 thereof are, under the order of court, to be invested in property which is exempt from process.[45]

Upon the death of a head of a family without widow or minor children, homestead becomes liable for the payment of debts.[46]

The following property is exempt from process in the hands of every male citizen of the age of eighteen years and upwards, and every female who is the head of a family, one gun; every single woman who uses it for a livelihood, one sewing-machine; every mechanic in the state who is engaged in the pursuit of his trade or occupation, one set of mechanic's tools, such as are usual and necessary to the pursuit of his trade; thirty dollars of the wages of every mechanic or other [47] laborer; the lien created by service of garnishment only affects that portion of a laborer's wages that may be due at the time service is made; [48] numerous specific exemptions to heads of families.[49]

To the head of a family engaged in agriculture there is further exempted two plows, two hoes, one grubbing-hoe, one cutting-knife, one harvest cradle, one set of plow gears, one pitchfork, one rake, three iron wedges and ten heads of stock hogs.[50]

The personal property mentioned in sections 2931 and 2932 is exempt from seizure in criminal and civil cases, but not exempt from distress or sale for taxes, or on a judgment for failure or refusal to work on public roads, or for fines and costs for voting out of district or ward in which the voter lives, or for carrying concealed weapons, or selling intoxicating liquors on election day.[51]

When the debtor absconds or leaves his family, the exempted property is set apart for the use of the wife and family, and is exempt in their hands; such property, on death of owner, is exempt in the hands of widow and children.[52]

[45] Code, Tenn., 1884, Sec. 2941.
[46] Code, Tenn., 1884, Sec. 2945.
[47] Act, Tenn., 1887, p. 267.
[48] Act, Tenn., 1895, p. 388.
[49] See Sec. 3798, Code, Tenn, 1884, Sec. 2031; Act, Tenn, 1895, p. 68.
[50] Code, Tenn., 1884, Sec. 2932.
[51] Code, Tenn., 1884, Sec. 2933.
[52] Code, Tenn., 1884, Sec. 2934.

Proceeds of life insurance for the benefit of wife or children are exempt.[53]

Property of municipal corporations held and used for public purposes is exempt.[54]

The moneys and effects of a decedent set apart to his widow are exempt from process.[55]

Uniforms, etc., of the national guard are exempt.[56]

The property of free public libraries is exempt from execution.[57]

The wages of any employe to the amount of $30 are exempt.[58]

Texas.[59] — The homestead of a family, not in a town or city, consists of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village consists of a lot or lots, not to exceed in value $5,000 at the time of their designation as a homestead, without reference to the value of any improvements thereon; the homestead must be used for the purpose of a home or as a place to exercise the calling or business of the head of a family; a temporary renting does not change the same when no other has been acquired; the proceeds of a voluntary sale are exempt for six months; this homestead is exempt from process.[60]

[53] Code, Tenn., 1884, Secs. 1813 and 3135.

[54] Code, Tenn., 1884, Sec. 1676.

[55] Code, Tenn., 1884, Sec. 3126.

[56] Act, Tenn., 1887, Chap. 159, Sec. 18, p. 274.

[57] Act, Tenn., 1897, Chap. 105, Sec. 13, p. 256.

[58] Acts of Tenn., 1899, Chap. 38, p 53.

[59] The homestead laws of this state are dealt with in *In re* Flannagan, 117 Fed. Rep 695, 9 Am. B. R. 140; *In re* Harrington, 99 Fed. Rep. 390, 3 Am. B. R. 639; *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140; *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re* Coffman, 93 Fed. Rep. 422, 1 Am. B. R. 530.

[60] Const., Tex., Art. XVI, Secs. 28, 50, 51; Sayle, Tex. Civil Stat., 1897, Art. 2395 and 2396. *In re* Flannagan, 117 Fed. Rep. 695, 9 Am. B. R. 140; *In re* Harrington, 99 Fed. Rep. 390, 3 Am. B. R. 639. For the mode of setting apart homestead and the treatment of excess, see Art. 2403–2427; homestead can not be conveyed without the consent of the wife, evidenced by her joining in the conveyance, properly signed, acknowledged and certified, Art. 636; for setting apart exempt property to widow and children, see Art. 2046; for what debts homestead liable on death of owner, see Art. 2060; for mechanics' liens on homestead, see Art. 3304.

The homestead exemption does not apply where the debt is due for the purchase money or taxes due thereon; for work and material used in constructing improvements thereon; such work and material must have been contracted for in writing, and the consent of the wife, if there be one, must be obtained in the same manner as is by law required in making sale and conveyance of the homestead.[61]

The following property is exempt from process for the payment of debts, except as provided in Title XLII, Chap. I: The homestead of the family; all household and kitchen property; a lot or lots in a cemetery for burial purposes; all implements of husbandry; all tools, apparatus and books belonging to any trade or profession; the family library and all family portraits and pictures; five milch cows and their calves; two yoke of work oxen, with necessary yokes and chains; two horses and one wagon; one carriage or buggy; one gun; twenty hogs, twenty head of sheep; all saddles, bridles and harness necessary for family use; all provisions and forage on hand for home consumption; all current wages for personal services.[62]

The following property is exempt to persons not constituents of a family: A lot or lots in a cemetery held for burial purposes; all wearing apparel; all tools, apparatus and books belonging to any trade or profession; one horse, saddle and bridle; current wages for personal service.[63]

Every ferryman may hold exempt from process one ferryboat, keel or flatboat, used as a ferryboat, with necessary tackle, not exceeding $500 in value; such exemption does not apply to damages sustained by the negligence of such ferryman.[64]

Public property of cities, towns and counties is exempt, ex-

[61] Sayle, Tex. Civil Stat., 1897, Art. 2401. Const., Art. XVI, Sec. 50.

[62] Const., Tex., Art. XVI, Secs. 28 and 50; Sayle, Tex. Civil Stat., 1897, Art. 2395; for what debts exempted property, other than the homestead, is liable in case of death, see Art. 201.

[63] Const., Tex., Art. XVI, Sec. 28; Sayle, Tex. Civil Stat., 1897, Art. 2397. *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140.

[64] Sayle, Tex. Civil Stat., 1897, Art. 2398.

cept as to vendors', mechanics' or other builders' liens, or other liens existing on April 18, 1876.[65]

All public libraries are exempt.[66] The exemption of personal property above mentioned does not apply when the debt is due for rents and advances made by a landlord to his tenant under the provisions of Title LXIII, or to other debts which are a lien on such property.[67]

Cemetery lots laid out and sold for a city for private places of burial are exempt.[68]

UTAH.— A homestead, consisting of lands and appurtenances, which lands may be in one or more localities, not exceeding in all $1,500 in value for the head of the family, and the further sum of $500 for his wife and $250 for each other member of his family, is exempt from process except as provided by law.[69]

If the homestead claimant is married the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property.[70]

Any person who is the head of a family may make a declaration of homestead; a failure to make such declaration does not impair the right.[71]

The declaration may be made by the wife, in case the husband has not made the declaration. It must be executed, acknowledged and recorded in the county where the land is situated.[72]

The declaration of homestead must contain a statement showing that the declarant is the head of a family, or when made by the wife, that the husband has not made such declaration; a description of the premises; an estimate of their cash value.[73]

[65] Sayle, Tex. Civil Stat., 1897, Art. 2399; Const., Tex., Art. IX, Sec. 9.

[66] Sayle, Tex. Civil Stat., 1897, Art. 2400.

[67] Sayle, Tex. Civil Stat., 1897, Art. 2402.

[68] Sayle, Tex. Civil Stat., 1897, Art. 571.

[69] Rev. Stat., Utah, 1898, Sec. 1147; as to homestead after death of owner, see Sec. 2829.

[70] Rev. Stat., Utah, 1898, Sec. 1148.

[71] Rev. Stat., Utah, 1898, Sec. 1149.

[72] Rev. Stat., Utah, 1898, Sec. 1150.

[73] Rev. Stat., Utah, 1898, Sec. 1151.

The husband or wife may claim and select the homestead.[74]

A sale of one homestead does not prevent the selection or purchase of another.[75]

The head of a family means the husband or wife, when claimant is married. In no case are both husband and wife entitled, each, to a homestead as herein provided; every person who has residing on the premises with him or her and under his or her care and maintenance his or her child or the child of a deceased husband or wife; a minor brother or sister or the minor child of such deceased person; a father, mother, or grandparents; the father, mother, or grandparents of a deceased husband or wife; an unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves.[76]

Both husband and wife must join in the conveyance or incumbrance by the married owner of a homestead.[77]

The homestead is subject to the satisfaction of judgments on debts secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same; for debts secured by lawful mortgage on the premises; for debts created for the purchase thereof and taxes.[78]

In case the husband or wife desert his or her family, the exemption continues in favor of the one residing upon the premises.[79]

When homestead is conveyed, the premises are not liable to any incumbrance to which it would not be subject in the hands of the owner; the proceeds of the sale are exempt for one year.[80]

The proceeds of insurance on homestead are exempt.[81]

Water rights and interests, either in the form of corporate

[74] Rev. Stat., Utah, 1898, Sec. 1152.

[75] Rev. Stat., Utah, 1898, Sec. 1153.

[76] Rev. Stat., Utah, 1898, Sec. 1154.

[77] Rev. Stat., Utah, 1898, Sec. 1155.

[78] Rev. Stat., Utah, 1898, Sec. 1156.

[79] Rev. Stat., Utah, 1898, Sec. 1157.

[80] Rev. Stat., Utah, 1898, Sec. 1158.

[81] Rev. Stat., Utah, 1898, Sec. 1159.

stock or otherwise, owned by the judgment debtor, are exempt to the extent that such rights and interests are necessarily employed in supplying water to the homestead for domestic and irrigating purposes; but such rights and interest are not exempt from assessment and sale by companies owning the water, nor from process against such companies.[82]

If the homestead is sold under legal proceedings, the money paid to the judgment debtor under such sale is exempt.[83]

The following property is exempt from execution, except as provided herein: Chairs, tables and desks, to the value of $200; the library and musical instruments in actual use in the family; necessary household, table and kitchen furniture, to the value of $300; one sewing-machine, all family hanging pictures, oil paintings and drawings, portraits and their necessary frames, all carpets in use; provisions actually provided for individual and family use, sufficient for three months; two cows with their sucking calves, two hogs with all their sucking pigs, all wearing apparel of every person and family, all beds and bedding; if the debtor is the head of a family consisting of five or more members, there is a further exemption of two cows and their sucking calves; farming utensils to the value of $300; two oxen or two horses, or two mules and their harness; one cart or wagon, all seed, grain or vegetables actually provided, reserved, or on hand, for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value $200; crops, whether growing or harvested, and the proceeds thereof, not exceeding $200 in value; the tools, chest, and implements of a mechanic or artisan, necessary to carry on his trade, not exceeding $500 in value; the notarial seal and records of a notary public; the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their professions, with their scientific and professional libraries, and the law professional libraries and office furniture of attorneys, counsellors and judges, and the libraries of ministers of the gospel, and the typewriting-machine of a stenographer, typewritist, copyist and reporter; and the type, presses and material of a printer or publisher

[82] Rev. Stat., Utah, 1898, Sec. 1160.

[83] Rev. Stat., Utah, 1898, Sec. 1164.

necessary in the pursuit of his business, not exceeding in value $500; the cabin of a miner, not exceeding in value $500; also his sluices, pipes, hose, windlass, derricks, cars, pumps and tools, not exceeding $500 in value; two oxen, two horses, or two mules, and their harness; a cart or wagon, one dray or truck, by the use of which a cartman, drayman, truckman, peddler, hackman, teamster, or other laborer habitually earns his living; one horse with vehicle and harness, or other equipments, used by a physician, surgeon or minister of the gospel in making professional visits; the earnings of the debtor for his personal services, rendered at any time within 60 days next preceding the levy of execution, if the debtor be a married man, or with a family dependent upon him for support; all moneys, etc., accruing from any life insurance on the life of the debtor, if the annual premiums do not exceed $500; arms, etc., required by law to be kept; public property of various kinds; the homestead.[84]

No property is exempt from execution on a judgment recovered for its purchase price, or upon a judgment on foreclosure of a mortgage or mechanics' or laborers' lien thereon, nor from sale for taxes. There are no exemptions to nonresidents or persons about to depart from the state with the intention of removing their effects therefrom; but their property is liable to execution with the exception of ordinary wearing apparel.[85]

Food for six months for exempted animals, provided, growing, or both, as the debtor may elect, is exempt.[86]

The earnings of any minor child of any debtor within the state and the proceeds thereof are exempt from execution against such debtor, by reason of any liability of such debtor, not contracted for the special benefit of such minor child.[87]

A judgment for damages for the unlawful taking of exempt property is exempt.[88]

[84] Rev. Stat., Utah, 1898, Sec. 3245; as amended L., Utah, 1899, Chap. 66, p. 99.

[85] Rev. Stat., Utah, 1898, Sec. 3247.

[86] Rev. Stat., Utah, 1898, Sec. 3246.

[87] Rev. Stat., Utah, 1898, Sec. 3243.

[88] Rev. Stat., Utah, 1898, Sec. 3244

The uniform, arms, equipments issued by the state for militia purposes are exempt.[89]

No property is exempt from seizure in satisfaction of fines, etc., imposed by courts-martial.[90]

No property or wages are exempt from the poll tax for labor on roads.[91]

In actions for damages done by trespassing animals, such animals trespassing are liable to process.[92]

VERMONT.[93] — The homestead of a housekeeper or head of a family, consisting of a dwelling-house, out-buildings, and land used in connection therewith, not exceeding $500 in value, used and kept by such person as a homestead, is exempt, except as hereinafter provided.[94]

Such homestead is subject to process upon causes of action existing at the time of acquiring the same, except as provided by law; for this purpose such time is the date of filing the deed of homestead for record in the proper office.[95]

When such head of a family or householder acquires another homestead, the prior homestead becomes liable for his debts, and may be conveyed like other real estate, but the new homestead is not liable for causes of action to which such prior homestead would not have been liable, if the new homestead is acquired with the consideration derived from the sale of the prior homestead, or with other means not derived from the property of such housekeeper or head of a family.[96]

[89] Rev. Stat., Utah, 1898, Sec. 1472.

[90] Rev. Stat., Utah, 1898, Sec. 1487.

[91] Rev. Stat., Utah, 1898, Sec. 1745.

[92] Rev. Stat., Utah, 1898, Sec. 20.

[93] The exemption laws of this state are dealt with in *In re* Gordon, 115 Fed. Rep. 445, 8 Am. B. R. 255; *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268; *In re* White, 103 Fed. Rep. 774, 4 Am. B. R. 613; *In re* Libby, 103 Fed. Rep. 776, 4 Am. B. R. 615; *In re* Marquette, 103 Fed. Rep. 777, 4 Am. B. R. 623; *In re* Oderkirk, 103 Fed. Rep. 779, 4 Am. B. R. 617; *In re* Hopkins, 103 Fed. Rep. 781, 4 Am. B. R. 619; *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53; *In re* Dawley, 94 Fed. Rep. 795, 2 Am. B. R. 496.

[94] Stat., Vt., 1894, Sec. 2179.

[95] Stat., Vt., 1894, Sec. 2186. *In re* Gordon, 115 Fed. Rep. 445, 8 Am. B. R. 255. The homestead is liable for damages and costs recovered for failure to maintain his proportion of division fence between homestead and adjoining lands. Sec. 3579.

[96] Stat., Vt., 1894, Sec. 2188.

No homestead can be conveyed by a married owner thereof, except by way of mortgage thereof for the purchase money, unless wife joins.[97]

When the housekeeper or head of a family dies, leaving a widow, his homestead rests in such widow free of debts, unless legally charged thereon.[98]

The homestead is subject to mechanics' liens thereon.[99]

The following articles are exempt from process, unless turned out to the officer by the debtor: Such suitable apparel, bedding, tools, arms and articles of household furniture as are necessary for sustaining life; one sewing-machine kept for use, one cow not exceeding in value $100, the best swine or the meat of one swine, sheep not exceeding in number ten, nor in value $100, and one year's product of said sheep in wool, yarn or cloth, and forage for ten sheep, one cow and two oxen or horses, as the debtor may select, through one winter, ten cords of firewood or five tons of coal, twenty bushels of potatoes, the pistols, side arms, and equipments of a soldier in the service of the United States, and kept by him or his heirs as mementoes of his service, growing crops, ten bushels of grain, one barrel of flower, three swarms of bees, and their hives with their produce in honey, 200 pounds of sugar, lettered gravestones, the bibles and other books used in the family, a pew, $10 worth of live poultry, the professional books and instruments of physicians, the professional books of clergymen and attorneys at law, to the value of $200, one tool chest kept for use by a mechanic, one yoke of oxen or steers, as the debtor may select, two horses kept and used for team work, and such as the debtor may select in lieu of oxen or steers, not exceeding in value $200, one two-horse wagon with whiffletrees and neckyoke, or one one-horse wagon used for teaming or one ox-cart, as the debtor may choose; one sled or one set of traverse sleds, either for horses or oxen, as the debtor may select; two harnesses, two halters, two chains, one plow, and one ox-yoke, which, with the oxen or steers or horses which the debtor may select for team work, shall not exceed

[97] Stat., Vt., 1894, Sec. 2189.

[98] Stat., St., 1894, Sec. 2183; as amended, L., Vt., 1896, p. 35. *In re* Marquette, 103 Fed. Rep. 777, 4 Am. B. R. 623.

[99] Stat., Vt., 1894, Sec. 2277.

in value $250. No personal property is exempt from process on a suit brought to recover payment for the purchase price thereof, or for material or labor expended on the same.[100]

No fire insurance company is liable on trustee process for the proceeds of policy on exempt property; a person can not be adjudged a trustee by reason of his having in his hands money due the debtor, as his debenture as a member of the general assembly, or as a petit or grand juror of a county court; a member of the general assembly, an officer of the state required to report thereto, can not be adjudged a trustee upon a contract express or implied, for board and lodging furnished him by the principal debtor while attending a session of the general assembly; a person can not be adjudged a trustee by reason of wages or compensation due the principal debtor, for work or labor performed by him in person after the service of the trustee process upon the trustee; no earnings of a minor or a married woman is subject to trustee process in a suit against the parent of such minor or husband of such married woman.[101]

No person, except as herein otherwise provided, is liable on trustee process for a sum due a principal debtor for property sold, conveyed, or delivered by him which was at the time exempt.[102]

Burial lots, etc., are exempt.[103]

No property of a magistrate is exempt from process on a judgment obtained for wrongfully withholding any portion of the fees allowed him.[104]

The avails of a policy of life insurance for the benefit of a married woman, whether effected by herself or her husband, are exempt from the claims of creditors of husband.[105]

When a married woman causes the life of her husband to be insured for her use, if the annual premium does not exceed $300, the avails thereof enures to her benefit, free from the claims of creditors of the husband.[106]

[100] Stat., Vt., 1894, Sec. 1805. *In re* Libby, 103 Fed. Rep. 776, 4 Am. B. R. 615.

[101] Stat., Vt., 1894, Sec. 1312.

[102] Stat., Vt., 1894, Sec. 1313.

[103] Stat., Vt., 1894, Secs. 3595, 3619.

[104] Stat., Vt., 1894, Sec. 332.

[105] Stat., Vt., 1894, Sec. 2656.

[106] Stat., Vt., 1894, Sec. 2653.

The rents, issues and profits of the real estate of a married woman, and the moneys and obligations arising from its sale, and the interest of her husband in her right in real estate are, during coverture, exempt from the sole debts of her husband. But such annual products may be attached for a liability of her husband for necessaries for the wife and family, and for debts for labor or materials furnished upon or for the cultivation or improvement of such real estate.[107]

VIRGINIA.[108] — Every householder, residing in the state, may hold exempt from process issued on any demand for any debt or liability on contract, in addition to the exemptions provided in sections 3650, 3651 and 3652, real and personal estate, or either, to be selected by him, including money and debts due him, to the value of $2,000. Such exemption does not extend to the following cases: *First*, for the purchase price of said estate; *second*, for services rendered by a laboring person or a mechanic; *third*, for liabilities incurred by any public officer, officer of a court, or by an attorney at law for money collected by him; *fourth*, for taxes; *fifth*, for rent; *sixth*, for the legal or taxable fees of any public officer or officer of a court; *seventh*, for any debt or liability on contract, as to which the debtor has waived, as provided by law, his exemptions which he may claim under this section.[109]

[107] L., Vt., 1902, p. 49.

[108] The exemption laws of this state are dealt with in *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. —; *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263; Moran v. King (C. C. A. 4th Cir.), 111 Fed. Rep. 730, 7 Am. B. R. 176; *In re* Wilson, 108 Fed. Rep. 197, 6 Am. B. R. 287; Richardson v. Woodward (C. C. A. 4th Cir.), 104 Fed. Rep. 873, 5 Am. B. R. 94; *In re* Tobias, 103 Fed. Rep. 68, 4 Am. B. R. 555; *In re* Sisler, 96 Fed. Rep. 402, 2 Am. B. R. 760.

[109] Const., Va., Art. XI, Sec. 1. Moran v. King, 111 Fed. Rep. 730, 7 Am. B. R. 176; *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263; Richardson v. Woodward (C. C. A. 4th Cir.), 104 Fed. Rep. 873, 5 Am. B. R. 94.

Code, Va., 1887, Sec. 3630: The real estate set apart to the householder as exempt is held by widow and minor children exempt until the death or marriage of the widow, and during the unmarried minority of the children. Sec. 3635: If householder has not set apart real estate during his lifetime, the widow and minor children may have it done. Sec. 3636: If widow receives dower or jointure, she can not have homestead exemption, but the rights of the minor children are unimpaired, Sec. 3637. As to garnishment, see Sec. 2076. Richardson v. Woodward (C. C. A. 4 Cir.), 104 Fed.

In order to secure an exemption to real estate, a declaration of intention to claim it must be made in writing, with a description of the property and an estimate of its cash value, which declaration must be admitted to record as a deed for land. Equitable as well as legal estates may be selected.[110]

The real estate set apart according to section 3631 can not be encumbered or aliened by the owner, if a married man, except by the joint deed of himself and wife, but the householder may, without the consent of his wife, mortgage or encumber such real estate for the purchase money thereof, or for the repair or erection of buildings thereon.[111]

If the householder does not set apart any real estate, or if what he does set apart is not of the value of $2,000, he may (in addition to the exemptions to which he is entitled under sections 3650, 3651 and 3652) in the first case select and set apart, to be held as exempt, so much of his personal estate as does not exceed $2,000, and in the latter case personal estate the value of which, when added to the value of the real estate set apart, does not exceed the said sum.[112]

The real or personal estate which a householder, his widow or minor children, may be entitled to may be set apart at any time before the same is subjected to process.[113]

The real and personal estate set apart as exempt to the value of $2,000 is not affected by any increase in its value afterwards, unless caused by permanent improvements on the real estate.[114]

A waiver of exemption may be made as to all exempted property except the property mentioned in sections 3650, 3651 and 3652.[115]

When any person entitled to the exemption provided in sec-

Rep. 873, 5 Am. B. R. 94; *In re* Wilson, 108 Fed. Rep. 197, 6 Am. B. R. 287, 3 N. B. N. 761; *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. —; *In re* Tobias, 103 Fed. Rep. 68, 4 Am. B. R. 555.

[110] Code, Va., 1887, Sec. 3631.

[111] Code, Va., 1887, Sec. 3634.

[112] Code, Va., 1887, Sec. 3638. How personal estate is set apart, see Secs. 3639-3641; *In re* Wilson, 108 Fed. Rep. 197, 6 Am. B. R. 287; *In re* Tobias, 103 Fed. Rep. 68, 4 Am. B. R. 555.

[113] Code, Va., 1887, Sec. 3642.

[114] Code, Va., 1887, Sec. 3643.

[115] Code, Va., 1887, Sec. 3647. *In re* Sisler, 96 Fed. Red. 402, 2 Am. B. R. 760; but see Lockwood v. Exchange National Bank, 190 U. S. 294.

tion 3630 ceases to be a householder, or when any person removes from the state, his exemption ceases. Upon the death of a householder, leaving surviving him neither wife nor minor child, or if she or any of them survive him and he leaves any estate which they may hold as exempt, then upon her death or marriage, and if there be minor children as soon as the youngest of those who attain the age of 21 years attain that age or all marry, if they all marry before attaining that age, the exemption ceases.[116]

In addition to the estate not exceeding $2,000 the householder is also entitled to hold exempt from process the following articles, to be selected by him, except that live stock so exempted under this section, and section 3651, is not exempt under chapter 93 of the code: The family bible, family pictures, schoolbooks, and library for the use of the family, not exceeding in all $100 in value, a pew, a lot in a burial ground, all necessary wearing apparel of himself and family, all beds, etc., necessary for the use of the family, all stoves and appendages put up and kept for the necessary use of the family not exceeding three, one cow and her calf till one year old, one horse, six chairs, one table, six knives, six forks, six plates, one dozen spoons, two dishes, two basins, one pot, one oven, six pieces of wooden or earthenware, one loom and its appurtenances, one safe or press, one spinning-wheel, one pair of cards, one axe, two hoes, ten barrels corn, or, in lieu thereof, 25 bushels rye or buckwheat, five bushels wheat or one barrel of flour, 20 bushels of potatoes, 200 pounds of bacon or pork, three hogs, fowls not exceeding in value $10, $10 worth of forage or hay, one cooking-stove and utensils, one sewing-machine; in the case of a mechanic, the tools and utensils of his trade, not exceeding $100 in value; in case of an oysterman or fisherman, his boat and tackle, not exceeding $200 in value.[117]

If the householder be at the time actually engaged in the business of agriculture there is also exempt from process while he is so engaged, to be selected by him, the following articles: One yoke of oxen, or a pair of horses or mules in

[116] Code, Va., 1887, Sec. 3649.

[117] Code, Va., 1887, Sec. 3650; as amended by acts of the assembly, Va., 1901–02, Chap. 54, p. 48.

lieu thereof (unless he selects or has selected under section 3650 a horse or mule, in which case he may select only one), with the necessary gearing, one wagon or cart, two plows, one dray, one harvest cradle, one pitchfork, one rake, and two iron wedges.[118]

Wages owing a laboring man, being a householder, not exceeding $50 a month, are exempt.[119]

Upon the death of a householder, leaving a widow, minor children or unmarried daughters, there is vested in them, free from sale for funeral expenses, costs of administration, or debts of the decedent, such property of the decedent as is exempt under section 3650.[120]

The exemptions under sections 3650, 3651, 3652 and 3653 do not extend to taxes, nor to process for the purchase price of the articles therein mentioned, nor for fines and damages arising from trespass by animals under section 2042 as to such animal so trespassing.[121]

Any deed of trust, mortgage, or other writing or pledge made by a householder on property exempt under section 3650 is void.[122]

The word "householder" is equivalent to the expression "householder or head of a family," and the term "laboring man" includes householders who receive wages for their services.[123]

The wages and salaries of all officials, clerks and employees of any city, town, or county are subject to garnishment, provided said persons are not exempt from process under chapter 178 of the code.[124]

Exemptions do not extend to fines imposed by courts-martial.[125]

Uniforms, arms, and equipments of militia are exempt from process.[126]

[118] Code, Va., 1887, Sec. 3651.

[119] Code, Va., 1887, Sec. 3652. See acts of assembly of Va., 1895-6, p. 324.

[120] Code of Va., 1887, Sec. 3653.

[121] Code, Va., 1887, Sec. 3654, as amended by act of assembly, 1893–94, p. 447.

[122] Code, Va., 1887, Sec. 3655.

[123] Code, Va., 1887, Sec. 3657; as amended by acts of the assembly, Va., 1887–8, p. 423.

[124] Acts of the assembly of Va., 1897–98, p. 445.

[125] Code, Va., 1887, Sec. 329.

[126] Code, Va., 1887, Sec. 353.

Payments made in weekly or monthly installments to the holder of any policy of insurance in any accident, sick benefit company or any company of like kind are not subject to process for any debt due by the holder of such policy.[127] Wages of minors are not liable in payment of debts of parents.[128]

WASHINGTON.[129] — The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this act provided.[130]

If the claimant is married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property; when the claimant is not married, but the head of a family, the homestead may be selected from any of his or her property.[131]

The homestead is exempt from process except in satisfaction of judgments obtained on debts secured by mechanics' or laborers' or vendors' liens upon the premises; on debts secured by mortgages executed by husband and wife or unmarried claimants.[132]

Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding $2,000 in value; the premises included in the homestead must be actually intended and used for the claimants, and can not be devoted exclusively to any other purpose.[133]

The conveyance or incumbrance of a homestead of a married person must be by both husband and wife.[134]

In order to select a homestead the husband or wife, or other head of a family, must execute and acknowledge a declaration thereof in the same manner as a grant of real estate, and file the same for record.[135]

The declaration of homestead must contain a statement

[127] Acts of assembly, Va., 1895–96, p. 700.

[128] Acts of the assembly, Va., 1893–4, p. 448.

[129] The exemption laws of this state are dealt with in *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389; *In re* Thomas, 96 Fed. Rep. 828, 3 Am. B. R. 99.

[130] L., Wash,. 1895, Sec. 1, p. 109. *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389.

[131] L., Wash., 1895, Sec. 2, p. 109.

[132] L., Wash., 1895, Secs. 4 and 5, pp. 109 and 110.

[133] L., Wash., 1895, Sec. 24, p. 112. Exemption in case of assignment, see L., Wash., 1897, p. 6.

[134] L., Wash., 1895, Sec. 6, p. 110.

[135] L., Wash., 1895, Sec. 30, p. 113.

showing that the declarant is the head of a family; when the declaration is made by the wife, that her husband has not made it; that the person making it is residing on the premises and has purchased the same as a homestead and intends to reside thereon and claims them as a homestead; a description of the premises; an estimate of their cash value.[136] The homestead may be abandoned by a declaration thereof or a grant executed by husband and wife or by an unmarried person; this declaration is effectual only from the time it is filed in the office in which the homestead was recorded.[137]

When homestead is sold under legal proceedings, the money paid to claimant is entitled to the same protection against process as the law gives to homestead.[138]

The phrase "head of a family" in the homestead or exemption law means the husband or wife when the claimant is married; every person who has residing on the premises with him or her, and under his or her care and maintenance, either his or her minor child or the minor child of a deceased husband or wife; a minor brother or sister or their minor child; a father, mother or grandparents; a father, mother or grandparents of a deceased husband or wife; an unmarried sister, or any other of the relatives mentioned in this section, who have attained majority and are unable to support themselves.[139]

The following properly is exempt from process, except as specially hereinafter provided: *First,* all wearing apparel of debtor and family; *second,* all private libraries, not to exceed $500 in value, and all family pictures and keepsakes; *third,* to each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods, utensils and furniture, not exceeding $500, coin, in value, to be selected by the debtor, his wife or the officer having the execution; *fourth,* to each householder, two cows with their calves, five swine, two stands of bees, 36 domestic fowls; provisions and fuel for the comfortable maintenance of such householder and family for six

[136] L., Wash., 1895, Sec. 31, p. 113.
[137] L., Wash., 1895, Secs. 7 and 8, p. 110.
[138] L., Wash., 1895, Sec. 21, p. 111.
[139] L., Wash., 1895, Sec. 25, p. 112. See L., Wash., 1897, Sec. 1, p. 93.

months, also feed for such animals for six months; in lieu of the animals named above the householder may select property to the value of $250, coin; *fifth,* to a farmer, one span of horses or mules with harness, or two yoke of oxen, with yokes and chains, and one wagon; farming utensils actually used about the farm, not to exceed $500 in value, coin; 150 bushels wheat, 150 bushels oats or barley, 50 bushels potatoes, 10 bushels corn, 10 bushels peas, 10 bushels onions for seed; *sixth,* to a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also the material used in his trade, not exceeding in value $500 in coin; *seventh,* to a physician, his library, not to exceed $500 in value in coin; also one horse, with harness and buggy; the instruments used in his practice, and medicines, not exceeding in value $200 in coin; *eighth,* to attorneys, clergymen and other professional men, their libraries, not exceeding in value $1,000, coin, also office furniture, fuel and stationery, not exceeding in value $200 in coin; *ninth,* all firearms kept for the use of any person or family; *tenth,* to any person, a canoe, skiff or small boat, with its oars, sails and rigging, not exceeding in value $250; *eleventh,* to a person engaged in lightering for the support of himself or family, one or more lighters, barges or scows, and a small boat, with oars, sails and rigging, not exceeding in the aggregate in value $250 in coin; *twelfth,* to a teamster or drayman engaged in that business for the support of himself or family, his team, consisting of one span of horses or mules, or two yoke of oxen, or a horse and mule, with harness, yokes, one wagon, truck, cart or dray; *thirteenth,* to a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business and camp equipments, not exceeding in value $300 in coin; *fourteenth,* a sufficient quantity of feed for the animals mentioned in the several subdivisions for six months. No property is exempt form process issued for the purchase price or for taxes. Each person may select the property to which he is entitled.[140]

[140] Hill, Ann. Code Proc., Wash., 1891, Sec. 486. Exemption in case of assignments, see L., Wash., 1897, p. 6. *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389.

In addition to the property exempt under section 486, there is exempt to every householder in the state property to the amount of $1,000; but no property is exempt from process for clerk's, laborer's or mechanic's wages earned within the state, nor is any property exempt from execution issued upon a judgment against an attorney or agent for money or property coming into his hands from or belonging to the client or principal.[141]

The avails of fire insurance on exempted property are exempt.[142]

The avails of all life and accident insurance are exempt from all liability for any debt.[143]

Current wages or salary to the amount of $100 for personal services rendered by any person having a family dependent upon him for support are exempt.[144]

Any money received by a citizen of the state as a pension from the government of the United States, whether in his actual possession or is deposited or loaned by him, is exempt from process.[145]

When any debtor dies or absconds and leaves his family, money exempted by section 487 is exempt to his family.[146]

Benefits payable by charitable associations, etc., to widows, orphans, or others dependent upon deceased members of such association, are not liable to garnishment.[147]

The arms, etc., of members of the national guard are exempt.[148]

West Virginia.— Any husband or parent residing in the state, or the infant children of deceased parents, may hold a homestead of the value of $1,000, and personal property to the value of $200, exempt from process, provided that such homestead exemption shall not affect obligations existing at the time of the adoption of the constitution of 1872, and pro-

[141] L., Wash., 1897, Sec. 1, p. 93; as amended L., Wash., 1901, Chap. 158, p. 323; for what is meant by householder, see Sec. 2.

[142] L., Wash., 1895, Sec. 1, p. 1345.

[143] L., Wash., 1895, Sec. 1, p. 336; as amended, L., Wash., 1897, Sec. 1, p. 70.

[144] L., Wash., 1897, Sec. 1, p. 24. See L., Wash., 1893; Sec. 25, p. 441.

[145] Hill, Ann. Code Proc., Wash., 1891, Sec. 487.

[146] Hill, Ann. Code Proc., Wash., 1891, Sec. 488.

[147] L., Wash., 1895, Sec. 8, p. 402.

[148] L., Wash., 1895, Sec. 82, p. 223.

vided that no property is exempt from taxes or for the payment of the purchase money due upon such property or for debts contracted for the erection of improvements thereon.[149]

Every husband or parent, and every guardian or curator of any infant child of deceased or insane parents, may acquire a homestead by a writing, executed and acknowledged according to law, in the same manner as deeds are executed; such writing must be recorded in the office of the county clerk.[150]

The real estate so set apart, from the time said writing is delivered to the county clerk, is exempt from debts thereafter incurred, except debts incurred for the purchase money, or for the erection of permanent improvements thereon and taxes; it is not exempt from debts and liabilities incurred prior to the delivery of such writing for record; this does not impair any right acquired under chapter 193 of the acts of 1872 and 1873.[151]

If the homestead set apart is not of a greater value than $1,000 at the time of the execution and recordation of the declaration thereof, the same is not affected by any increase in value unless caused by the erection of permanent improvements thereon.[152]

In case of the death of a husband or parent owning a homestead, the benefit thereof descends to his or her minor children, and is to be enjoyed by them until all of said infants attain the age of 21 years or die.[153]

Any husband or parent residing in this state, or the widow, or the infant children of deceased parents, may set apart and hold personal property to the value of $200, exempt from process, except as hereafter appears; any mechanic, artisan or laborer residing in the state may hold the working tools of his trade or occupation to the value of $50 exempt.[154]

After the death of any husband or parent residing in the

[149] Const. of W. Va., 1872, Art. VI, Sec. 48. Code, W. Va., 1891, Chap. XLI, Sec. 30, p. 303.

[150] Code, W. Va., 1891, Chap. XLI, Sec. 31, p. 303.

[151] Code, W. Va., 1891, Chap. XLI, Sec. 32, p. 303.

[152] Code, W. Va., 1891, Chap. XLI, Sec. 33, p. 304.

[153] Code, W. Va., 1891, Chap. XLI, Sec. 34, p. 304.

[154] Const., W. Va., 1872, Art. VI, Sec. 48; Code, W. Va., 1891, Chap. XLI, Sec. 23, p. 301.

state, his widow or minor children may hold exempt $200 worth of personal property.[155]

No exemptions can be claimed as against the purchase money for the personal estate, nor against taxes.[156]

Any deed of trust, mortgage or other writing made by a husband or parent, to give a lien on property set apart as exempt, is void.[157]

A married woman may insure the life of her husband, and the proceeds of such insurance are free from the claims of the creditors of her husband; but such exemption does not apply when the annual premium paid out of the funds of the husband exceeds $150.[158]

Wisconsin.[159] — A homestead, to be selected by the owner, consisting, when not included in any city or village, of not exceeding forty acres of land, used for agricultural purposes, and when included in any city or village of any quantity of land not exceeding one fourth of an acre, and the dwelling-house thereon and appurtenances, owned and occupied by any resident of the state, is exempt from seizure or sale on execution, from the lien of every judgment and from liability in every form for the debts of such owner to the amount in value of $5,000, except process for laborers', mechanics' and purchase money liens, and mortgages lawfully executed, and taxes and except as specially otherwise provided by law; such exemption is not impaired by temporary removal with intention to reoccupy, nor by a sale of the homestead, but extends to the proceeds of the sale thereof to an amount not exceeding $5,000, while held, with the intention to procure another homestead therewith, for two years; such exemption extends to land not exceeding altogether the amount and value afore-

[155] Code, W. Va., 1891, Chap. XLI, Sec. 27, p. 302.

[156] Code, W. Va., 1891, Chap. XLI, Sec. 28, p. 303.

[157] Code, W. Va., 1891, Chap. LXXI, Sec. 6, p. 633.

[158] Acts, W. Va., 1893, p. 7, Sec. 5. As to patents of married women for their own invention. Act of W. Va., 1893, p. 7, Sec. 7.

[159] The exemption laws of this state are dealt with in *In re* Neimann, 124 Fed. Rep. 738, 10 Am. B. R. —; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278; *In re* Mayer, 108 Fed. Rep. 599, 6 Am. B. R. 117; *In re* Friedrich, 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Hoag, 97 Fed. Rep. 543, 3 Am. B. R. 290; *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259.

said, owned by husband and wife jointly or in common, and to the interest therein of a tenant in common, or two or more tenants in common having a homestead thereon, with the consent of the co-tenants and to any estate less than a fee held by lease or otherwise.[160]

No mortgage or other alienation of homestead by a married man is valid without the signature of the wife.[161]

The following property, except as specially provided by law, is exempt from process: (1) The family bible; (2) family pictures and schoolbooks; (3) the library of the debtor and every part thereof; but this provision does not extend to circulating libraries; (4) a pew; (5) all wearing apparel of the debtor and family; all beds, etc., kept and used by the debtor and family; all stoves and appendages kept and used by the debtor and family; all cooking utensils and all other household furniture not herein enumerated, not exceeding $200 in value; one gun, rifle, or other firearm, not exceeding $50 in value;[162] (6) two cows, ten swine, one yoke of oxen and one horse or mule, or in lieu of one yoke of oxen and a horse or mule, two horses or two mules, ten sheep, and the wool from the same, either in the raw material or made into yarn or cloth; the necessary food for all stock mentioned in this section for one year, either provided, or growing, or both, as the debtor may choose; also one wagon, cart, or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding $200 in value; (7) the provisions for the debtor and his family for one year, and one year's fuel; (8) the tools and implements and stock in trade of any mechanic, miner, merchant, trader, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding $200 in value; (9) all sewing-machines owned by individuals, and kept for the use of themselves or families; (10) any sword, plate, books, or other articles presented to any person by congress, etc.; (11) printing materials and press or presses, used in the business of any printer or publisher, to an amount not exceeding $500 in value; but no

[160] Stat., Wis., 1898, Sec. 2983; as amended L., Wis., 1901, Chap. 269, p. 365. See Const., Art. I, Sec. 17.

[161] Stat., Wis., 1898, Sec. 2203.

[162] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259.

sum in excess of $400 is exempt from execution for the payment of wages of laborers or servants for services rendered the defendant; (12) the arms, etc., of the national guard, and all military property thereof; (13) all books, maps, plats, and other papers kept and used for the purpose of making abstracts of title to land; (14) the interest owned by any inventor in any invention secured to him by letters patent of the U. S.; (15) the earnings of any person having a family dependent upon him for support at the time of commencement of proceedings for the collection of the debt, including the earnings of minor children, whose earnings contribute to the support of the family, for three months next preceding the issuing of process, to the amount of $60 only, for each month in which such earnings are made or earned; they must not exceed $180 in all for said time; (16) all public property used to extinguish fires; (17) the proceeds of all fire insurance on exempted property; (18) all private property is exempt from process rendered upon any judgment or decree, any county, town, city, village, or school district of the state; (19) all moneys arising on any policy of insurance on the life of a minor, payable to his father, mother, or both, are exempt against the creditors of the father or mother, but not against the creditors of such minor; all moneys arising under any policy of insurance payable to a married woman is exempt from the creditors of her husband and the person effecting such insurance for her benefit, subject to the provisions of section 2347; all moneys, etc., provided for by any mutual beneficiary or fraternal association, etc., authorized to do business in the state, are exempt against the creditors of any member thereof, or of his beneficiary, to the amount of $5,000, in all cases where the insured pays the premiums or any part thereof, but if some other person pays such premiums or assessments the insurance is absolutely exempt;[163] (20) cemetery lots, monuments therein, the coffins, and other articles for the burial of the dead, etc.; (21) pension moneys payable to retired members of the police or fire department in certain cities, or to the widow of minor children of a deceased member; (22) shares in a local building and loan association, as

[163] *In re* Neimann, 124 Fed. Rep. 738, 10 Am. B. R. —.

defined by section 2009, to the value of $1,000 at the time of withdrawal; but this subdivision does not apply to a person owning an exempted homestead. The exemptions provided for in subdivisions 3, 6, 7, 8, 9, 11, 13, 14, 17 and 19, of this section, extend only to debtors having an actual residence in the state, and when such debtors and their families are removing from one place of residence to another, and those granted in subdivisions 5, 6, 11, 13, 14, 15, 17 and 19 shall not be granted as against a claim for manual or domestic labor rendered by any female in or about the dwelling of another. No property exempted by the provisions of this section in actions for the recovery of the purchase price thereof; all articles so exempted may be selected by the debtor when necessary; if debtor fails to claim the exemption, his wife may, unless she has deserted him before sale, select same, and in her own name maintain an action for the possession of the same, or the value thereof, provided the claim of exemption and selection has been made.[164]

No horse entered in any race is exempt from process in an action brought for the recovery of the whole or part of such entrance fee.[165]

The capital stock held by members of mutual co-operative corporations is exempt from process except for debts of the association.[166]

The costs of repairs, etc., of a fence, assessed according to the provisions of 1397, may be recovered by action, and the land is subject to a judgment therefor without exemption.[167]

Wyoming.— Every householder of the state, being the head of a family, is entitled to a homestead, not exceeding in value $1,500, exempt from process arising from any debt, contract, or civil obligation.[168]

Such homestead is exempt while occupied by the owner, or the person entitled thereto, or his or her family.[169]

When any person dies seized of a homestead, leaving a

[164] Stat., Wis., 1898, Sec. 2982. *In re* Freidrich, 100 Fed. Rep. 284, 3 Am. B. R. 801.

[165] Stat., Wis., 1898, Sec. 1467*a*.

[166] Stat., Wis., 1895, Sec. 1786*e*.

[167] Stat., Wis., 1898, Sec. 1397.

[168] Rev. Stat., Wy., 1887, Sec. 2780; Rev. Stat., Wy., 1899, Sec. 3901.

[169] Rev. Stat., Wy., 1887, Sec. 2781; Rev. Stat., Wy., 1899, Sec. 3902.

widow or husband, or minor children, such person is entitled to the homestead, but when there is no such person the homestead is liable for the debts of the deceased.[170]

The homestead may consist of a house and lot, or lots, in any town or city, or if a farm, consisting of any number of acres, not exceeding 160, so that the value does not exceed $1,500.[171]

The homestead may be voluntarily conveyed or incumbered; but when the owner is married, the wife must join and acknowledge separate and apart from her husband.[172]

In the case of the sale of homestead, $1,500 of the proceeds of the sale is exempt; any subsequent homestead acquired with the proceeds is also exempt; no judgment or claim against the owner of such homestead is a lien against the same in the hands of a *bona fide* purchaser for value.[173]

The following property, when owned by any head of a family, and residing with the same, is exempt from process, but no property of any person about to remove or abscond from the state is exempt under sub. 4, of Chap. 1, of Div. 5, of the Rev. Stat.: The family bible, pictures and schoolbooks, a lot in a burial-ground, furniture, bedding, provisions, as the debtor may select, not to exceed in all $500.[174]

Whenever the head of a family dies, deserts, or ceases to live with the same, the family is entitled to receive the benefits of section 2788; when the property before mentioned is the sole and separate property of the wife it is exempt from the debts of the wife to the same extent.[175]

The tools, team, and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for carrying on his business or trade, not exceeding in value $300, the

[170] Rev. Stat., Wy., 1887, Sec. 2782; Rev. Stat., Wy., 1899, Sec. 3903. See also L., Wy., 1890, Chap. LXX, sub. Chap. XIII, p. 266.

[171] Rev. Stat., Wy., 1887, Sec. 2783; Rev. Stat., Wy., 1899, Sec. 3904.

[172] Rev. Stat., Wy., 1887, Sec. 2784.

[173] Rev. Stat., Wy., 1887, Sec. 2786; Rev. Stat., Wy., 1899, Sec. 3906.

[174] Rev. Stat., Wy., 1887, Sec. 2788; Rev. Stat., Wy., 1899, Sec. 3908.

[175] Rev. Stat., Wy., 1887, Sec. 2789; Rev. Stat., Wy., 1899, Sec. 3909.

library, instruments, and implements of any professional man, not exceeding in value $300, are exempt from process.[176]

The necessary wearing apparel of every person, not exceeding in value $150, is exempt.[177]

No article of property, heretofore mentioned, is exempt from process for the purchase money of said article of property, and the person claiming such exemptions must be a *bona fide* resident of the state.[178]

One half of the earnings of a judgment debtor for his personal services, rendered at any time within 60 days next preceding the issuing of process, are exempt when it appears that such earnings are necessary for the use of his family residing within the state, supported in whole or part by his labor.[179]

Fire saving apparatus is also exempt.[180]

[176] Rev. Stat., Wy., 1887, Sec. 2790; Rev. Stat., Wy., 1899, Sec. 3910.

[177] Rev. Stat., Wy., 1887, Sec. 2787; Rev. Stat., Wy., 1899, Sec. 3907.

[178] Rev. Stat., Wy., 1887, Sec. 2790; Rev. Stat., Wy., 1899, Sec. 3910.

[179] Rev. Stat., Wy., 1899, Sec. 3951; as amended L., Wy., 1903, Chap. 31, p. 27.

[180] Stat., Wy., 1887, Sec. 2791; Rev. Stat., Wy., 1899, Sec. 3911.

CHAPTER XVIII.

PREFERENCES AND LIENS.

§ 189. The general nature of preferences and liens.

Preferences and liens, as used in the bankrupt law, usually relate to charges upon the property of an insolvent debtor. But an insolvent debtor may have a lien upon the property of another, who may be either solvent or insolvent. The present inquiry is confined to preferences and liens against an insolvent debtor's property.

A preference is defined by the act itself in the following words: "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [1]

From this definition it appears that a preference may be created by a judgment or a transfer.

By judgment, in this section, is probably meant an order or decree of court upon which is founded process or other proceedings, the object of which is to take hold of the property and withdraw it from the possession and control of the debtor and from the ordinary reach of the creditors for the payment of what is due to them.

A transfer is defined to mean "the sale and every other and different mode of disposing of or parting with property, or the

[1] B. A. 1898, Sec. 60; as amended Feb. 5, 1903, 32 Stat. at L. 797.

possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." [2]

A lien, as used in the bankruptcy statute, includes a hold or claim which one person has upon the property of another as a security for some debt or charge. There are common law, statutory and equitable liens. As ordinarily used in the sense of the bankrupt law, liens are included in the definition of a preference.

A preference or a lien may be valid or invalid or voidable. It may be avoided if tainted with fraud, or it may be avoided, although otherwise unobjectionable, because made fraudulent by the provisions of the bankrupt statute.

§ 190. Valid preferences and liens.

The statute expressly recognizes certain preferences, liens or charges to be valid.[3] They are: *First,* taxes legally owing by the bankrupt to the United States, state, county, district or municipality. *Second,* the actual and necessary cost of preserving the estate subsequent to filing the petition. *Third,* the filing fees paid by creditors. *Fourth,* the actual cost of administration. *Fifth,* wages due to workingmen, clerks or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed $300 to each claimant. *Sixth,* a debt owing to any person who by the laws of the states or the United States is entitled to priority. *Seventh,* any preference, valid under local laws, given more than four months prior to the filing of the petition.[4] *Eighth,* any preference created within four months before the filing of the petition where the person to be benefited, or his agent therein, shall not have reasonable cause to believe that it was intended thereby to give a preference; that is to say, a preference which has been acquired in good faith.[5] *Ninth,* liens given or accepted in good faith and not in contemplation of or in fraud upon the act, and for a present consideration, which

[2] B. A. 1898, Sec. 1, clause 25.

[3] B. A. 1898, Sec. 64*b*.

[4] B. A. 1898, Secs. 60*b* and 67*c*, last clause. *In re* West Norfolk Lumber Co., 7 Am. B. R. 648; *In re* Mitchell, 8 Am. B. R. 324, 116 Fed. Rep. 87.

[5] B. A. 1898, Secs. 60*b* and 67*c*.

have been recorded according to law, if record thereof was necessary in order to impart notice.[6]

Property upon which there is a valid preference or lien passes to the trustee, if he elects to take it, subject to such equities, liens or incumbrances, whether created by operation of law or by the act of the bankrupt.[7]

§ 191. Invalid preferences and liens.

The bankrupt act provides that certain preferences and liens shall be void or voidable. Such are: *First,* those which are invalid under the state law.[8] *Second,* any preference created within four months before the petition is filed and the person to be benefited has reasonable cause to believe that it was intended thereby to create a preference.[9] *Third,* a lien created by legal proceedings begun within fourth months before the petition was filed, where the person sought to be benefited had reasonable cause to believe that the debtor was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the bankrupt act.[10] And *fourth,* any levy, judgment, attachment or other lien obtained by legal proceedings within four months prior to the filing of the petition.[11] In addition to these any preference or lien which is tainted

[6] B. A. 1898. Sec. 67*d*. *In re* West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. Rep. 759.

[7] Yeatman v. New Orleans Savings Institution, 95 U. S. 764; Cook v. Tullis, 18 Wall. 332; Stewart v. Platt, 101 U. S. 731; Dudley v. Easton, 104 U. S. 99; Long v. Bullard, 117 U. S. 617; Peck v. Jenness, 7 How. 612; Davis v. Friedlander, 104 U. S. 570; Doe v. Childress, 21 Wall. 642; Jerome v. McCarter, 94 U. S. 734; Chatt. Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441; *In re* Hanna, 105 Fed. Rep. 587, 5 Am. B. R. 127, 3 N. B. N. 237; Hutchinson v. Otis (C. C. A. 1st Cir.), 8 Am. B. R. 382, 115 Fed. Rep. 937; *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; *In re* Cobb, 96 Fed. Rep. 821, 3 Am. B. R. 129; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744; *In re* Nicholas, 122 Fed. Rep. 299, 10 Am. B. R. 291; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; *In re* English, 122 Fed. Rep. 113, 10 Am. B. R. 133; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324; First National Bank v. Pa. Trust Co. (C. C. A. 3rd Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782. See also Title to bankrupt's property, Sec. 149.

[8] B. A. 1898, Secs. 67*a* and *e*, last clause.

[9] B. A. 1898, Sec. 60*b*.

[10] B. A. 1898, Sec. 67*c*.

[11] B. A. 1898, Sec. 67*f*.

with fraud is in itself void, irrespective of the provisions of the bankrupt act. These several liens will be more fully considered in connection with the treatment of the particular subjects immediately following.

Whenever a preference or a lien which is declared fraudulent or invalid under the bankrupt act has been placed upon property, the trustee takes such property discharged and released from such lien or preference.[12] The trustee is authorized to reclaim and recover such property or its value.[12]

§ 192. Preferences by judgments, attachments, levies, etc.

Whether a lien obtained through legal proceedings, otherwise valid, may be avoided or dissolved under the bankrupt law depends upon the time when it attached as a lien and the solvency of the debtor at that time.[13] Liens by judgment, levy, attachment or otherwise obtained prior to four months before the commencement of bankruptcy proceedings are recognized and preserved by the bankrupt law.[13] Those which are obtained within that period may be dissolved or avoided.[14]

Judgment, etc., Liens Obtained Prior to Four Months.— The provisions of the bankrupt statute relating to judgments, levies, attachments and other liens created by legal proceedings provide for dissolving or avoiding such liens if obtained within four months before filing the petition.[15] No other and earlier liens are thereby subject to be avoided or dissolved.[16] Not being void or dissolved, they remain in

[12] B. A. 1898, Secs. 60, 67 and 70; as amended Feb. 5, 1903; Trimble v. Woodhead, 102 U. S. 647.

As to the manner of computing time see Jones v. Stevens, 5 Am. B. R. 571, 48 Atl. Rep. 170, 94 Me. 582.

[13] Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177.

[14] Clarke v. Laramore, 188 U. S. 486, affirming *In re* Kenney, 5 Am. B. R. 355, 105 Fed. Rep. 897.

[15] B. A. 1898, Secs. 67*c* and *f*, and Sec. 60; as amended Feb. 5, 1903.

[16] Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177; *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* English, 122 Fed. Rep. 113.

This rule was adopted in construing the act of 1867, which was similar in this respect to the present act, as well as the act of 1841, which, by Sec. 2, expressly declared that "nothing in this act contained shall be considered to annul, destroy or impair" any liens, etc.

Doe v. Childress, 21 Wall. 642; Peck v. Jenness, 7 How. 612; Samson, v. Burton, No. 12285, Fed.

full force.[16] It has been held that an equitable or legal lien created prior to four months of bankruptcy is valid, although legal proceedings to enforce such lien may have been had within the four months' period. Thus where the commencement of a judgment creditor's suit creates a lien in equity upon the judgment debtor's equitable assets more than four months before bankruptcy such lien is not invalidated by a judgment to enforce the lien obtained within that period.[17] An attachment lien created more than four months prior to bankruptcy is not affected by a judgment subsequently rendered in the attachment suit.[18] The same rule has been applied to a lien created by garnishment.[19]

An equitable lien upon partnership assets created by the transfer of the interest of the partnership estate more than four months prior to the filing of the petition is not affected by a judgment within that period.[20]

When such a lien attaches depends upon the state law.[21] The general rule is that whenever by the law and usage of the state the charge created by process of law becomes fixed, fastened to the property itself, so as to make is specifically liable for the debt more than four months before bankruptcy proceedings are commenced, it is a valid lien or security on the property under the bankrupt law. In various states the

Cas., s. c. 5 Ben. 325; Bates v. Tappan, 99 Mass. 376; Davenport v. Tilton, 51 Mass. 320; Johnson v. Collins, 116 Mass. 392; Bowman v. Harding, 56 Me. 559; Leighton v Kelsey, 57 Me. 85; Perry v. Somerly, 57 Me. 552; Kittredge v. Emerson, 15 N. H. 227; Kittredge v. Warren, 14 N. H. 509; Stoddard v Locke, 43 Vt. 574; Daggett v. Cook, 37 Conn. 341; Ingraham v. Phillips, 1 Day. (Conn.) 117; May v. Courtnay, 47 Ala. 185; *In re* Bellows, No. 1278, Fed. Cas., s. c. 3 Story, 428. See also Davis v. Friedlander, 104 U. S. 570, where the principle is recognized, although the case was decided upon other grounds.

[17] Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177; Taylor v. Taylor, 59 N. J. Eq. 84, 4 Am. B. R. 211; Frazier v. Southern Loan & Trust Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707; Doyle v. Heath, 22 R. I. 213, 4 Am. B. R. 705; Nat. Bank v. Hobbs (Sup. Ct., Ga.), 9 Am. B. R. 190.

[18] *In re* Beaver Coal Co., 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206.

[19] Bank of Commerce v. Elliott, 6 Am. B. R. 409, 109 Wis. 648.

[20] *In re* English, 122 Fed. Rep. 113.

[21] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206.

property becomes so charged at different stages in the process as by the rendition of judgment, by the delivery of the execution to the sheriff, by the commencement of the levy, or it may relate back to the beginning of the suit or the first day of the term at which the judgment was rendered.[22] When the lien has attached prior to four months before the filing of the petition, the debtor's title to the property passes to the trustee, subject to the creditor's lien acquired by virtue of such levy, attachment, judgment or other lien.

JUDGMENT, ETC., LIENS OBTAINED WITHIN FOUR MONTHS.— The act provides "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid, and the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attach-

[22] *In re* Mencke v. Rosenberg, 202 Penn. St. Rep. 131, 9 Am. B. R. 323, it was held that a *testatum fi fa* issued within four months on a judgment entered prior to that time was avoided by Sec. 67*f*. *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, it was held that a lien of execution could not by relating back to the beginning of the suit antedate the date of acquiring the property seized. In Waller v. Best, 3 How. 111, a lien was held to attach under the laws of Kentucky upon the delivery of the writ to the sheriff.

Voyles v. Parker, 4 Fed. Rep. 210, where the lien was held to relate back to the beginning of a suit under a local statute.

In Reed v. McIntyre, 98 U. S. 507, it was held that a levy on the property of a bankrupt after it had been conveyed to an assignee for the benefit of creditors did not constitute a valid lien, because the title to the property had passed out of the bankrupt before the levy.

ment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." [23]

This section applies to voluntary as well as to an involuntary petition in bankruptcy.[24]

In Metcalf *v.* Barker,[25] the supreme court held that "it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise." To come within the prohibition of this section as thus construed three things must concur. *First,* a lien must be created through legal proceedings; *second,* it must be created within four months before a petition in bankruptcy is filed; and *third,* the debtor must be insolvent at the time. If any one of these elements is absent the judgment, levy or attachment is valid.

The effect of a legal proceeding to create a lien and the time at which it attaches is determined by the law as construed by the highest court of the state, where such proceeding is had.[26]

It should be observed that a judgment, levy or attachment obtained within the four months' period does not necessarily create a lien within the prohibition of Sec. 67*f*. It has been expressly ruled by the supreme court that "a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens." [27] Thus it has been

[23] B. A. 1898, Sec. 67*f*.

This provision was inserted in the bill for the first time by the conference committee, just before its passage. See statement of conference committee reported to the house of representatives June 28, 1898, paragraph XIX, 31 Cong. Record, p. 7205.

[24] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; Brown v. Case (S. C. Mass.), 6 Am. B. R. 744; *In re* Blair, 108 Fed. Rep. 529.

[25] 187 U. S. 174.

[26] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Wilkes, 7 Am. B. R. 574.

[27] Metcalf v. Barker, 187 U. S. 174; *In re* English, 122 Fed. Rep. 113.

shown heretofore in this section that judgments within the four months' period to enforce a lien created by the commencement of a judgment creditor's suit, or an attachment lien, or a lien created by garnishment, or otherwise valid lien existing prior to the four months' period, is not affected by an adjudication in bankruptcy. It is equally clear that a judgment to foreclose a valid mortgage existing prior to the four months' period, or a mechanics' lien even though created within the four months' period, would not be invalidated by bankruptcy, although the judgment was obtained within the four months' period, because these liens are not created but are merely enforced by the legal proceedings.[28]

It has been held that a judgment entered after the adjudication is not within the four months' period and is consequently valid.[29]

It is essential to bring a case within the prohibition that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear the lien is valid.[30] It is not sufficient that the levy caused insolvency.[31]

If the elements mentioned above exist the property passes to the trustee, or may be recovered by him, discharged from the lien, although otherwise valid. A lien created by a judgment and levy of execution within four months of the filing of a petition in bankruptcy is null and void where the officer has not paid the money collected on the execution to the judgment creditor.[32] It has been intimated by the supreme court [33]

[28] *In re* Emslie, 102 Fed. Rep. 291, 4 Am. B. R. 126; *In re* Kerby-Dennis Co. (C. C. A. 7th Cir.), 95 Fed. Rep. 116, 2 Am. B. R. 402.

[29] *In re* Engle, 105 Fed. Rep. 893, 5 Am. B. R. 372; Kinmouth v. Braeutigam (S. C. N. J.), 4 Am. B R. 344; see also same v. same, 10 Am. B. R. 83, 52 Atl. 226; but see St. Gyr v. Daignault, 103 Fed. Rep. 854, 4 Am. B. R. 638.

[30] Simpson v. Van Etten, 108 Fed. Rep. 199, 6 Am. B. R. 204.

As to computing time see Jones v. Stevens, 94 Me. 582, 5 Am. B. R. 571.

[31] Chicago Title & Trust Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368; Reed v. Equitable Trust (Sup. Ga.), 8 Am. B. R. 242.

[32] Clarke v. Larremore, Trustee, 188 U. S. 486, 9 Am. B. R. 476; affirming *In re* Kenney, 5 Am. B. R. 355; *In re* Benedict (Sup. Ct. N. Y.), 8 Am. B. R. 463; Brown v. Case (Sup. Ct. Mass.), — Mass. —, 6 Am. B. R. 744.

In re Breslauer, 10 Am. B. R. 33, it was held recoverable by trustee where sheriff had notice of bankruptcy before payment to creditor.

[33] Clarke v. Larremore, Trustee, 188 U. S. 486, 9 Am. B. R. 476.

and held by other courts [34] that where the money has been collected upon an execution issued upon a judgment obtained against the bankrupt within the four months' period and paid to the judgment creditor before the filing of the petition in bankruptcy that it does not fall within the prohibition of Sec. 67*f*. The reason for this distinction is that Sec. 67 refers to existing liens and does not cover cases where a lien has been merged in judgment, execution and sale and the money distributed. The lien is thereby extinguished. It would seem that property so paid to a judgment creditor might be recovered in a proper case under Sec. 60*b*, as a preference created by a judgment. The bankruptcy court may intervene to stay the process at the instance of the creditors who had or were about to institute bankruptcy proceedings. This has frequently been done.[35]

A lien created by a judgment obtained within the four months' period on a note which gave the holder a power of attorney to enter up judgment against the debtor in case of nonpayment at maturity is void, although the note was given prior to that period.[36] The reason is that the lien is created by the judgment and not by giving the note.

An execution levied within four months of bankruptcy upon a judgment obtained prior to that period is annulled by Sec. 67*f*.[37]

The seizure of property by a vendor to subject it to the payment of the purchase money falls within the prohibition of the statute.[38]

An attachment in a suit to collect a simple contract debt begun within four months before the filing of a petition in

[34] Botts v. Hammond (C. C. A. 4th Cir.), 99 Fed. Rep. 916, 3 Am. B. R. 775; Levor v. Seiter (Sup. Ct. App. Div. N. Y.), 8 Am. B. R. 459; Peck v. Connell (Com. Pleas Pa.), 6 Am. B. R. 93.

[35] Clarke v. Larremore, Trustee, 188 U. S. 486, 9 Am. B. R. 476; Peck v. Connell (Com. Pleas Pa.), 6 Am. B. R. 93.

[36] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; but see also Wilson v. Nelson, 183 U. S. 191, 7 Am. B. R. 142.

[37] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; Mencke v. Rosenberg, 202 Penn St. Rep. 131, 9 Am. B. R. 323.

[38] *In re* Wilkes, 7 Am. B. R. 574.

bankruptcy is invalidated by an adjudication.[39] Where the attachment lien existed prior to the four months' period a judgment within that period enforcing the lien is valid.[40] The same rule has been recognized by the courts with reference to garnishment proceedings.[41]

When the statutes operate to nullify and render void a judgment, such nullity and invalidity relate back to the time of the entry of the judgment and affects that and all subsequent proceedings.[42] The property affected by such lien is wholly discharged and released therefrom. If the property has been sold to a *bona fide* purchaser the fund received from such sale takes the place of the property and passes to the trustee.[43]

It is to be observed that the general rule just stated is subject to a qualification. Judicial liens are not necessarily held null and void. The court may preserve them if to destroy the lien would militate against the best interests of the estate. A familiar example is where there are subordinate valid liens which would take precedence if the judicial lien be null and void. It is possible that if the lien be avoided the whole property to which the lien attached might be exhausted by claims which should justly be paid after the judicial lien.

In such cases the court may, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate.[44] In other words, the trustee is subrogated to the rights of a particular creditor for the benefit of all the creditors. Substantially the same provision is made with reference to liens created by judicial proceedings begun within four months of bankruptcy proceedings.[45] The court

[39] *In re* Tune, 8 Am. B. R. 285, 115 Fed. Rep. 906; *In re* Moore, 6 Am. B. R. 175, 107 Fed. Rep. 234.

[40] *In re* Beaver Coal Co., 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206.

[41] Garnishment held valid in Bank of Commerce v. Elliott, 109 Wis. 648, 6 Am. B. R. 409; *In re* Swift, 7 Am. B. R. 117.

Garnishment held invalid *In re* McCartney, 109 Fed. Rep. 621, 6 Am. B. R. 367; *In re* Beals, 8 Am. B. R. 639.

[42] Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476; *In re* Beals, 8 Am. B. R. 639.

[43] Clarke v. Larremore, 188 U. S. 486, 9 Am. B. R. 476.

[44] B. A. 1898, Sec. 67*f*. *In re* Moore, 6 Am. B. R. 175.

[45] B. A. 1898, Sec. 67*c*.

is authorized to order such conveyance as may be necessary to carry the purposes of this section into effect. But nothing contained in this provision has the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who has acquired the same without notice or reasonable cause for inquiry.

§ 193. Dissolution of liens.

The act provides [46] that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if, *first,* it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference; [47] or, *second,* the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy; [48] or, *third,* that such lien was

[46] B. A. 1898, Sec. 67c. *In re* Dougherty, 109 Fed. Rep. 480.

[47] Wilson v. City Bank, 17 Wall. 473; Clark v. Iselin, 21 Wall. 360; Watson v. Taylor, 21 Wall. 378; Little v. Alexander, 21 Wall. 500; National Bank v. Warren, 96 U. S. 539; Rogers v. Palmer, 102 U. S. 263; Traders' Bank v. Campbell, 14 Wall. 87; Buchanan v. Smith, 16 Wall. 277; Hoover v. Wise, 91 U. S. 308; *In re* Kerr, No. 7728, Fed. Cas. s. c. 2 N. B. R. 388; *In re* Campbell, No. 2349, Fed. Cas., s. c. 1 Abb. U. S. 185; *In re* Schnepf, No. 12471, Fed. Cas., s. c. 2 Ben. 72.

As to judgment notes and judgment by confession, see Clark v. Iselin, 21 Wall. 360; Watson v. Taylor, 21 Wall. 378; Haughey v. Albin, No. 6222, Fed. Cas., s. c. 2 Bond. 244; Mays v. Fritton, 20 Wall. 414; Street v. Dawson, No. 13533, Fed. Cas., s. c. 4 N. B. R. 207; Balfour v. Wheeler, 18 Fed. Rep. 893; *In re* Baxter, 25 Fed. Rep. 703.

[48] As to what constitutes a reasonable cause to believe the defendant was insolvent, etc., see Buchanan v Smith, 16 Wall. 277; Grant v. First National Bank, 97 U. S. 80; Merchants National Bank v. Cook, 95 U. S. 342; Wager v. Hall, 16 Wall. 584; Barbour v. Priest, 103 U. S. 293; Toof v. Martin, 13 Wall. 40; Stuckey v. Masonic Savings Bank, 108 U. S. 74; Clark v. Iselin, 21 Wall. 360; Fostei v. Hackley, No. 4971 Fed. Cas., s. c. 2 N. B. R. 406; *In re* Wright, No. 18071 Fed. Cas., s. c. 2 N. B. R. 490; Scammon v. Cole, No. 12432 Fed. Cas., s. c. 3 Clif. 472; Peckham v. Burrows, No. 10897 Fed. Cas., s. c. 3 Story, 544; Burpee v. National Bank, No. 2185 Fed. Cas.,

sought and permitted in fraud of the provisions of the act. The act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any judicial lien, obtained with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a lien sought and permitted in fraud of the provisions of this act.[49]

It has been held that this provision was destroyed by the subsequent introduction of Sec. 67*f* into the bill before enactment.[50] It, however, stands as a part of the bankruptcy law of this country and a case falling within its terms and not controlled by 67*f* will undoubtedly be sustained according to its terms.

§ 194. Preferences by transfers.

Under the bankrupt act a preference may be created by transferring property to or for the benefit of a creditor as well as by a judicial lien.[51] The word "transfer," as used in the bankrupt act, includes the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a pay-

s. c. 5 Biss. 405; Forbes v. Howe, 102 Mass. 427; Otis v. Hadley, 112 Mass. 100; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520; Castle v. Lee, No. 2506 Fed. Cas., s. c. 11 B. R. 80; Haskell v. Ingalls, No. 6193 Fed. Cas., s. c. 1 Hask. 341; *In re* Walton, No. 17128 Fed. Cas., s. c. Deady, 442.

As to the meaning of the words "in contemplation of bankruptcy," see Buckingham v. McLean, 13 How. 167; *In re* Craft, No. 3316 Fed. Cas., s. c. 2 Ben. 214, affirmed in No. 3317 Fed. Cas., s. c. 6 Blatch. 177; Ashby v. Steere, No. 576 Fed. Cas., s. c. 2 Woodb. & M. 347; Robson's Bankruptcy, 166.

To the effect that actual bankruptcy must be contemplated by the debtor at the time of the transaction, see Morgan v. Brundrett, 5 B. & Ad. 296; Atkinson v. Brindall, 2 Bing., N. C. 225; Abbott v. Burbage, 2 Scott, 656; Strachan v. Barton, 11 Ex. 647.

To the effect that the circumstances and not the actual intent of the debtor at the time of the transaction are such as to make his bankruptcy a probable or inevitable event, is a sufficient contemplation of bankruptcy, see Gibson v. Boutts, 4 M. & G. 169; Gibson v. Muskett, 4 M. & G. 160; Poland v. Glyn, 12 J. B. Moore, 109; *Ex parte* Simpson, De Gex, 9; Aldred v. Constable, 4 Ad. and El. N. S. 674.

[49] See observation of Mr. Justice Field, with reference to transfers, in Toof v. Martin, 13 Wall. 40, 51.

[50] *In re* Tune, 8 Am. B. R. 285, 115 Fed. Rep. 906.

[51] B. A. 1898, Sec. 60, as amended Feb. 5, 1903.

ment, pledge, mortgage, gift or security.[52] Before considering these different methods of transferring property separately, it may be profitable to notice the incidents relating to transfers generally.

It should be observed that Sec. 60*a* defines what constitutes a preference, and par. *b* of the same section prescribes the conditions under which such preference may be set aside. By the amendment of 1903 the four months' limitation was taken from clause *b* and inserted in clause *a*. Under the bankruptcy act as it exists the only interest a practitioner has in a preference is to determine whether it is a voidable preference or not. This is necessary in deciding whether the preferred property transferred can be recovered in a suit by the trustee or whether the creditor must surrender his preference under Sec. 57*g* before allowance of his claim. In either of these cases it must be a voidable preference since the amendment of 1903. What constitutes a preference so as to be an act of bankruptcy is considered in Chapter VIII.

In order that a transfer shall constitute a preference, which may be avoided, whatever the manner of transferring it may be, four elements are necessary.[53] *First,* the transfer must be made from an insolvent person to a creditor. *Second,* the effect of such transfer must be to enable any one of his creditors to

[52] B. A. 1898, Sec. 1, clause 25.

In Stern, Falk & Co. v. Louisville Trust Co., 112 Fed. Rep. 501, 7 Am. B. R. 305, the circuit court of appeals for the sixth circuit said:

"The controlling question of law in the cases is whether these facts constitute a preference within the meaning of that term in the bankruptcy act. The word is not in set terms defined by the act, but we have no doubt that so far as the nature of the property transferred is concerned it includes everything which has capacity for being taken and appropriated to the satisfaction of debts provable under the act. It may be of a legal or of an equitable nature.

"In respect to the means by which the transfer is effected there is no limitation. However devious the method, if the result is that, but for the act, the creditor acquires property from the debtor which is subject at law or in equity to be appropriated to the satisfaction of the debtor's obligations, that is a transfer within the meaning of the law."

See also Pirie v. Chicago Title & Trust Co., 182 U. S. 438; Jaquith v. Alden, 189 U. S. 78.

A transfer does not embrace a fictitious transaction where no value was intended to pass and where none was actually transferred. *In re* Steam Vehicle Co., 10 Am. B. R. 385.

[53] Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re* Dundas, 7 Am. B. R. 129.

obtain a greater percentage of his debt than any other of such creditors of the same class. *Third,* the person receiving it or to be benefited thereby, or his agent acting therein, must have had reasonable cause to believe that it was intended thereby to give a preference. *Fourth,* the transfer must have been made within four months before filing a petition in bankruptcy, or after filing the petition and before adjudication.

If any one of these elements is wanting, the preference can not be set aside, if otherwise valid under the state law.[54] Thus if it were made more than four months prior to the filing of the petition, or by a solvent person, or did not in fact prefer a creditor by giving him a larger percentage than other creditors, or if the person receiving it had no cause whatever to believe that he was obtaining a preference over other creditors, it can not be recovered by the trustee.

It is immaterial under the bankrupt act whether the preference is given voluntarily or at the urgent solicitation or threat of a creditor.[55]

Although the bankrupt law does not operate beyond the limits of the United States, a preference given to a foreigner is in violation of its provision to the same extent and under the same conditions that it would be if the preference had been given to a resident of the United States.[56] It makes no difference in this proposition that the contract of purchase was made abroad, and to be performed abroad when the goods had been delivered to the bankrupt, and they were his property, and in the United States.[56]

First. The Transfer must be made by an Insolvent Person to a Creditor.— An important element of a transfer

[54] Tiffany v. Lucas, 15 Wall. 410; Anibal v. Heacock, 2 Fed. Rep. 169; Rice v. Grafton Mills, 117 Mass. 228; Paddock v. Fish, 10 Fed. Rep. 125; Alexander v. Galt, 9 Fed. Rep. 149; Warren v. Moody, 122 U. S. 132.

In re Henry C. King Co., 113 Fed. Rep. 110, 7 Am. B. R. 619, Judge Lowell said: "I must hold, therefore, that knowledge insolvency did not make a preference of acts which otherwise did not amount to a preference."

[55] Clarion Bank v. Jones, 21 Wall. 325; Wilson v. Brinkman, No. 17794 Fed. Cas., s. c. 2 N. B. R. 468; Rison v. Knapp, No. 11861 Fed. Cas., s. c. 1 Dill. 187; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 N. B. R. 357; Foster v. Hackley, No. 4971 Fed. Cas., s. c. 2 N. B. R. 406.

[56] Olcott v. McLean, 50 How. Prac. 455.

under Sec. 60*a* is that a creditor of the bankrupt must have obtained a greater percentage of his debt than any other creditor of the same class. A transfer to a person other than a creditor unless for his benefit is not a preference within this section.[57] But a creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act.[58] Such transfers may be recovered in a proper case under Sec. 67*e* and Sec. 70*e*.

The act of 1867 did not define what constituted insolvency. It was defined by the courts to mean that a debtor could not pay his debts in the ordinary course of business as men in trade usually do, and such was the conclusion, even though his inability was not so great as to compel him to stop business.[59]

But in the present act "insolvency" is not used in the same sense as it was used in the prior acts. It is defined by the statute itself: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to hinder or delay his creditors shall not at a fair valuation be sufficient in amount to pay his debts."[60] It thus appears that a person might not be able to pay his debts as they become due in the ordinary course of business, and yet be perfectly solvent. It he is solvent at the time of making the transfer he can not give a preference, although

[57] Swarts v. Siegel, 8 Am. B. R. 220, 114 Fed. Rep. 1001; Lyon v. Clark, 129 Mich. 381; North v. Taylor, 70 N. Y. Supp. 339, 6 Am. B. R. 233; Hackney v. Raymond Bros., Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213.

[58] *In re* Beerman, 112 Fed. Rep. 663, 7 Am. B. R. 431; *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345.

[59] Toof v. Martin, 13 Wall. 40; Wager v. Hall, 16 Wall. 584; Wilson v. City Bank, 17 Wall. 473; Tiffany v. Lucas, 15 Wall. 410; Markson v. Hobson, No. 9099 Fed. Cas., s. c. 2 Dill. 327; Sawyer v. Turpin, 91 U. S. 114.

Scammon v. Cole, No. 12433 Fed. Cas., s. c. 1 Hask. 214, Judge Fox says, "this definition has been substantially adopted by every district judge in the country before whom the question has arisen."

[60] B. A. 1898, Sec. 1, clause 15; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449.

For a discussion of when a debtor is insolvent, see Sec. 49, *ante*.

he pays a creditor in full. He may afterwards become insolvent and not be able to pay his other creditors. The fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition against him.[61]

The question of insolvency is one of fact, and but little reliance can be placed upon the statements of the bankrupt that at the time of the transfer he had no reason to believe himself insolvent.[62] The burden of establishing insolvency at the time the preference was given is on the person alleging it.[63]

In order to set aside a conveyance or transfer of property, it must have been made by a person insolvent at that time.[64] A person may dispose of his property by gift or sale so long as he has enough left to pay his just debts. The fact that subsequently he becomes insolvent, and is adjudged a bankrupt, is not sufficient to invalidate such a transfer.[65] It has been held that where a levy on a judgment was the cause of insolvency no preference was created thereby which could be recovered by the trustee.[66] An allegation that the debtor "was in failing circumstances and unable to pay all his debts in full" is not sufficient to establish insolvency.[67]

[61] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[62] Scammon v. Cole, No. 12432 Fed. Cas., s. c. 1 Hask. 214; Warren v. National Bank, No. 17202 Fed. Cas., s. c. 10 Blatch. 493, reversed on another ground, 96 U. S. 539; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520; Pierce v. Evans, 61 Penn. 415; Otis v. Hadley, 112 Mass. 100; *In re* Linton, 7 Am. B. R. 676.

Where the quantity and value of the bankrupt's assets were not materially diminished from the time of the transfer until the commencement of the proceedings in bankruptcy, the jury may find that he was insolvent when he made the transfer. Clarion Bank v. Jones, 21 Wall. 325.

[63] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[64] Warren v. Moody, 122 U. S. 132; Adams v. Collier, 122 U. S. 382; *In re* Alexander, 102 Fed. Rep. 464, 4 Am. B. R. 376; *In re* Wittenberg Veneer & Panel Co., 108 Fed. Rep. 593, 6 Am. B. R. 271; Martin v. Bigelow (Sup. Ct. N. Y.), 7 Am. B. R. 218.

[65] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608; R. S. Sec. 5128; Toof v. Martin, 13 Wall. 40; Wilson v. City Bank, 17 Wall. 473; Sawyer v. Turpin, 91 U. S. 114; Wager v. Hall, 16 Wall. 584; Beattie v. Gardner, No. 1105 Fed. Cas., s. c. 4 Ben. 479; Warren v. National Bank, No. 17202 Fed. Cas., s. c. 10 Blatch. 493; Lickman v. Wilcox, No. 8374 Fed. Cas., s. c. 1 Dill. 161; Traders' National Bank v. Campbell, 14 Wall. 87.

[66] Chicago Title & Trust Co. v. Roebling Sons, 107 Fed. Rep. 71, 5 Am. B. R. 368.

[67] Martin v. Bigelow (Sup. Court N. Y.), 7 Am. B. R. 218.

SECOND. THE EFFECT MUST BE TO ENABLE ANY CREDITOR TO OBTAIN A GREATER PERCENTAGE OF HIS DEBT THAN ANY OTHER CREDITOR OF THE SAME CLASS.— The main object of the bankrupt law is to provide for the equal distribution of the property of a debtor among his creditors. Sec. 60*a* makes every transfer of any of the insolvent's property, by means of which a greater percentage would be paid out of his estate to any creditor, or on any claim, than every other creditor and every other claim of the same class would receive a preference to be avoided or surrendered under other provisions of the statute. "The test of a preference, under the act, is the payment, out of the bankrupt's property, of a greater percentage of the creditor's claim than other creditors of the same class receive." [68] It does not depend upon the purpose or intent of the debtor or the creditor.[69] It is merely the effect or result of the transaction. Payments and sales in the usual course of business where the new sales succeed payments and the net result is to increase the bankrupt's estate do not constitute preferential transfers.[70]

Where creditors are entitled to the same percentage on their debts they are in the same class, as unsecured creditors having provable claims. This is true even though some of them are secured by endorsement or guaranty and the others are not.[71] Labor claimants, entitled to priority, constitute a separate class from the unsecured creditors.[72] Other classes may be composed of creditors having a valid mortgage, lien or other securities or entitled to priorities in the distribution of the estate.

[68] Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673.

[69] Pirie v. Trust Co., 182 U. S. 438, 5 Am. B. R. 814; *In re* Fixen, 102 Fed. Rep. 295, 4 Am. B. R. 10; *In re* Conhaim, 97 Fed. Rep. 923, 3 Am. B. R. 249; Crooks v. People's Nat. Bank (N. Y. Sup. Ct.), 3 Am. B. R. 238.

[70] Jaquith v. Alden, 189 U. S. 78; *In re* Sagor (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenhan Co. (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

[71] Swarts v. Fourth Nat. Bank, 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel, 114 Fed. Rep. 1001 (on app. to C. C. A.), 8 Am. B. R. 689, 117 Fed. Rep. 13.

But see *In re* Harpke, 116 Fed. Rep. 295, 8 Am. B. R. 535.

[72] *In re* Read & Knight, 7 Am. B. R. 111.

These secured classes become material in actual practice when there are not sufficient funds to pay the whole of any one class, as where the assets are insufficient to pay all the labor claims. In such case they must be paid *pro rata* or a preference is created.

The giving of a leasehold in order that the grantee may get an advantage over other creditors is a preference.[73]

THIRD. REASONABLE CAUSE TO BELIEVE, ETC.— Under the act of 1867 the person receiving the transfer must at the time have had reasonable cause to believe the person making the transfer was insolvent.[74] Under the present act the creditor to be benefited must have reasonable cause to believe that a preference was intended to be given.[75] This phrase undoubtedly includes reasonable cause to believe that the debtor is insolvent, for this is one of the elements of a preference. It also includes a reasonable cause to believe that he is to obtain a greater percentage of his debts than any other creditor in his class, for this is another element of a preference.

It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of

[73] Carter v. Hobbs, 94 Fed. Rep. 108, 2 Am. B. R. 224.

[74] R. S. Sec. 5128; Toof v. Martin, 13 Wall. 40; Buchanan v. Smith, 16 Wall. 277; Wager v. Hall, 16 Wall. 584; Scammon v. Cole, No. 12433 Fed. Cas., s. c. 1 Hask. 214; Forbes v. Howe, 102 Mass. 427; Otis v. Hadley, 112 Mass. 100; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520; Foster v. Hackley, No. 4971 Fed. Cas., s. c. 2 N. B. R. 406; Sedgwick v. Sheffield, No. 12624 Fed. Cas., s. c. 6 Ben. 21; Swan v. Robinson, 5 Fed. Rep. 287.

[75] B. A. 1898, Sec. 60*b*; Jacobs v. Van Sickle, 123 Fed. Rep. 340; Tait v. National Bank, 8 Ohio N. P. Rep. 59, 2 N. B. N. 1145; Hicks v. Langhorst (Hamilton County, O., Common Pleas), 3 N. B. N. 528, 6 Am. B. R. 178; *In re* Jacobs, 1 Am. B. R. 518; Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; Levor v. Seiter (N. Y. Sup. Ct. App. Div.), 8 Am. B. R. 459; *In re* Dundas, 7 Am. B. R. 120, 111 Fed. Rep. 500.

knowledge are at hand, and if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained.[76] It has been held that the mere knowledge that a debtor was behind in his payments is not sufficient of itself to put his creditors upon inquiry and charge him with notice of facts which inquiry might disclose,[77] nor the mere fact of taking security for a loan.[78]

Mr. Justice Bradley, speaking for the supreme court in a leading case on this subject, laid down the rule with reference to what constituted a reasonable cause to believe a debtor to be insolvent under the former statutes in the following words:[79] "Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' *Dicta* are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure.[80] It was never the intention of the framers of the act

[76] Crittenden v. Barton (N. Y. Sup. Ct. App. Div.), 5 Am. B. R. 775; Wager v. Hall, 16 Wall. 584; Peckham v. Burrows, No. 10897 Fed. Cas., s. c. 3 Story, 544; Scammon v. Cole, No. 12432 Fed. Cas., s. c. 3 Cliff. 472; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520.

[77] *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Hackney v. Raymond Bros., Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213.

[78] Stedman v. Bank, 117 Fed. Rep. 237, 9 Am. B. R. 4.

[79] Grant v. National Bank, 97 U. S. 81. This is referred to in Stuckey v. Savings Bank, 108 U. S. 74, as "a case which was fully considered, and which has since been followed by us as a leading case on the subject."

[80] *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Lyon v. Clark, 129 Mich. 381; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 8 Am. B. R. 45.

to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of the ordinary intelligent man." The definition given by the supreme court to the phrase used in the act of 1867 may fairly be applied in construing the language used in the present bankrupt act.[81]

[81] As was done *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Hackney v. Raymond Bros. Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213; Lyon v. Clark, 129 Mich. 381.

Whether a creditor has reasonable cause to believe, etc., may be determined from the conduct of the parties and the nature of the transaction.[82] This is often the only means of proof. A person is always presumed to intend what is the necessary and unavoidable consequences of his act. The acts, knowledge and intention of an attorney or agent are, in law, the acts, knowledge and intention of the principal.[83]

It may be collated from the decisions that a person has reasonable cause for inquiry, where a banker allows his drafts to go to protest, suspends payment and closes his doors against depositors and the creditor has knowledge of these facts;[84] or where a merchant stops payment of his commercial paper and the holder is compelled to bring a suit to which no defense is put in;[85] or where a merchant fails to meet his debts as they mature in the ordinary course of business.[86] The existence

[82] Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; Hackney v. Raymond Bros., Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213.

[83] B. A. 1898, Sec. 60*b*; Babbitt v. Kelley (St. Louis Court of App.), 9 Am. B. R. 335, 70 S. W. R. 384; *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41; *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119; Beattie v. Gardner, No. 1195 Fed. Cas., s. c. 4 Ben. 479; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520; Mayer v. Herman, No. 9344 Fed. Cas., s. c. 10 Blatch. 256; Rogers v. Palmer, 102 U. S. 263; Nisbit v. Macon Co., 12 Fed. Rep. 686; Ungewitter v. Von Sachs, No. 14343 Fed. Cas., s. c. 4 Ben. 167.

Where money is collected through a collection agency by an attorney of that agency, who was not employed directly by the creditors, his knowledge was held not chargeable to the creditors in such a sense as to render them liable to the trustee in bankruptcy for the money collected. Hoover v. Wise, 91 U. S. 308.

[84] Markson v. Hobson, No. 9099 Fed. Cas., s. c. 2 Dill. 327. But if the bank is not the general banker of a bankrupt, the rule does not apply. Rankin v. National Bank, No. 15568 Fed. Cas., s. c. 14 N. B. R. 4.

[85] Dunning v. Perkins, No. 4180 Fed. Cas., s. c. 2 Biss. 421.

[86] *In re* Forsyth, No. 4948 Fed. Cas., s. c. 7 N. B. R. 174; Swan v. Robinson, 5 Fed. Rep. 287; Mayer v. Herman, No. 9344 Fed. Cas., s. c. 10 Blatch. 256; Dunning v. Perkins, No. 4180 Fed. Cas., s. c. 2 Biss. 421; Bartholow v. Bean, 18 Wall. 635; Wilson v. City Bank, 17 Wall. 473.

But the mere knowledge that a small claim remains unsettled does not constitute a reasonable cause to believe, etc. Castle v. Lee, No. 2506 Fed. Cas., s. c. 11 N. B. R. 80. *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Hackney v. Raymond Bros. Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213; Lyon v. Clark, 129 Mich.

of a general financial crisis should put a prudent man upon inquiry with reference to doubtful debtors,[87] or rumors which a creditor has heard about his debtor's embarrassment,[88] or any transfer or payment made to a creditor out of the ordinary course of business.[89] Where an execution must necessarily stop the debtor's business, it is sufficient to put the creditor upon inquiry,[90] or knowledge of the commission of an act of bankruptcy on the part of the debtor.[91] The plea of ignorance on the part of the creditor will not relieve him of liability when a small amount of inquiry would have given all the necessary information.[92] Nor is an inquiry of a person suspected of fraud, who has every motive for concealing the truth, sufficient, when better and more reliable sources of information are open.[93]

Fourth. Within Four Months, etc.—In order that a preference be created under the bankruptcy act the transfer must have been within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudication.[94] This clause was transferred from Section 60*b* to Sec. 60*a* by the amendment of Feb. 5, 1903. By this change the four months limitation becomes an element of a preference and not merely an element of a voidable preference. Prior to the amendment there was a conflict in the decisions as to whether

[87] *In re* Clark & Dougherty, 10 N. B. R. 21.

[88] Golson v. Nichoff, No. 5524 Fed. Cas., s. c. 2 Biss. 434; Post v. Corbin, No. 11269 Fed. Cas., s. c. 5 N. B. R. 11; Hyde v. Corrigan, No. 6968 Fed. Cas., s. c. 9 N. B. R. 466.

[89] See R. S. Sec. 5130, which expressly provided that such transfers are *prima facie* void. *In re* Coleman, No. 3021 Fed. Cas., s. c. 2 N. B. R. 562; Tuttle v. Truax, No. 14277 Fed. Cas., s. c. 1 N. B. R. 601; *In re* Meyer, No. 9515 Fed. Cas., s. c. 2 N. B. R. 422; *In re* Beck, No. 1205 Fed. Cas., s. c. 1 N. B. R. 588; North v. House, No. 10310 Fed. Cas., s. c. 6 N. B. R. 365; *In re* Palmer, No. 10681 Fed. Cas., s. c. 3 N. B. R. 283.

[90] Zahm v. Fry, No. 18198 Fed. Cas., s. c. 9 N. B. R. 546; Hood v. Karper, No. 6664 Fed. Cas., s. c. 5 N. B. R. 358; Smith v. McLean, No. 13074 Fed. Cas., s. c. 10 N. B. R. 260; Buchanan v. Smith, 16 Wall. 277.

[91] Warren v. National Bank, No. 17202 Fed. Cas., s. c. 10 Blatch. 493, s. c. 96 U. S. 539.

[92] *In re* Wright, No. 18071 Fed. Cas., s. c. 2 N. B. R. 490.

[93] Singer v. Jacobs, 11 Fed. Rep. 559.

[94] B. A. 1898, Sec. 60, as amended Feb. 5, 1903, Mayer v. Hellman, 91 U. S. 496; Alexander v. Galt, 9 Fed. Rep. 149.

a transfer prior to the four months period was a preference. This became material in determining whether the preference must be surrendered under Section 57*g* before a claim could be allowed. It is not material since the amendment because only voidable preferences are required to be surrendered.

The acts mentioned in section 60 are not such as were forbidden by the common law or generally by the statutes of the states nor are they acts which in their essential nature are immoral or dishonest. In order to carry out the spirit of the bankrupt system, namely, an equal division of the bankrupt's property among his creditors, congress has adopted a conventional rule to determine the validity of these preferences. It has prescribed a limit of four months. Any transfer made within that time is fraudulent and voidable. It is so not because such preferences are morally objectionable, but simply because the bankrupt act says they are.[95]

Prior to the amendment of Feb. 5, 1903, there was considerable conflict in the decisions of the courts of bankruptcy as to whether the four months period began to run from the date of recording or registering the transfer or from the date of the transfer itself.[96] The amendment provides that "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." [97] The construction and effect of the registering and recording acts, given them by the courts of the state, will be followed by the courts of bankruptcy.[98]

Where no recording or registering is required under the state law, the general rule is that the four months limitation

[95] Bean v. Brookmire, No. 1168 Fed. Cas., s. c. 1 Dill. 25.

[96] It was held that the time began to run from date of transfer. *In re* Wright, 96 Fed. Rep. 187, 2 Am. B. R. 364; Dean v. Plane, 195 Ill. 495; *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; *contra, In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; Babbitt v. Kelley, 9 Am. B. R. 335; Chesapeake Shoe Co. v. Seldner, 122 Fed. Rep. 593.

[97] B. A. 1898, Sec. 60*a*, as amended Feb. 5, 1903.

[98] *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; Chesapeake Shoe Co. v. Seldner, 122 Fed. Rep. 593.

begins to run from the date when the beneficiary takes notorious, exclusive and continuous possession of the property, or the date when the creditors have received actual notice of such transfer.[99] This, however, is only necessary in cases where the absence of a change of possession would justify third parties in assuming that the property actually belonged to the vendor.[100]

It has been held that where an agreement to pledge was made more than four months prior to bankruptcy but the goods actually pledged within that four months a preference was created.[101] Where a creditor in pursuance of a valid contract executed prior to the four months exercised his rights in possessing himself of the bankrupt's property and making sale of it under such contract within four months no preference was created.[102] Where the creditor had previously agreed to receive grain in payment of his debt that the transfer dated from the time when the warehouse receipt was mailed to him, but if the creditor had not previously agreed to receive grain in payment of his debt, the transfer dated from the time when the receipt sent by mail was received and accepted by him.[103] In other words, it dated from the time the contract was actually made. Where four months have elapsed after the giving of a firm note by a person to pay a separate debt before the bankruptcy of the firm, but less than four months before the bankruptcy of the partner, the transfer is valid.[104] But where the arrangement was made by which property was changed from joint to several after insolvency and within four months of bankruptcy, it was held voidable.[105]

The date from which an unauthorized act of an agent

[99] *In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554. But see Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

[100] *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148.

[101] *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554.

[102] Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578; *In re* Wolf, 98 Fed. Rep. 74, 3 Am. B. R. 555.

[103] Brooks v. Scoggins, 11 N. B. R. 258.

[104] *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333. See also Forsaith v. Merritt, No. 4946 Fed. Cas., s. c. 1 Low. 336; *In re* Shepard, No. 12754 Fed. Cas., s. c. 3 Ben. 347.

[105] *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Federhen, No. 4713*a* Fed. Cas.; *In re* Johnson, No. 7360 Fed. Cas., s. c. 2 Low. 129.

which has been ratified is computed is the date of the act and not of the ratification. This rule is subject to the exception that intervening rights of third persons can not be defeated by the ratification.[106]

In computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.[107] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[108]

If the transfer is made within four months or before the adjudication it may be avoided and set aside.[109] If it has been made prior to that time it is a valid preference, and the creditor secured thereby will be protected under the bankrupt act.[110] But where a transfer is made by the debtor after an adjudication, and before a trustee is appointed, it is not a preference, but simply an unlawful intermeddling. Such a transfer is at least voidable.

§ 195. Payments.

A payment of money within four months of bankruptcy by an insolvent to apply on a debt past due is a preferential transfer of property, irrespective of the intent of the parties, where

[106] Cook v. Tullis, 18 Wall. 338; *In re* Kansas Manufacturing Co., No. 7610 Fed. Cas., s. c. 9 N. B. R. 76; Strain v. Gourdin, No. 13521 Fed. Cas., s. c. 2 Woods, 380.

[107] B. A. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480; Jones v. Stevens, 94 Me. 582, 5 Am. B. R. 571; Whitley Grocery Co. v. Roach, 115 Ga. 918.

[108] B. A. 1898, Sec. 1, clause 14.

[109] Blennerhasset v. Sherman, 105 U. S. 100; Auffm'ordt v. Rasin, 102 U. S. 620; Wager v. Hall, 16 Wall. 584; Gibson v. Warden, 14 Wall. 244; Dutcher v. Wright, 94 U. S. 553; *In re* Klingaman, 101 Fed. Rep. 691; 4 Am. B. R. 254; *In re* Woodward, 2 Am. B. R. 233; Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re* McLam, 3 Am. B. R. 245, — Fed. Rep. —.

[110] Bank v. Sherman, 101 U. S. 404; *In re* Randall, No. 11552 Fed. Cas., s. c. 1 Saw. 56; Taylor v. Robertson, 21 Fed. Rep. 209; *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; *In re* Wright, 96 Fed. Rep. 187, 2 Am. B. R. 364.

it has the effect of enabling a creditor to obtain a greater percentage of his debt than other creditors of the same class.[111] Such a preferential payment may be recovered or required to be surrendered before claim is allowed in cases where the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference,[112] but not otherwise.[113]

It has been held to be a preference to pay a note or check, even where there is an endorsement by a solvent party.[114] If the surety pays the debt of his principal he takes it subject to the disqualifications and limitations of the principal debtor, and if the principal creditor had received preferential payments it is as if the endorser had received such preferential payments.[115] It should be observed that it is the payment on a check or note and not the giving of it that constitutes a preference,[116] but giving the note of a third person creates a preference.[117] Payments on account of loans constitute a preference although the loans were made during the insolvency and within the four months period.[118] Where a bank borrows one of its depositor's deposit and gives security therefor, the giving security creates a preference.[119] A payment to a bank to pay a note which the bank has discounted is a preference in favor of

[111] B. A. 1898, Sec. 60*a*, as amended Feb. 5, 1903; Pirie v. Trust Co., 182 U. S. 438, 5 Am. B. R. 814.

[112] For a discussion of the elements of a voidable preference, see Sec. 194.

[113] Sherman v. Luckhardt (Sup. Ct. of Kan.), 9 Am. B. R. 307.

[114] Swarts v. Fourth Nat. Bank, 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, — Am. B. R. —; Landry v. Andrews, 6 Am. B. R. (Sup. Ct. R. I.), 6 Am. B. R. 281, 22 R. I. 597; *In re* Lyon, 114 Fed Rep. 326, 7 Am. B. R. 412, affirmed 10 Am. B. R. 25.

[115] Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689; Livingston v. Heineman (C. C. A. 6th Cir.), 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 10 Am. B. R. 25, — Fed. Rep. —.

But see *In re* Levi, 121 Fed. Rep. 108; *In re* Wyly, 116 Fed. Rep. 38; *In re* New, 116 Fed. Rep. 116.

[116] *In re* Wolf & Levy, 122 Fed. Rep. 127, 10 Am. B. R. 153.

[117] *In re* Crooks v. Nat. Bank (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 238; Dickinson v. Security Bank (C. C. A. 4th Cir.), 110 Fed. Rep. 353, 6 Am. B. R. 551.

[118] *In re* Colton Export & Import Co. (C. C. A. 2d Cir.), 121 Fed. Rep. 663, 10 Am. B. R. 25.

[119] *In re* Cobb, 96 Fed. Rep. 821, 3 Am. B. R. 129.

the person who had the note discounted.[120] Giving an order on another which is afterwards accepted and paid is a preference.[121] Payments to an indorsee who holds the note as collateral security for a debt of the payee are payments to the payee and a preference.[122] A payment which relieves a surety is a preference in favor of the surety.[123] It has been held to be a preference to pay any creditor in full while insolvent and leave others unpaid,[124] and it does not take it out of the general rule that the payment was made to a holder of a note overdue, on which there was a solvent indorser, whose liability was already fixed,[125] or to pay a private debt out of partnership property,[126] or to pay an overdraft on a bank,[127] or either directly or indirectly, in contemplation of the filing of a petition by or against him, to pay money or transfer property to an attorney and counselor at law, solicitor in equity or proctor in admiralty for services to be rendered. Such transaction may be reexamined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.[128]

But, on the other hand, it has been held not to be a preference to pay rent for the purpose of preserving a valuable lease,[129] or to make payments and sales under a running ac-

[120] *In re* Waterberry Furniture Co., 114 Fed. Rep. 255, 8 Am. B. R. 79.

[121] *In re* Dundas, 111 Fed. Rep. 500, 7 Am. B. R. 129.

[122] *In re* Meyer, 115 Fed. Rep. 997, 8 Am. B. R. 598.

[123] Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39.

[124] Fox v. Gardner, 21 Wall. 475; *In re* Oregon Bulletin Printing and Publishing Co., No. 10559 Fed. Cas., s. c. 13 N. B. R. 503; Silverman's Case, No. 12855 Fed. Cas., s. c. 1 Saw. 410; *In re* Dibblee, No. 3884 Fed. Cas., s. c. 3 Ben. 283, s. c. *sub nom* Clark v. Iselin, 21 Wall. 360.

[125] Bartholow v. Bean, 18 Wall. 635.

[126] *In re* Mattot, No. 9282 Fed. Cas., s. c. 16 N. B. R. 485.

[127] Payne v. Solman, No. 10856 Fed. Cas., s. c. 14 N. B. R. 162; *In re* Kellar, 110 Fed. Rep. 348, 6 Am. B. R. 621.

[128] B. A. 1898, Sec. 60*d*; Furth v. Stahl (Sup. Ct. Pa.), 205 Pa. 439, 10 Am. B. R. 442; *In re* Lewin, 4 Am. B. R. 632, 103 Fed. Rep. 850; *In re* Corbett, 5 Am. B. R. 224, 104 Fed. Rep. 872.

[129] *In re* Pearson, 95 Fed. Rep. 425, 2 Am. B. R. 482; Merchants' Insurance Co., No. 9441 Fed. Cas., s. c. 3 Biss. 162; *contra,* Smith v. Teutonia Ins. Co., No. 13115 Fed. Cas., s. c. 6 Am. Law Rev. 584.

In re Lange, 97 Fed. Rep. 197, 3 Am. B. R. 231, Judge Brown said:

count, where new sales succeed payments and the net result is to increase the indebtedness of the bankrupt, because the creditor does not obtain a greater percentage of his debt than other creditors,[130] or to pay wages because if there are sufficient assets to pay all labor claims of the same class in full, payments on account prior to the bankruptcy are immaterial as each creditor of that class is fully paid, and therefore there can be no preference of one over another,[131] or to repay a bank money advanced for a certain purpose on a check when not used for such purpose,[132] or to pay money on account of interest on statutory dower,[133] or to pay interest in advance for the renewal of a loan,[134] or to make fictitious book entries where no actual value passes,[135] to collect book accounts assigned at the time the credit was given,[136] or to subsequently take possession of property or give security for a debt in accordance with an agreement made at the time the debt was created,[137] or to pay an old debt separate and distinct from an indebtedness arising upon an open account,[138] or to pay a percentage on

"Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded."

[130] Jaquith v. Alden, 189 U. S. 78; Peterson v. Nash (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 7 Am. B. R. 181; *In re* H. C. King Co., 113 Fed. Rep. 110, 7 Am. B. R. 619; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Sagor & Bro. (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenham Co. (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

Where the additional credits do not equal the payments the difference only need be surrendered. Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734.

[131] *In re* Feuerlicht, 8 Am. B. R. 550; *In re* Reed & Knight, 7 Am. B. R. 111.

But see *In re* Kohn, 7 Am. B. R. 111 (note); *In re* Jones, 4 Am. B. R. 563; *In re* Proctor, 6 Am. B. R. 660.

[132] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[133] *In re* Riddle's Sons, 122 Fed. Rep. 559, 10 Am. B. R. 204.

[134] *In re* Kellar, 110 Fed. Rep. 348, 6 Am. B. R. 621.

[135] *In re* Steam Vehicle Co., 121 Fed. Rep. 939, 10 Am. B. R. 385.

[136] *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681; Young v. Upson, 115 Fed. Rep. 192, 8 Am. B. R. 377.

[137] Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

But see *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554.

[138] *In re* Abram Steers Lumber Co., 7 Am. B. R. 332, 112 Fed. Rep. 406; *In re* Seay, 7 Am. B. R. 700,

claims of a part of the creditors when the others will receive the same percentage,[139] or to pay unearned premiums on policies on insurance,[140] or a payment made in full to a creditor by a third person as a friendly act.[141] The reason for this is that the fund to which the creditors look for payment is in nowise diminished. It has been held not to constitute a preferential payment that where mutual debts and credits have been adjusted in good faith by payments by the debtor,[142] for the acceptance and payment of a bill of exchange which had been given before insolvency after the debtor's insolvency was notorious,[143] or when a payment was made to a collection agency, whose attorney knew that it was a preference, but the creditor did not have cause to believe it.[144]

113 Fed. Rep. 969; *In re* Champion, 7 Am. B. R. 560; Dickson v. Wyman, 7 Am. B. R. 186, 111 Fed. 726.

In the case of Abram Steers Lumber Co., the court says:

"The bankrupt was indebted to the creditor upon an open account, and at a date more than four months previous to the filing of the petition made a payment upon that account of money, and gave his note for the balance, which payment and note were treated by the creditor as full payment, and the account was balanced upon his books. The debtor was insolvent at the time, but the creditors had no reasonable cause to believe that preference was intended. Subsequently the bankrupt contracted another debt with the creditor. The question is, whether proof of that debt can not be allowed without a surrender by the creditor of the payment received upon the previous debt. We are of opinion that the payment, notwithstanding it was a preference, being upon a distinct and independent debt than that which is sought to be proved, need not be surrendered by the creditor. . . . We do not deem it necessary to enlarge upon the reasons for our conclusions in respect to these questions. These are fully discussed in the opinion of Judge Thomas, who decided the case in the court below, and we fully concur in his views."

[139] *In re* Hapgood, No. 6044 Fed. Cas., s. c. 2 Low. 200; Jones v. Sleeper, No. 7496 Fed. Cas., s. c. 2 N. Y. Leg. Obs. 131.

[140] Knickerbocker Ins. Co. v. Comstock, No. 7879 Fed. Cas., s. c. 9 N. B. R. 484.

[141] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541; Winsor v. Kendell, No. 17886 Fed. Cas., s. c. 3 Story, 507; Repplier v. Bloodgood, 1 Sweeney (N. Y. Sup. Ct.) 34.

[142] Robinson v. Ins. Co. Bank, No. 11969 Fed. Cas., s. c. 9 Biss. 117; Hough v. National Bank, No. 6721 Fed. Cas., s. c. 4 Biss. 349; Winslow v. Bliss, 3 Lansing (N. Y.) 220.

[143] *In re* Baxter, 28 Fed. Rep. 452.

[144] Hoover v. Wise, 91 U. S. 308. The attorney's knowledge in this case was that of his principal — the collection agency — and not the creditors, who did not employ him.

§ 196. Sales.

The law does not recognize that every sale of property by an embarrassed person within the period limited is necessarily in fraud of the bankrupt act.[145] If it were so, no one would know with whom he could safely deal; and, besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from the difficulty.

The interdiction in the act with reference to preferences applies to sales having a fraudulent object, and not to those with an honest purpose. Thus the transfer of property by an insolvent to a creditor, with the consent of all his other creditors, is not a preferential sale which can be set aside by the trustee.[146] So also a sale by a merchant of his entire stock of goods for full value, in the absence of fraud, can not be impeached.[147] It has also been held that a *bona fide* purchaser will be protected to the extent of the actual money paid as consideration.[148]

In order to set aside a sale on the ground that it is a preference, four things must concur: *First,* the sale must be made by an insolvent person to a creditor; *second,* the effect of such sale must be to enable that creditor to obtain a greater percentage of his debt than any other of such creditors of the same class; *third,* the creditor must have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth,* the sale must have been made within four months before filing the petition in bankruptcy, or after the filing of the petition and before the adjudication.[149] If any one of these elements is wanting, the sale can not be set aside as a preference. It should be borne in mind that a sale which is fraudulent under the common or statutory law

[145] Tiffany v. Lucas, 15 Wall. 421; Rice v. Grafton Mills, 117 Mass. 228; Rice v. Melendy, 41 Iowa, 395; Sparhawk v. Richards, No. 13205 Fed. Cas., s. c. 12 N. B. R. 74; Sonstiby v. Keeley, 11 Fed. Rep. 578; Lancaster v. Collins, 7 Fed. Rep. 338; *In re* Strenz, 8 Fed. Rep. 311.

[146] Judson v. The Courier Co., 8 Fed. Rep. 422.

[147] *In re* Strenz, 8 Fed. Rep. 311.

[148] Lancaster v. Collins, 7 Fed. Rep. 338; Sonstiby v. Keeley, 11 Fed. Rep. 578.

[149] B. A. 1898, Sec. 60. For a further consideration of these elements, see Preferences by transfers, Sec. 194.

may be avoided on another ground, although made more than four months before the filing of the petition.[150]

Whether a sale is a fraudulent preference or not depends upon the facts in the particular case. It has been held to be a preferential sale which could be avoided, where an insolvent sold to a creditor, knowing that he was receiving a preference, all his real and personal property, leaving other creditors unprovided for;[151] or, under similar circumstances, where a merchant transferred to one creditor his entire stock of goods;[152] or where a debtor transferred a large portion of his property to one creditor without making provision for an equal distribution among his other creditors;[153] or where property was transferred on the ground of exercising a factor's lien;[154] or a sale to a creditor through the intervention of an agent who pays the purchase price with notes of the bankrupt;[155] or a sale in consideration of an illegal agreement, as that creditor would not prosecute the debtor for a misdemeanor;[156] or a sale to a bank to make good an overdraft;[157] or generally any sale the consideration of which is a preexisting debt;[158] or where firm property is conveyed to a continuing partner.[159] But the conveyance of property to a creditor who

[150] See Setting aside fraudulent conveyances, Sec. 203.

[151] Foster v. Hackley, No. 4971 Fed. Cas., s. c. 2 N. B. R. 406.

[152] Walburn v. Babbit, 16 Wall. 577; Rison v. Knapp, No. 11861 Fed. Cas., s. c. 1 Dill. 187; Smith v. McLean, No. 13074 Fed. Cas., s. c. 10 N. B. R. 260; Norton v. Billings, 4 Fed. Rep. 623; Singer v. Jacobs, 11 Fed. Rep. 559.

[153] Toof v. Martin, 13 Wall. 40; Wager v. Hall, 16 Wall. 584; Merchants' Nat. Bank v. Cook, 95 U. S. 342.

In re Drummond, No. 4094 Fed. Cas., s. c. 4 Biss. 149; *In re* House, No. 6735 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 348; *In re* Foster, No. 4964 Fed. Cas., s. c. 18 N. B. R. 64; Nisbet v. Quinn, 7 Fed. Rep. 760.

[154] Nudd v. Barrows, 91 U. S. 426.

[155] Fleming v. Andrews, 3 Fed. Rep. 632.

[156] Sharp v. Philadelphia Warehouse Co., 10 Fed. Rep. 379.

[157] Alderdice v. State Bank, No. 154 Fed. Cas., s. c. 1 Hughes, 47.

[158] Post v. Corbin, No. 11299 Fed. Cas., s. c. 5 N. B. R. 11; *Ex parte* Shouse, No. 12815 Fed. Cas., s. c. Crabbe, 482. See also Casey v. La Societe, etc., No. 2496 Fed. Cas., s. c. 2 Woods, 77; Armstrong v. Chemical National Bank, 41 Fed. Rep. 234.

[159] *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; Collins v. Hood, 3015 Fed. Cas., s. c. 4 McLean, 186; *In re* Johnson, No. 7369 Fed. Cas., s. c. 2 Low. 129; *In re* Waite, No. 17044 Fed. Cas., s. c. 1

has a valid lien on such property to a greater amount than the value of it is not a preferential sale.[160] It is otherwise where the lien is invalid.[161]

The return of goods which have been purchased on credit creates a preference.[162] An unrecorded conditional sale is voidable where by the state law it is required to be recorded.[163]

Mr. Justice Field has aptly observed:[164] "The act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act."

§ 197. Mortgages.

The law applicable to mortgages and liens is much too extensive to be discussed at length in this treatise. The present inquiry will be confined to what constitutes a preference by way of mortgages under the bankrupt law. A debt may be secured by a mortgage on real estate or personal property. The principles, so far as bankruptcy proceedings are concerned, are substantially the same with reference to real estate and chattel mortgages.

It is as much the policy of the bankrupt act to uphold mortgages when valid, as it is to set them aside when invalid. The preference which the law condemns is a preference made within the limited time by the bankrupt and not a priority lawfully gained by a creditor. A mortgage lien valid under the state law and not within the provisions of the bankrupt law will be respected and enforced by a court of bankruptcy.[165]

Low. 207; *In re* Federhen, No. 4713*a* Fed. Cas., referred to *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333. But see Forsaith v. Merritt, No. 4946 Fed. Cas., s. c. 1 Saw. 336; *In re* Shepard, No. 12754 Fed. Cas., s. c. 3 Ben. 347; Smith v. McLean, No. 13074 Fed. Cas., s. c. 10 N. B. R. 260. See also Johnston v. Straus, 26 Fed. Rep. 57.

[160] Coxe v. Hale, No. 3310 Fed. Cas., s. c. 10 Blatch. 56; Catlin v. Hoffman, No. 2521 Fed. Cas., s. c. 2 Saw. 486; Ashuelot Sav. Bank v. Frost, 19 Fed. Rep. 237.

[161] *In re* Gregg, No. 5797 Fed. Cas., s. c. 4 N. B. R. 456.

[162] Silberstein v. Stahl, 4 Am. B. R. 626; *In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254.

[163] *In re* Fraizer, 117 Fed. Rep. 746.

[164] Toof v. Martin, 13 Wall. 40, 51.

[165] B. A. 1898, Sec. 60 and Sec. 67*d*.

Thus, if a bankrupt purchases property with a mortgage lien on it which is valid between him and the vendor it is valid against his trustee in bankruptcy.[166]

A mortgage lien is deemed valid when made more than four months prior to the filing of the petition in bankruptcy.[167] A mortgage made within four months before filing the petition in bankruptcy may be valid if the transaction is *bona fide* and for a valuable consideration,[168] although the mortgagor intended to use the money to create a preference.[169] Thus it has been held valid where the creditor has not reasonable cause to believe that he was receiving a preference from the insolvent debtor.[170] So also a mortgage may be valid to the extent of the actual loan made at the time the mortgage was given, although it may be invalid to the extent of preexisting debts secured thereby.[171] A mere renewal of a mortgage is not a preference.[172] A mortgage may be sustained when given in pursuance of a valid promise made at the time of the advance, provided it be shown that the promise was to give a specific security, and that the promise was given as an inducement upon which the advance

[166] *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254.

[167] Curry v. McCauley, 20 Fed. Rep. 583; *In re* Barman, No. 999 Fed. Cas., 14 N. B. R. 125; First National Bank v. Haire, 36 Iowa, 443; Judson v. Courier Co., 25 Fed. Rep. 705.

It should be borne in mind that the time limit under the original act of 1867, Secs. 35 and 39 (R. S. Sec. 5128), was four months. But this was changed to two months by the act of June 22, 1874, Secs. 10 and 11, 18 Stat. at L. 180; Auffm'ordt v. Rasin, 102 U. S. 620.

[168] *In re* Josephson, 116 Fed. Rep. 404, 8 Am. B. R. 423.

[169] *In re* Soudan Mfg. Co., 113 Fed. Rep. 804, 8 Am. B. R. 45.

[170] Grant v. National Bank, 97 U. S. 80; Stuckey v. Savings Bank, 108 U. S. 74; *In re* Perrin, No. 10995 Fed. Cas., s. c. 7 N. B. R. 283; Dow v. Sargent, 15 N. H. 115; Graham v. Stark, No. 5676 Fed. Cas., s. c. 3 Ben. 520.

[171] Paddock v. Fish, 10 Fed. Rep. 125; United States v. Griswold, 8 Fed. Rep. 496; Tiffany v. Boatman's Savings Institution, 18 Wall. 375; Stedman v. Bank of Monroe, 117 Fed. Rep. 237; 9 Am. B. R. 4; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; City Nat. Bank v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 6 Am. B. R. 311.

[172] Deland v. Miller & Chaney Bank (Ia.), 93 N. W. Rep. 304; *In re* Little River Lumber Co., 92 Fed. Rep. 585, 1 Am. B. R. 483; Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. 755, 4 Am. B. R. 441.

was made.[173] But where a state statute makes void as against all creditors, an unrecorded chattel mortgage, the giving of a chattel mortgage in pursuance of a contract made at the time a loan was made is a preference:[174] and a general promise to give " security if required " will not support such a mortgage.[175] A mortgage has been held valid when given to secure future advances to be made to the debtor,[176] or where a mortgage is taken by the creditor in exchange for a prior valid security.[177] This is but an exchange of securities, which ordinarily is not deemed a violation of the bankrupt law;[178] but if the security surrendered to the bankrupt is of less value than the mortgage given there is a preference created to the extent of the difference.[179]

A mortgage upon property exempt by the statute is valid and the security is preserved, notwithstanding the bankruptcy of the debtor.[180] Where property lying in two states is mortgaged in one deed, it may be a valid security as to the property in one state and not as to the property in another.[181]

In order to make a mortgage security for a debt a voidable preference within the provisions of the bankrupt law, it is necessary that all the prescribed conditions should concur, namely: *First*, the mortgage must have been given by an insolvent person to a creditor; *second*, the effect of such mortgage must be to enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class; *third*, the creditor receiving the mortgage must

[173] *In re* Jackson Iron Manufacturing Co., No. 7153 Fed. Cas., s. c. 15 N. B. R. 438; Burdock v. Jackson, 15 N. B. R. 318; Douglass v. Vogeler, 6 Fed. Rep. 52; Gattman v Honea, No. 5271 Fed. Cas., s. c. 12 N. B. R. 493.

[174] *In re* Ronk, 111 Fed. Rep. 154, 7 Am. B. R. 31. See also Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

[175] Lloyd v. Strobridge, No. 8435 Fed. Cas., 16 N. B. R. 107.

[176] *Ex parte* Ames, No. 323 Fed. Cas., s. c. 1 Low. 561.

[177] Sawyer v. Turpin, 91 U. S. 114; Burnhisel v. Firman, 22 Wall. 170; Douglass v. Vogeler, 6 Fed. Rep. 52; Morris v. Brush, No. 9828 Fed. Cas., s. c. 2 Woods, 354.

[178] Cook v. Tullis, 18 Wall. 340; Clark v. Iselin, 21 Wall. 360.

[179] *In re* Manning, 123 Fed. Rep. 181.

[180] Long v. Bullard, 117 U. S. 617; Schlitz v. Schatz, No. 12459 Fed. Cas., s. c. 2 Biss. 248; Rix v. Capitol Bank, No. 11869 Fed. Cas., s. c. 2 Dill. 367.

[181] *In re* Soldiers' Business, Messenger and Dispatch Co., No. 13163 Fed. Cas., s. c. 3 Ben. 204.

have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth,* the mortgage must have been made within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.[182]

If any element of the combination is wanting, the mortgage being valid under the state law, there is no infringement of the bankrupt law.[183] But if in making the mortgage the four elements named above concur, the mortgage is deemed a preference, which may be avoided and set aside by the trustee.[184] A mortgage given to secure a preexisting debt, although a promise to give security when required was made at the time the debt was created, is invalid.[185] But it is otherwise where the promise was to give specific security as an inducement for an advance.[186] It has been held that a note of a partner given to pay a firm debt, which was secured by mortgage upon the individual property of the partner was a fraudulent preference.[187] The reason is that it was in effect an appropriation of so much of the separate estate of the partner to the payment of one creditor's debt to the prejudice and wrong of the other creditors of the firm, to whom any surplus of such estate, after the payment of his individual debts, justly belonged. But a mortgage by a partnership of partnership property does not create a preference in favor of the mortgagee as against the trustee in bankruptcy of one of the partners.[188]

A mortgage given on the eve of bankruptcy "to hinder,

[182] For further consideration of these elements generally, see Preferences by transfers, Sec. 194.

[183] McNair v. McIntyre (C. C. A. 4th Cir), 113 Fed. 113, 7 Am. B. R. 638, and cases cited above in this section.

[184] B. A. 1898, Sec. 60; Wager v. Hall, 16 Wall, 484; Matthews v. Westphal, 48 Fed. Rep. 664; Southwick v. Whipple, 2 Fed. Rep. 770; May v. LeClaire, 18 Fed. Rep. 164; Driggs v. Moore, No. 4083 Fed. Cas., s. c. 1 Abb., U. S. 440.

[185] *In re* Conner, No. 3118, Fed. Cas., s. c. 1 Low. 532; Forbes v. Howe, 102 Mass. 427; Lloyd v. Strobridge, No. 8435 Fed. Cas., s. c. 16 N. B. R. 197.

[186] Douglass v. Vogeler, 6 Fed. Rep. 52, and cases cited in the opinion.

[187] *In re* Parker, 11 Fed. Rep. 397.

[188] *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638.

delay or defraud creditors" is a voidable preference.[189] If a chattel mortgage, executed at the time a loan is made, creates at that time a lien on specific chattels, no preference is created; but if the mortgage was to an unidentified part of a mass, the lien is not created until there is a separation, and at that time is for an antecedent debt and so a preference;[190] the fact that the mortgage is not given to the creditor but is given to a third person in trust for him does not prevent its being a preference.[191] The court of bankruptcy will not permit a mortgagee to use the court for the purpose of saving them the costs of foreclosure when no benefit is to be derived by the estate therefrom.[192]

It is assumed above that the mortgage is valid under the state law. Any mortgage or other claim which, for want of record or for other reasons, is not a valid lien as against the claims of the creditors of the bankrupt are not liens against his estate.[193] The validity of such mortgages is not affected by time. They are not preferences, but simply futile attempts to acquire liens.[194] Thus a deed which purports to transfer the title to land to a creditor to secure a debt but which is void for usury can not be enforced against the other creditors in bankruptcy.[195] In this class of mortgages may be included such as are fraudulent, and which could not be enforced in a court of equity irrespective of the bankrupt law.[196]

In deciding whether or not the mortgage creates a valid lien the court will ordinarily follow the law as laid down by the state courts.[197] Thus where the state courts hold that a chattel mortgage which the state statute required to be recorded

[189] B. A. 1898, Sec. 67*e*; *In re* Steininger Mercantile Co. (C. C. A. 5th Cir.), 107 Fed. Rep. 669, 6 Am. B. R. 68.

[190] Bank of Holdridge v. Johnson (Neb.), 10 Am. B. R. 208.

[191] *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345.

[192] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731.

[193] Sec. 67 of the act of July 1, 1898, 30 Stat. at L.; Bank of Leavenworth v. Hunt, 11 Wall. 391; Blennerhassett v. Sherman, 105 U. S. 100; Stewart v. Platt, 101 U. S. 731; Kane v. Rice, No. 7609 Fed. Cas., s. c. 10 N. B. R. 469.

[194] See Mechanics' and other liens, Sec. 200, *post*.

[195] *In re* Miller, 118 Fed. 360, 9 Am. B. R. 274.

[196] Robinson v. Elliott, 22 Wall. 513; Crooks v. Stuart, 7 Fed. Rep. 800.

[197] *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Josephson, 116 Fed. Rep. 404, 8 Am. B. R. 423.

is valid against all creditors except those who have taken steps to fasten on the property between the time of the execution and the recording of the mortgage a chattel mortgage recorded before the filing of the petition will be good against the trustee,[198] or where the state courts hold that an unrecorded mortgage is unenforceable only against judgment creditors the trustee can avoid it only to the extent of the claims of such creditors,[199] while if the state courts hold such mortgages void as to all creditors the trustee will be allowed to set them aside.[200] Whether or not a mortgagee waives or loses his lien by attaching the mortgaged property would seem also to depend upon the state law. Where, however, the United States supreme court has held certain kinds of mortgages to be invalid as a matter of general law such mortgages will be set aside although the state courts hold them good against other creditors in insolvency proceedings.[201] Such state laws may, however, cause a valid mortgage to become a preference under the bankrupt act. Thus where a state statute makes void as against all creditors an unrecorded chattel mortgage, the later giving of a chattel mortgage in pursuance of a contract made at the time the loan was made is a preference though recorded when executed;[202] so where a mortgage is given on goods in stock and to be acquired; that on the goods to be acquired is preferential if the state law requires possession to be taken before a mortgage on after acquired property becomes valid;[203] and where a state statute made unrecorded chattel mortgages void as to all subsequent creditors it was held that where the assets of the bankrupt covered by such a mortgage were not sufficient to pay subsequent creditors they take the whole fund to the exclusion of antecedent creditors.[204]

In dealing with mortgages it should always be born in mind that although not such preferences as could be set aside under

[198] *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299.

[199] *In re* N. Y., etc., Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; *In re* Sewell, 111 Fed. Rep. 791, 7 Am. B. R. 133.

[200] *In re* Pekin Plow Co., 112 Fed. Rep. 308, 7 Am. B. R. 369.

[201] *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.

[202] *In re* Rouk, 111 Fed. Rep. 154, 7 Am. B. R. 31.

[203] *In re* Ball, 123 Fed. Rep. 164.

[204] *In re* Cannon, 121 Fed. Rep. 582.

section 60 they may often be set aside as being in violation of section 67.[205]

§ 198. Pledges.

A security by way of pledge or pawn is a species of mortgage. It is confined to movable goods and chattels and is created by the mere delivery of such goods or chattels to some other person as a security for money advanced or to be advanced. The possession of the pledgee is essential.[206] A pledge differs from a chattel mortgage in that in case of a mortgage the title is vested in the mortgagee subject to defeasance upon the performance of the condition, while in the case of a pledge the title remains in the pledgor and the pledgee holds the possession for the purposes of the bailment.[207] It differs from a lien in that it can be created only by contract, express or implied, whereas a lien may arise by operation of law.[208] It has been held that the giving of a pledge within four months of the filing of a petition in bankruptcy, in pursuance of a prior contract is a preference, but this is *contra* to what is thought to be the better rule in regard to mortgages.[209]

Where the pledge is made in good faith for a valuable consideration, and not in violation of the provisions of the bankrupt law, it is valid and will be respected in a court of bankruptcy.[210] Thus where insurance policies are equitably assigned

[205] Pollock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, affirming *In re* Jones, 118 Fed. Rep. 673, 9 Am. B. R. 262; *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245; *In re* Steininger Mercantile Co. (C. C. A. 5th Cir.), 107 Fed. Rep. 660, 6 Am. B. R. 68; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278.

[206] As to what constitutes a delivery, see Casey v. Cavaroc, 96 U. S. 467; Stout v. Milling Co., 13 Fed. Rep. 802.

But see *In re* Wiley, No. 17655 Fed. Cas., s. c. 4 Biss. 171, where one chattel was pledged to secure two debts to different persons.

[207] Jones on Chattel Mortgages, Sec. 4.

[208] In Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441, it was held that an equitable right which is incapable of delivery may be pledged by a contract in writing. This transaction was properly held to raise an equitable lien but it is scarcely accurate to call it a pledge.

[209] *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554. See *contra* in regard to mortgages, Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R 578.

[210] Yeatman v. Savings Institution, 95 U. S. 764; Jerome v. Mc-

as collateral for a loan there is no preference though they were not delivered (*i. e.* though the technical pledge was not made) until within four months.[211] The right of the trustee, in regard to such a valid pledge, is either to redeem the property, or, under order of court, to sell it subject to the lien of the pledge.[212] The pledgee may proceed upon default to sell the pledge in the usual way, although the pledgor may have been adjudged a bankrupt,[213] and the court will not interfere with a pledgee selling a thing pledged, under the power of sale given by the terms of his contract when there is no claim that such power is exercised in a fraudulent or oppressive manner.[214] Notice of such sale should ordinarily be given to the trustee, provided he has been appointed before the sale. The pledgee may rely wholly upon his security and refuse to prove his claim in the bankruptcy court. In such a case he loses only the privilege in participating in the distribution of the bankrupt's estate. He may surrender his preference and prove his claim as an unsecured creditor.[215]

Where the pledge is in fraud of the bankrupt law it is void, and the trustee may disregard the contract of pledge and recover the property for the benefit of the creditors. In order to constitute a preferential pledge under section 60 it must have been, *first,* pledged by an insolvent person to a creditor, and, *second,* with the effect to enable the creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, and, *third,* such creditor must have had reasonable cause to believe that it was intended to give him a preference, and, *fourth,* the pledge must have been within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudi-

Carter, 94 U. S. 734; Clark v. Iselin, 21 Wall. 360; Firth Co. v. Loan and Trust Co. (C. C. A. 4th Cir.), 122 Fed. Rep. 569.

[211] McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543.

[212] Yeatman v. Savings Institution, 95 U. S. 764; Jerome v. McCarter, 94 U. S. 734; Clark v. Iselin, 21 Wall. 360; Dayton National Bank v. Merchants' National Bank, 37 O. S. 208; Moses v. St. Paul, 67 Ala. 168; Dowler v. Cushwa, 27 Md. 354; *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681.

[213] Jerome v. McCarter, 94 U. S. 734.

[214] *In re* Browne, 104 Fed. Rep. 762, 5 Am. B. R. 220.

[215] B. A. 1898, Sec. 57*g*.

cation.[216] If the effect of the transaction is not to give a pledge, the creditor stands as a common instead of a preferred creditor of the bankrupt's estate.[217] But the re-delivery of negotiable paper to the pledgor for collection does not destroy the pledge.[218]

§ 199. As to liens generally.

The bankrupt law recognizes and preserves liens given or accepted in good faith, and not in contemplation of, or in fraud upon the act, and for a present consideration which has been recorded according to law, if record thereof is necessary to impart notice.[219]

In order that a lien be valid under the bankrupt act it is necessary that, *first*, it should have been given or accepted in good faith and for a present consideration, and, *second*, that it should have been recorded if the local law requires record to impart notice. There is no four months limitation to liens created other than by transferring property or through legal proceedings. But claims which, for want of record,[220] or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt are not liens against his estate.[221]

[216] For further consideration of these elements consult Preferences by transfer, Sec. 194. For examples of invalid pledges, see Ogden v. Jackson, 1 Johns. (N. Y.) 370; Adams v. Nat. Bank, 2 Fed. Rep. 174; Casey v. Cavaroc, 96 U. S. 467.

[217] Casey v. Cavaroc, 96 U. S. 467; Adams v. National Bank, 2 Fed. Rep. 174.

[218] Clark v. Iselin, 21 Wall. 360. But see Casey v. Cavaroc, 96 U. S. 467.

[219] B. A. 1898, Sec. 67*d*; *In re* English, 122 Fed. Rep. 113; *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441; McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543; First National Bank v. Pa. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782; *In re* Hanna, 105 Fed. Rep. 587, 5 Am. B. R. 127; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744; *In re* Nicholas, 122 Fed. Rep. 299, 10 Am. B. R. 291; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

[220] Bank v. Herbert, 8 Cranch, 36; *In re* Brunquest, No. 2055 Fed. Cas., s. c. 7 Biss. 208.

[221] B. A. 1898, Sec. 67*a*; Spencer v. Duplan Silk Co., 112 Fed. Rep. 638, 7 Am. B. R. 563; *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Economical Printing Co. (C.

Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.[222]

Liens may be divided into three classes.

First. Common law or retaining liens, such as the lien of tradesmen upon the specific goods in their hands, for their labor and expense in improving or altering them;[223] livery-stable keepers, for care and keep of horses;[224] common carriers of goods, for their services and expenditure with reference to carriage of goods,[225] or inn-keepers, upon the luggage, carriage or horses of a guest, for debts incurred while in their keeping,[226] etc., etc.

Second. Liens created by statute, such as mechanics' liens, which will be further considered hereafter.[227]

Third. Equitable liens. The term "lien" is especially applicable to the common law lien, but it has by analogy been applied to other cases where a right to prepayment exists out of the particular property, or a particular estate or interest in property, either by contract express or implied by the implication of a trust or statute, although the property itself may not be in the possession of or vested in the person claiming the lien.[228]

Liens of this description are in the nature of equitable charges. Mortgages which have already been considered[229]

C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302; *In re* Andrae Co., 117 Fed. Rep. 561, 9 Am. B R. 135.

[222] B. A. 1898, Secs. 67*b* and 67*f*; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; Pattern v. Carley (Sup. Ct. N. Y. App. Div.), 8 Am. B. R. 482.

[223] *Ex parte* Deeze, 1 Atk. 228; Franklin v. Hosier, 4 B. & Ald. 341.

[224] Jackson v. Cummins, 5 M. & W. 342; Judson v. Etheridge, 1 Cr. & M. 743.

[225] Aspinall v. Pickford, 3 B. & P. 44 n.; Rushforth v. Hadfield, 6 East. 519; Wright v. Snell, 5 B. & Ald. 350.

[226] Mulliner v. Florence, 3 Q. B. Div. 484; Turrill v. Crawley, 13 Ad. and El. (N. S.) 197.

[227] Sec. 201, *et seq.*

[228] *In re* English, 122 Fed. Rep. 113; 3 Pomeroy Eq. Jur., Sec. 1235; Walker v. Brown, 165 U. S. 654.

[229] Sec. 197, *ante.*

may also be regarded as equitable liens, but for convenience they have been classed under the head of mortgages. A familiar example of an equitable lien is that of a vendor for the purchase money,[230] of a judgment creditor, etc.

Where a valid lien exists the lien-holder has the same courses open to him as any other preferred creditor.[231] The court of bankruptcy may authorize the trustee to redeem the property and discharge the lien, or it may order the entire property to be sold and ascertain the amount of the debt secured by the lien. In such case the debt will be preferred in the distribution of the proceeds and the purchaser of the estate will take it discharged of all incumbrances. Or, on the other hand, the court may allow the trustee to sell the property subject to the lien on the bankrupt's estate, to be finally settled without any determination of the rights claimed under the lien. In such case the petitioner will retain those rights as against the purchaser of the property. If his lien is not sufficient to secure the whole debt he may prove the balance of such claim over the value of such lien, but for only such excess.[232]

§ 200. Mechanics' liens.

A mechanic's lien is created by a state statute. It gives a lien to material men and laborers upon specific property for the payment for materials furnished for and labor performed on that property.

What constitutes a valid mechanic's lien, when it attaches, and what is necessary to be done in order to complete and preserve the lien, varies in different states. Whether a mechanic's lien is a valid claim against the estate of the bankrupt depends upon the local law as construed by the highest court of the state.[233] If a valid lien has attached under the

[230] *In re* Bryan, No. 2062 Fed. Cas., s. c. 3 N. B. R. 110; Hall v. Scovel, No. 5945 Fed. Cas., s. c. 10 N. B. R. 295; *In re* Brooks, No. 1943 Fed. Cas., s. c. 2 N. B. R. 466; *In re* Perdue, No. 10975 Fed. Cas., s. c. 2 N. B. R. 183; *In re* Hutto, No. 6960 Fed. Cas., s. c. 3 N. B. R. 787.

[231] Sec. 202, *post*.

[232] B. A. 1898, Sec. 56*b*.

[233] *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126; *In re* Kerby-Dennis Co. (C. C. A. 7th Cir.), 95 Fed. 116, 2 Am. B. R. 402; *In re* Coe-Powers Co. (C. C. A. 6th Cir.), 109 Fed. 550, 6 Am. B. R. 1; *In re* Falls

state law before proceedings in bankruptcy have been commenced the lien will be respected by the court of bankruptcy.[233] But if for want of record or for other reasons it would not have been a valid lien as against the claims of the creditors of the bankrupt, it is not a lien against his estate.[234] A lien can not be created after the filing of the petition in bankruptcy.[235]

The adoption of the state statutes with reference to liens is constitutional.[236] The uniformity required by the constitution relates to national legislation only, and therefore the laws of the several states may be left in force, and to such an extent as congress may see fit.

Where the trustee delays in electing to take the property subject to the lien, the holder of such lien may bring a suit in the proper state court to foreclose it.[237] The reason for this is, that if the court of bankruptcy should abstain from ascertaining the lien, and from providing for its satisfaction out of the property or proceeds of a sale thereof, the lien might be lost under the state law.[237*] Nearly every state, which has a mechanics' lien law, has provided for bringing a suit to enforce the lien within a limited time or the lien is lost.[238]. The trustee in bankruptcy, if one has been appointed,

City Shirt Mfg. Co., 98 Fed. Rep. 592; 3 Am. B. R. 437; *In re* West Norfolk Lumber Co., 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re* Georgia Handle Co. (C. C. A. 5th Cir.), 109 Fed. Rep. 632, 6 Am. B. R. 472; South End Imp. Co. v. Harden (N. J.), 52 Atl. 1127.

[234] B. A. 1898, Sec. 67*a*.

In re Brunquest, No. 2055 Fed. Cas., s. c. 7 Biss. 208; Bank v. Herbert, 8 Cranch, 36.

[235] *In re* Roeber (C. C. A. 2d Cir.), 121 Fed. Rep. 449; Lazzari v. Havens, 79 N. Y. S. 395.

[236] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed. Cas., s. c. 1 Dill. 45; *In re* Jordon, No. 7514 Fed. Cas., s. c. 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., s. c. 10 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., s. c. 2 Hughes, 322.

[237] Marston v. Stickney, 55 N. H. 383; Clifton v. Foster, 103 Mass. 233; Bryant v. Small, 35 Wis. 205; Douglass v. Zinc Co., 56 Mo. 388; Keller v. Denmead, 68 Penn. St. 449.

[237*] In Bryant v. Small, 35 Wis. 209, the court said: "This court has held that the lien exists by virtue of the statute. . . . . But, nevertheless, the party must file his petition and commence his action within the period prescribed to enforce it, or it will be lost." This is the usual rule in this respect.

[238] Bryant v. Small, 35 Wis. 205; Clifton v. Foster, 103 Mass. 233.

should be made a party to such suit. If the trustee does not appear to contest either the suit or the lien, the lien may be foreclosed and the property sold. If he does appear to contest the suit the state court will ordinarily continue the case to await the action of the bankruptcy court. The lien is preserved by the bringing of the suit in the state court.

The jurisdiction of the court of bankruptcy is sufficient to enforce a mechanic's lien in that court, without any petition being filed or suit instituted in the state court to preserve and continue it, provided the bankruptcy court has lawful custody of the property to which the lien is claimed.[239] Before beginning a suit in the state court, if bankruptcy proceedings have been commenced, an application should be made to the bankruptcy court for leave to foreclose the lien in the state court.[240] If that particular court is inclined to the opinion that its jurisdiction is sufficient, and will be exercised to preserve the rights of the lien-holder, the court may refuse leave with the intimation that such rights will be preserved by the court of bankruptcy. This undoubtedly would be sufficient to preserve the lien if otherwise valid.

§ 201. Admiralty liens.

There is a class of maritime liens for materials and supplies furnished to vessels. Where such a lien exists a court of bankruptcy will enforce it with the same effect as it would have in admiralty.[241] A court of bankruptcy will also enforce a lien for supplies and materials furnished to a vessel, founded upon a state statute, and not of a strictly maritime character.[242]

[239] B. A. Sec. 2.; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 8 Am. B. R. 444; South End Imp. Co. v. Harden (N. J.), 52 Atl. 1127; *In re* Lemmon & Gale Co. (C. C. A. 6th Cir.), 112 Fed. Rep. 206, 7 Am. B. R. 291; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623.

[240] *In re* Cook, No. 3151 Fed. Cas., s. c. 3 Biss. 116.

[241] The Ironsides, No. 7069 Fed. Cas., s. c. 4 Biss. 518; *In re* Scott, No. 12517 Fed. Cas., s. c. 1 Abb. U. S. 336; *In re* Kirkland, No. 7842 Fed. Cas., s. c. 12 Am. Law. Reg. 300.

[242] *In re* Scott, No. 12517 Fed. Cas., 1 Abb. U. S. 336. This principle is also recognized in The Edith, 94 U. S. 518; The Belfast, 7 Wall. 624; Leon v. Galceran, 11 Wall. 185.

§ 202. **Rights of a secured creditor.**

A "secured creditor" is a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under the bankrupt act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.[243]

Where a creditor has received security for his debt valid under the bankrupt act, three courses are open to him, provided the trustee does not elect to redeem by paying the debt or to take the property as assets of the bankrupt, subject to the preference. They are:

First. The secured creditor may rely upon his lien and neither prove his debt in bankruptcy nor release his security In such case the security is preserved, notwithstanding the bankruptcy of the debtor.[244]

Second. The secured creditor may rely upon his security and prove for such sum as may be owing above the value of his security.[245] The value of securities held by secured creditors is determined by converting the same into money, according to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value credited upon such claims, and a dividend paid only on the unpaid balance.[246]

Third. A secured creditor may surrender his security and then prove his debt as an unsecured creditor.[247] In 1813 Lord Eldon said:[248] "The practice has been long established in bankruptcy not to suffer a creditor holding a security to prove, unless he will give up that security, or the value has

[243] B. A. 1898, Sec. 1, clause 23.

[244] Long v. Bullard, 117 U. S. 617; Dudley v. Easton, 104 U. S. 103; McHenry v. La Societe Francaise, 95 U. S. 58; Porter v. Lazear, 109 U. S. 84.

[245] B. A. 1898, Sec. 56*b*.

[246] B. A. 1898, Sec. 57*h*

[247] *In re* Conner, No. 3118, Fed. Cas., s. c. 1 Low, 532; *In re* Kipp, No. 7836, Fed. Cas., s. c. 4 N. B. R. 593; *In re* Leland, No. 8230, Fed. Cas. s. c. 7 Ben. 156; *In re* Stephens, No. 13365, Fed. Cas., s. c. 3 Biss. 187; *In re* Evans, No. 4552, Fed. Cas., s. c. 3 N. B. R. 261.

[248] In *ex parte* Smith, 2 Rose, 64.

been ascertained by the sale of it. The reason is obvious; till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and with this further consideration that, in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his title in a situation of predominate advantage." The bankruptcy act of 1867 [249] expressly provided for the application of the rule, as does the present English bankruptcy act.[250]

The trustee may, however, elect to take the property of the bankrupt subject to the valid liens of creditors.[251] In such case the court may, in its discretion, order the property sold, subject to the lien or free from the lien.[252] If it is sold subject to the lien the creditor still has his claim preserved against the new purchaser. If it is sold free of the lien he has his claim preserved against the trustee for the amount of his debt. The trustee is authorized to convey property to the purchaser.[253]

§ 203. Suits to set aside fraudulent conveyances and preferences.

The trustee is authorized to sue for and recover that which was conveyed in fraud of the rights of creditors or its value.[254] It makes no difference whether the conveyance is constructively fraudulent under a statute of frauds or under a special provision of the bankrupt law.[254] The trustee is also authorized to set aside all fraudulent preferences which creditors

"In Cooke's Bankrupt Laws the rule in bankruptcy is attributed to legislative enactment, and is thus stated: 'The aim of the legislatures in all the statutes concerning bankrupts being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally.'" Lord Coltenham, in Mason v. Bogg, 2 Myl. & Cr. 446.

[249] R. S. Sec. 5084.

[250] Act of 1883, 46 and 47 Vict. c. 52, Sec. 39, clauses 9 to 16.

[251] See Title to bankrupt's property, Sec. 149, *ante*; Gibson v. Warden, 14 Wall. 244; Jerome v. McCarter, 94 U. S. 734.

[252] Houston v. City Bank, 6 How. 486; Fowler v. Hart, 13 How. 373; *In re* Sanborn, 3 Am. B. R. 54; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Styer, 3 Am. B. R. 424, 98 Fed. Rep. 290; *In re* Gerry, 112 Fed. Rep. 957, 7 Am. B. R. 461.

[253] B. A. 1898, Sec. 70*c*.

[254] B. A. 1898, Secs. 67*e* and 70*e*; Burr v. Hopkins, No. 2192, Fed. Cas., s. c. 6 Biss. 245.

have received and to recover the property or its value from such persons.[255] The proceedings in these two classes of cases are substantially the same and will be considered together.

The trustee must bring the suit.[256] It can not be maintained by a creditor.[257]

Whom the Trustee Represents.— For most purposes the trustee represents the bankrupt, but in respect to suits to avoid fraudulent preferences and conveyances he represents the general or unsecured creditors. In such cases he has all the rights of a judgment creditor, as well as the powers specifically conferred by the bankrupt act.[258] Hence, what would have been an invalid conveyance or preference at the suit of a creditor is voidable as against the trustee.[258] In cases of this nature the trustee has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate or to determine whether there is an excess of property over what is required for the purposes of the security.[259] The trustee's duties in this respect relate chiefly to the interests of the general creditors.

The bankrupt act provides that, in case it is for the benefit of the general estate, the trustee may be subrogated to the rights of a particular creditor for the benefit of all the creditors. Thus, whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subro-

[255] B. A. Sec. 60*b*.

[256] Trimble v. Woodhead, 102 U. S. 647; Glenny v. Langdon, 98 U. S. 20; Allen & Co. v. Montgomery, 48 Miss. 101; *In re* Meyers, No. 9518, Fed. Cas., s. c. 2 Ben. 424; *In re* Gray, 47 App. Div. (N. Y.) 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore.) 70 Pac. R. 286.

[257] Moyer v. Dewey, 103 U. S. 301; Glenny v. Langdon, 98 U. S. 20; King v. Dietz, 12 Penn. St. 156; Lane v. Nickerson, 99 Ill. 284.

[258] Dudley v. Easton, 104 U. S. 103; Harvey v. Crane, No. 6178, Fed. Cas., s. c. 2 Biss. 496; *In re* Morrill, No. 9821, Fed. Cas., s. c. 2 Saw. 356; Smith v. Ely, No. 13044, Fed. Cas. s. c. 10 N. B. R. 553; *In re* Gray, 47 App. Div. (N. Y.) 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore.) 70 Pac. R. 286.

[259] McHenry v. La Societe Francaise, 95 U. S. 58; Dudley v. Easton, 104 U. S. 99.

gated to and may enforce such rights of such creditor for the benefit of the estate.[260]

So also a preference created by a levy, judgment, attachment or other lien obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him is ordinarily null and void. But the court may, upon notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate.[261]

It will be observed that neither of the provisions referred to above militate against, but especially protect, a *bona fide* purchaser for a fair present consideration, and also a creditor who has honestly received a preference, which is valid under the act.

In What Courts such Proceedings may be Instituted. — A difference of opinion existed for some time with reference to the extent of the jurisdiction of a court of bankruptcy over suits to recover fraudulent conveyances and preferences. The question was finally settled by the supreme court, which held that a court of bankruptcy had no jurisdiction, without the proposed defendant's consent, to entertain proceedings to recover property conveyed to the defendant by the bankrupt in fraud of the bankrutpcy act.[262] By the amendment of Feb. 5, 1903, jurisdiction was conferred upon the courts of bankruptcy of suits for the recovery of property under Sec. 60*b*, Sec. 60*c* and Sec. 70*e*. In respect to this class of suits the courts of bankruptcy and the state courts now have concurrent jurisdiction. It has been held that this is true even where the adjudication of bankruptcy was before the passage of the amendment of Feb. 5, 1903, authorizing such suits to be brought in courts of bankruptcy.[263]

[260] B. A. 1898, Sec. 67*e*.

[261] B. A. 1898, Secs. 67*e* and *f*.

[262] Bardes v. Hawarden Bank, 178 U. S. 524; Mitchell v. McClure, 178 U. S. 539; Hicks v. Knost, 178 U. S. 541; Wall v. Cox, 181 U. S. 244.

[263] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992; *In re* Knickerbocker, 121 Fed. Rep. 1004.

But see *In re* Hartman, 121 Fed. Rep. 940.

It is sometimes the case that the court of bankruptcy in which the original proceedings are pending can not obtain jurisdiction of the person and subject-matter for the reason that it is beyond the reach of its process. In such cases it is necessary to go into a court which has jurisdiction. The trustee may maintain such a suit in a court of bankruptcy in a district other than that in which the decree of bankruptcy was made.[264] A bill or petition for this purpose should show what proceedings have taken place in the principal court with reference to the commencement of the proceedings and the adjudication of bankruptcy, etc. Suits of this character are not dependent upon the citizenship of the parties.

Suits to avoid a preference or conveyance may be maintained in the circuit courts of the United States only when they fall within the provisions of section 23 with reference to citizenship and the amount involved. Under the act of 1867 such suits might be prosecuted, irrespective of the citizenship of the parties, on the ground that a federal question was involved.[266] But the rule is clearly changed by the provisions of section 23.[267]

Pleading and Practice in Suits to Recover Property. — To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy.[268] It must be a plenary suit at law or in equity according to the nature of the case.[269] Such suits may be actions at law in ejectment, trover, assumpsit, etc., or suits in equity, as a bill to set aside a fraudulent convey-

[264] *In re* Peiser, 115 Fed. Rep. 199, 7 Am. B. R. 690; Lathrop v. Drake, 91 U. S. 516; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Clif. 552; *Ex parte* Martin, No. 9149, Fed. Cas., s. c. 5 Law Rep. 158. See also ancillary jurisdiction, Sec. 21, *ante*.

[266] Smith v. Mason, 14 Wall. 419; Marshall v. Knox, 16 Wall. 551; Lathrop v. Drake, 91 U. S. 516; Eyster v. Gaff, 91 U. S. 521; Burbank v. Bigelow, 92 U. S. 179; Dudley v. Easton, 104 U. S. 103; Sec. 25, *ante*.

[267] Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328.

[268] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992.

[269] *In re* Knickerbocker, 121 Fed. Rep. 1004; Louisville Trust Co. v. Comingor, 184 U. S. 18; Jaquith v. Rowley, 188 U. S. 620.

ance, etc.[270] It has been held that an action for assumpsit will not lie but that the action should be one of trover.[271]

The suit should be prosecuted by the trustee and it is not necessary for him to obtain an order from the court of bankruptcy in order to maintain such a suit.[272] The right to maintain such a suit is not barred by his failure to contest the claim presented by the preferred creditor against the bankrupt's estate,[273] because such a proceeding is not *res judicata.*

The plaintiff should allege in his bill or petition facts essential to show that the conveyance was made while the bankrupt was insolvent[274] and within four months of bankruptcy, and that the person receiving it had reasonable cause to believe that he was receiving a preference.[275]

It has been held that he should allege that the assets in the trustee's hands are insufficient to satisfy the claims of the creditors.[276] No demand is necessary before beginning an action to recover property transferred in fraud of the act.[277]

In a suit to set aside a preference or a conveyance the burden of proof is on the trustee to establish that the preference or transfer is fraudulent under the bankrupt act.[278] It is proper

[270] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992; Wall v. Cox, 101 Fed. Rep. 403, 5 Am. B. R. 727, reversed on another point, 181 U. S. 244.

[271] Lyon v. Clark, 129 Mich. 381; Weeks v. Fowler (N. H.) 53 Atl. Rep. 543.

[272] Chism v. Bank of Friar's Point (Sup. Ct. of Miss.) 5 Am. B. R. 56.

[273] Buder v. Columbia Distilling Co. (Ct. of App., St. Louis) 70 S. W. Rep. 508, 9 Am. B. R. 331.

[274] Deland v. Miller & Chaney Bank (Ia.), 93 N. W. Rep. 304; Severin v. Robinson (Ind. App.) 60 N. E. Rep. 966.

[275] Crooks v. People's Nat. Bank, 3 Am. B. R. 238; *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; Peck v. Connell (Supr. Ct. of Pa.) 8 Am. B. R. 500; Levor v. Seiter (Sup. Ct. N. Y., App. Div.) 8 Am. B. R. 459; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; Taft v. Fourth Nat. Bank (Sup. Ct. Cin.) 2 N. B. N. 1145, 8 Ohio N. P. Rep. 59.

[276] Mueller v. Bruss, 112 Wis. 406.

[277] Goldberg v. Harlan (Ind. App.) 67 N. E. Rep. 707; Tredway v. Kaufman, 21 Pa. (Super. Ct.) 256.

[278] Barbour v. Priest, 103 U. S. 293; Crane v. Penny, 2 Fed. Rep. 187; Webb v. Sachs, No. 17325, Fed. Cas., s. c. 4 Saw. 158; *In re* Black, No. 1457, Fed. Cas., s. c. 2 Ben. 196. As to what evidence may be used to establish a fraudulent preference, see Rosenthal v. Walker, 111 U. S. 185; Hicks v. Langhorst (Hamilton Co., O., Com. Pleas) 6 Am. B. R. 178; Dutton v. Cloar (Tex. Cir. App.) 65, S. W. 70.

to permit a party to testify as to his intention in making the transfer.[279] A schedule of liabilities filed in a bankruptcy proceeding is not competent evidence on an issue between the trustee and a third person as to the financial condition of the bankrupt months before bankruptcy.[280]

Where a preference is set aside the creditor's debt is extinguished by a discharge, unless he comes in and proves his debt like any other creditor.[281]

The Order.— The decree annulling a fraudulent conveyance or transfer may contain a direction for a conveyance by a person holding title to the trustee in bankruptcy.[282] Under the present act it may be doubted if it is necessary to direct such a conveyance because the title is vested in the trustee by operation of law. If the purchase was joint the judgment or decree of recovery should be joint.[283] Where real estate has been conveyed to a *bona fide* purchaser by bankrupt's grantee before commencement of suit to recover, the judgment should not provide that the conveyance from bankrupt be set aside, as this would cloud the *bona fide* purchaser's title.[284]

It has been held that an assignee for the benefit of creditors who has proceeded under the state law to distribute the property of the bankrupt can not be held personally liable for the assets which came into his hands and were distributed. But the trustee "must seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act." [285] A conveyance or transfer should be set aside *in toto* when the trustee elects to avoid it at all.[286]

The express provision of the bankrupt act is that the trustee may, in case of a fraudulent preference or transfer, recover

[279] Hackney v. Raymond Bros. Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213.

[280] Hackney v. Raymond Bros. Clarke Co. (Sup. Ct. Neb.), 10 Am. B. R. 213.

[281] See Provable Debts, Chap. XIII.

[282] Keating v. Keefer, No. 7635, Fed. Cas., s. c. 5 N. B. R. 133; Burkholder v. Stump, No. 2165, Fed. Cas., s. c. 4 N. B. R. 597.

[283] Schulenburg v. Kabwrech, No. 12487, Fed. Cas., s. c. 2 Dill. 132.

[284] Skillin v. Maibrunn, 78 N. Y. Supp. 436.

[285] Cragin v. Thompson, No. 3320, Fed. Cas., s. c. 2 Dill. 513, per Judge Dillon; *In re* Cohn, No. 2966, Fed. Cas., s. c. 6 N. B. R. 379; Jones v. Kinney, No. 7473, Fed. Cas., s. c. 5 Ben. 259; Anshutz v. Hoerr, 1 Fed. Rep. 594–5.

[286] Wehl v. Wald, 3 Fed. Rep. 93.

the property or the value of it from the person so receiving it or so to be benefited by it.[287] Where property has been sold at a judicial sale, or where a *bona fide* sale for a valuable consideration has been subsequently made by the person taking the property in fraud of creditors, it can not be recovered in specie. The only remedy of the trustee is for the value of it. The measure of damages in such cases is the actual value of the property at the time of the conveyance.[288] The trustee is not bound by the price paid by a purchaser at a judicial sale or otherwise as the value of the property. All kinds of damages are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be founded, the act of finding is for it.[289]

[287] B. A. 1898, Sec. 60*b* and Sec. 70*e*.

[288] Frank v. Musliner, 28 N. Y. L. J. 765, 9 Am. B. R. 229; Clarion Bank v. Jones, 21 Wall. 339; Conrad v. Insurance Co., 6 Pet. 274; Comly v. Fisher, No. 3053, Fed. Cas., s. c. Taney, 121; Marshall v. Knox, 16 Wall. 559; Eby v. Schomacher, 29 Penn. St. 40; Davis v. Anderson, No. 3623, Fed. Cas., s. c. 6 N. B. R. 145; *In re* Rosenberg, No. 12055, Fed. Cas., s. c. 3 Ben. 366; Smith v. Kehr, No. 13071, s. c. 2 Dill. 50.

[289] Alder v. Keighley, 15 M. & W. 117; Clarion Bank v. Jones, 21 Wall. 325.

CHAPTER XIX.

EXAMINATIONS.

§ 204. When a bankrupt may be examined.

The bankrupt may be examined when he is present at the first meeting of his creditors and at such other times as the court shall order.[1] The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee.[2] For convenience the same day is usually selected as that upon which the first creditors' meeting is held. The examination may be had at any time after the petition is filed either in voluntary or involuntary bankruptcy.[3] The first examination is regularly made at the first creditors' meeting.

A bankrupt may be examined as many times as the judge or referee shall order. The fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor.[4] The referee should, in the exercise of a sound discretion, so regulate the time, manner and courses of examination, as to protect the bankrupt from annoyance, and oppression, and mere delay. At the same time full and fair opportunity should be allowed to the creditors to inquire into such matters as the statute permits.[5] Where one full examination of the bankrupt has been made, a subsequent examination will not ordinarily be permitted except for cause.[6]

[1] B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086.

[2] Gen. Ord. 12; B. A. 1898, 55*b*.

[3] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[4] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; *In re* Mellin, 97 Fed. Rep. 326, 3 Am. B. R. 226; *In re* Adams, No. 40, Fed. Cas., s. c. 3 Ben. 7; *In re* Gilbert, No. 5410, Fed. Cas., s. c. 1 Low. 340; *In re* Vogel, No. 16984, Fed. Cas., s. c. 5 N. B. R. 393.

[5] *In re* Horgan (C. C. A. 2d Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Mellen, 97 Fed. Rep. 326, 3 Am. B. R. 226.

[6] *In re* Frisbie, No. 5131, Fed. Cas., s. c. 13 N. B. R. 349; *In re* Isidor, No. 7105, Fed. Cas., s. c. 2 Ben. 123; *In re* Frizelle, No. 5153, Fed. Cas., s. c. 5 N. B. R. 122; *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

Where an examination is sought or carried on for the purpose of gratifying malice or mere curiosity, it may be arrested.[7]

An examination may be adjourned to a day certain, but if it is adjourned without day a new notice of examination is necessary.[8]

It will sometimes be necessary to determine at what stage in the proceedings does the right to examine the bankrupt cease. There can be no doubt that this right extends up to the final adjudication upon his application for a discharge.[9] The hearing upon a petition for a discharge may be continued for the purpose of affording an opportunity to examine the bankrupt in a proper case.[10] It has been held that a bankrupt can be compelled, after his discharge, to submit to an examination.[11] This was a matter of express enactment in the act of 1867.[11*] There is no limitation in the statute of the court's jurisdiction over his person in respect to the time of his discharge. The language of section 21 authorizes the court, by order, to require the bankrupt to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration in bankruptcy. The only limitation, with reference to time, seems to be that the estate shall still be in the process of administration. There can be no doubt of the right to examine a bankrupt, upon a proper application being made for that purpose, after his discharge is suspended or vacated.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him

[7] *In re* Salkey, No. 12252, Fed. Cas., s. c. 5 Biss. 486.

[8] *In re* Price, 1 Am. B. R. 419, 91 Fed. Rep. 635.

[9] Gen. Ord. 12; *In re* Solis, No. 13165, Fed. Cas., s. c. 4 Ben. 143; *In re* Vetterlein, No. 16926, Fed. Cas., s. s. 5 Ben. 7; *In re* Frizelle, No. 5132, Fed. Cas., s. c. 5 N. B. R. 119.

[10] *In re* Seckendorf, No. 12600, Fed. Cas., s. c. 2 Ben. 462; *In re* Mawson, No. 93210, Fed. Cas., s. c. 1 N. B. R. 271.

[11] *In re* Westfall Bros. Co., 8 Am. B. R. 431. But a contrary rule prevailed under the Act of 1867. *In re* Dean, No. 3701, Fed. Cas., s. c. 3 N. B. R. 768; *In re* Jones, No. 7449, Fed. Cas., s. c. 6 N. B. R. 386; *In re* Witkowski, No. 17020, Fed. Cas., s. c. 10 N. B. R. 209; *In re* Dole, No. 3964, Fed. Cas., s. c. 11 Blatch. 499. See also *in re* Heath, No. 6304, Fed. Cas., s. c. 7 N. B. R. 448.

[11*] R. S. Sec. 5104.

to be produced upon *habeas corpus,* by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy.[12]

Where the bankrupt is about to leave the district in which he resides or has his principal place of business, to avoid examination, he may be arrested and kept in custody, not exceeding ten days, until he shall be examined and released or give bail to appear for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.[13] It has been held that a court of bankruptcy is without power to make an order for the extradition of a bankrupt, after he had escaped into another district, for the purpose of an examination,[14] and that a bankrupt can not be examined by the order of a court of bankruptcy in a district other than the one in which the bankruptcy is pending in the exercise of ancillary jurisdiction.[15]

§ 205. When persons other than bankrupts may be examined.

The statute expressly authorizes the referee to exercise the powers vested in courts of bankruptcy for the administering of oaths to, and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.[16]

A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this act, provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to

[12] Gen. Ord. 30; *In re* Gilbert, 2 N. B. N. 378.

[13] B. A. 1898, Sec. 9*b*. For proceedings to detain a bankrupt for examination, see When a bankrupt may be arrested, Sec. 219.

[14] *In re* Hassenbusch (not reported) but affirmed *in re* Hassenbusch (C. C. A., 6th Cir.) 108 Fed. Rep. 35, 47 C. C. A. 177.

[15] *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538.

[16] B. A. 1898, Sec. 38, clause 2.

determine the fact whether she has transacted or been a party to any business of the bankrupt.[17]

The language of these provisions is very general. They give the referee power to summon any person who could give evidence in a court at law.[18] They authorize the examination of them upon all matters which are likely to arise in respect to the bankrupt or his property. The only limitation as to time within which this power may be exercised is that the estate shall be in process of administration in bankruptcy. The judge or referee may therefore summon a witness at any time after the commencement of proceedings until the estate is closed by order of court. The referee of course can only summon witnesses while the case is pending before him upon reference.

Prior to the amendment of Feb. 5, 1903, only persons, who were competent witnesses under the laws of the state in which the proceedings were pending, could be examined.[19] This is the rule with reference to examination of witnesses in proceedings instituted prior to the amendment. A wife not competent to testify under the law of the state cannot be compelled to testify in such bankruptcy proceedings.[20] In proceedings instituted since the amendment of Feb. 5, 1903, the competency of witnesses under the state law is immaterial. A wife may be examined only touching business transacted by her or to which she is a party and to determine the fact whether she has transacted or been a party to any business of the bankrupt's.[21]

§ 206. How to obtain an order for an examination.

The judge or referee may make the order for an examination.[22] The referee usually makes the order for examination after the order requiring the bankrupt to attend before the referee, which is made by the judge in the order of reference.[23]

[17] B. A. 1898, Sec. 21*a* as amended Feb. 5, 1903, 32 Stat. at L. 797. Compare R. S. Sec. 5087.

[18] This includes a trustee in insolvency under a state proceeding. See *In re* Pursell, 114 Fed. Rep. 371, 8 Am. B. R. 96.

[19] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; *In re* Westfall Bros. Co., 8 Am. B. R. 431.

[20] *In re* Jefferson, 96 Fed. Rep. 826, 3 Am. B. R. 174; *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555.

[21] B. A. 1898, Sec. 21*a* as amended Feb. 5, 1903, 32 Stat. at L. 797.

Orders for examinations of a bankrupt subsequent to the first one are regularly made only upon application and for cause shown.[24]

It has been held that a court of bankruptcy has no special ancillary power under the bankruptcy statute to make an order on the application of the trustee of a bankrupt whose estate is being administered in another district, requiring persons residing within the district to appear before a referee for examination concerning the acts, conduct, and property of the bankrupt. A court having charge of the administration of a bankrupt's estate has power to order that any person having knowledge "concerning the acts, conduct, or property of the bankrupt," but who resides without the district or state, and more than 100 miles from the court, shall be examined before a commissioner in accordance with the provisions of the general statutes or practice in equity cases, and that persons so ordered to be examined may be compelled by proper process, as in other cases, to appear and testify.[25]

The application for an order requiring the bankrupt or other person to appear for examination may be made by any officer, bankrupt or creditor.[26] A receiver [27] or a trustee [28] are such officers. A creditor is entitled to an order for an examination before he has filed proof of his claim in set form.[29] The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt. It seems sufficient proof if the party is named in the schedules attached to the petition in bankruptcy.[30]

The application is usually made by petition or motion. The petition must designate the persons to be examined, but it need

[22] B. A. 1898, Sec. 21; Sec. 1, clause 7; Sec. 38, and Official Form No. 28, see Form No. 47, *post*.

[23] Gen. Ord. 12.

[24] *In re* Frisbie, No. 5131, Fed. Cas., s. c. 13 N. B. R. 349; *In re* Isidor, No. 7105, Fed. Cas., s. c. 2 Ben. 123; *In re* Frizelle, No. 5133, Fed. Cas., s. c. 5 N. B. R. 122.

[25] *In re* Williams, 123 Fed. Rep. 321.

This was done *in re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[26] B. A. 1898, Sec. 21.

[27] *In re* Fixen, 96 Fed. Rep. 748, 2 Am. B. R. 822.

[28] *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

[29] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498; *In re* Walker, 96 Fed. Rep. 550, 3 Am. B. R. 35; *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[30] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498.

not specify the particular matters concerning which an examination is sought.[31] In a proper case a letter or a verbal request may be sufficient upon which to make the order for examination.[31] Less proof, of course, is required from an officer, as a trustee, than from a creditor.[32] The proceeding is *ex parte*, and no previous notice is required to be given to any party.[33] The form of the order for an examination of a bankrupt is prescribed by the supreme court.[34] It should be entered of record among the proceedings before the referee.

§ 207. Notice of examination to bankrupts, creditors and witnesses.

A copy of the order for examination of the bankrupt, signed by the referee, should be delivered to the bankrupt as soon as may be.[35] A copy of the order is used in place of a summons or subpœna. Where service is made upon a bankrupt by delivering him a copy of the order, proof of service may be made by affidavit of the person delivering it or by a written acceptance of service by the bankrupt. If the bankrupt appears, he waives any irregularity in the service. A bankrupt is a party to the proceedings, and is required to comply with all lawful orders of the judge or referee.[36] If he disobeys or resists any lawful order of a referee, he is liable to be committed by the judge for contempt.[37]

The bankrupt can not be required to attend at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court or a judge thereof for cause shown.[38] He is not entitled to witness fees in any case.[39] But he is allowed his actual expenses from the estate when examined or

[31] *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

[32] *In re* McBrien, No. 8665, Fed. Cas., s. c. 2 Ben. 513.

[33] *In re* Macintire, No. 8821, Fed. Cas., s. c. 1 Ben. 277.

[34] Official Form No. 28; see Form No. 47, *post*.

[35] Official Form No. 28. See Form No. 47, *post*.

[36] B. A. 1898, Sec. 7, clause 2.

[37] B. A. 1898, Sec. 41*a* and Sec. 2, clause 16.

[38] B. A. 1898, Sec. 7, clause 9.

[39] *In re* Okell, No. 10475, Fed. Cas., s. c. 2 Ben. 144; *In re* McNair, No. 8907, Fed. Cas., s. c. 2 N. B. R. 219.

required to attend at any place other than the city, town or village of his residence.[40]

When the bankrupt is present before the court or referee he may be examined without previous notice being given him.[41] In other cases the bankrupt is entitled to a reasonable notice of his examination.

A reasonable notice is such time as will enable him to reach and appear before the court or referee with such knowledge as may be under his control upon the matters of the investigation or information asked for. "This depends upon the circumstances and facts surrounding the bankrupt, the distance he is from the court or the place of his examination, and also upon what, if any, particular facts he is to be examined. If the defendant is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would manifestly be much longer than in a case where the notice of examination was in regard to a few items of his property." [42]

The referee is also required to give at least ten days' notice to all creditors of all examinations of the bankrupt.[43] This notice is regularly sent by mail to the respective addresses of the creditors as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors.[44] The creditors may waive notice in writing.[45] No notice to creditors of the examination of witnesses, other than the bankrupt, is required.

Where a person is not a party to the proceedings, and therefore not bound to obey the orders made therein, he must be brought before the court for examination by process of summons. A bankrupt, as has just been stated, is a party, and need not be served with summons. A creditor who has proved his claim is bound to obey all the orders of the court touching his alleged debt, and therefore may be summoned by service of a copy of the order for an examination of him in respect

[40] B. A. 1898, Sec. 7, clause 9.

[41] B. A. 1898, Sec. 7, clouse 9; *In re* Bromley & Co., 3 N. B. R. 86; *In re* Brandt, No. 1812, Fed. Cas. s. c. 2 N. B. R. 215.

[42] *In re* Bromley & Co., 3 N. B. R. 692–3.

[43] B. A. 1898, Sec. 58*a*.

[44] B. A. 1898, Sec. 58*a*; Gen. Ord. 21, par. 2.

[45] B. A. 1898, Sec. 58*a*.

to his claim.[46] The form of summons is prescribed.[47] This must issue out of court under the seal thereof and be tested by the clerk.[48] Blanks with the signature of the clerk and the seal of the court may be furnished to the referees upon application.[49]

The summons may be served by any person. The return is in the form of an affidavit of personal service prescribed in Form No. 30.

It may be served upon witnesses living without the district but within one hundred miles of the place of testifying.[50] But no person can be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.[51]

A person who disobeys a summons to appear before a referee to be examined as a witness may be punished for contempt.[52]

§ 208. How an examination is made.

At the time and place appointed, the bankrupt, creditor or other witness must present himself for examination. The bankrupt can not refuse to be sworn by reason of his claiming that he has an off-set which extinguishes, or that the statute of limitations has run against, the claim of the creditor upon whose application he is to be examined. So long as the debt stands proved and unimpeached the bankrupt may be sworn and examined.[53] A person is exempt from arrest or

[46] Gen. Ord. 21, par. 6; *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Paddock, No. 10657, Fed. Cas., s. c. 6 N. B. R. 132; *In re* Pease, 29 Fed. Rep. 593.

[47] Official Form No. 30, see Form No. 49, *post*.

[48] Gen. Ord. 3; Official Form No. 30, see Form No. 49, *post*.

[49] Gen. Ord. 3.

[50] R. S. Sec. 876; *In re* Woodward, No. 18000, Fed. Cas., s. c. 8 Ben. 112.

[51] B. A. 1898, Sec. 41*a*.

[52] B. A. 1898, Sec. 41 and Sec. 2, clause 16.

[53] *In re* Kingsley, No. 7818, Fed. Cas., s. c. 6 Ben. 300; *In re* Winship, No. 17878, Fed. Cas., s. c. 7 Ben. 194; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

An examination was allowed when the creditor's claims had been proved and protest filed against them. *In re* Belden, No. 1241, Fed. Cas., s. c. 4 N. B. R. 194. *In re* Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49, it was held that a witness was

service of process while attending as a witness before the judge or referee.[54]

The testimony before a referee is usually taken orally. It is the duty of the referee, upon application of any party in interest, to preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them when a stenographer is not in attendance.[55] In practice, the evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narrative, unless he determines the examination should be taken by question and answer.[56] He is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the evidence.[57]

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross examination, which shall be had in conformity with the mode now adopted in courts of law.[58]

A witness is not entitled to be attended or represented by counsel during his examination.[59] The bankrupt, being a party to the proceedings, is entitled to have the assistance of counsel. The true rule, with reference to what assistance he is entitled to, is thus stated by Judge Lowell: "The questions to a bankrupt are usually concerning matters of fact, and in the vast majority of cases involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client

bound to take the oath although not bound to answer incriminating questions.

[54] *In re* Kimball, No. 7767, Fed. Cas., s. c. 2 Ben. 38. See also Service of subpœna, Sec. 73, *ante*.

[55] B. A. 1898, Sec. 39, clause 9.

[56] Gen. Ord. 22.

[57] B. A. 1898, Sec. 38, clause 5.

[58] Gen. Ord. 22.

The bankrupt may be cross-examined, see *in re* Levy, No. 8296, Fed. Cas., s. c. 1 Ben. 496; *In re* Leachman, No. 8157, Fed. Cas., s. c. 1 N. B. R. 391; *In re* Bragg, No. 1799, Fed. Cas., s. c. 5 Law Rep. 323.

[59] *In re* Comstock, No. 3080, Fed. Cas., s. c. 3 Saw. 517; *In re* Fredenberg, No. 5075, Fed. Cas., s. c. 2 Ben. 133; *In re* Stuyvesant Bank, No. 13582, Fed. Cas., s. c. 6 Ben. 33; *In re* Feinberg, No. 4716, Fed. Cas., s. c. 3 Ben. 162.

were called to the stand in his own cause in any other court, and with the further reserved right to advise with him concerning his answers when the referee can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard."[60] The wife of the bankrupt is not entitled to the assistance of counsel any more than any other witness, and the bankrupt's counsel has no right to advise her while under examination.[61] Where time is needed to refresh the memory by referring to books or papers, or for the production of any written instruments or documents, it should be granted.[62]

When objections are made to questions and answers in the course of the examination, the grounds of the objection and the ruling of the referee should be noted by the referee. It has been held that one creditor has no right to interpose any objections to the examination of the bankrupt by another creditor.[63] With reference to the power of the referee to decide whether a question is incompetent, immaterial or irrelevant, it should be observed that there is a distinction between the general order under the present act and that under the act of 1867. General order 10, under the act of 1867, expressly provided that the register "shall not have power to decide on the competency, materiality or irrelevancy of the question." General order 22, under the present act, follows very closely the language of general order 10, of the act of 1867, but omits the words quoted. The present statute expressly authorizes the referee to perform such part of the duties, except as to questions arising out of applications of bankrupts, which shall be prescribed by the rules and orders of the courts of bankruptcy in their respective districts, except as otherwise provided by the statute.[64] It would therefore seem that referees have power to pass upon the competency, relevancy or materiality of any question in the course

[60] *In re* Tanner, No. 13745, Fed. Cas., s. c. 1 Low. 215. See also *in re* Judson, No. 7562, Fed. Cas., s. c. 2 Ben. 210; *In re* Lord, No. 8502, Fed. Cas., s. c. 3 N. B. R. 243. See *in re* Cobb, 7 Am. B. R. 104, as to the right of bankrupt to cross-examine witnesses.

[61] *In re* Schonberg, No. 12477, Fed. Cas., s. c. 7 Ben. 211.

[62] *In re* Tanner, No. 13745, Fed. Cas., s. c. 1 Low. 215.

[63] *In re* Winship, No. 17878, Fed. Cas., s. c. 7 Ben. 104.

[64] B. A. 1898, Sec. 38, par. 4.

of an examination, subject to have the question reviewed by the judge upon certificate.[65] The more convenient practice would seem to be for the referee to make his ruling, and thereupon require the question to be answered. If his ruling be against the question, and the court should reverse his finding, it would not be necessary to have a reexamination of the witness; if the court should affirm such ruling, the answer may properly be disregarded. The examination should continue, and the question be certified after the deposition is completed, to prevent delay.

In case a witness refuses to be sworn or to answer any particular question, the referee should rule upon the question. If either party is dissatisfied with his ruling, he may have the question certified to the judge for review.[66] The examination may be adjourned pending the decision of the judge upon such question.

Where a bankrupt or a witness refuses to answer a question when ordered to do so by the referee, the matter may also be brought to the attention of the judge upon an application to commit for contempt.[67] So also where the bankrupt makes an unsatisfactory answer which is untrue, as that "he does not remember," or "is unable to tell," the court may commit him for contempt. In England it has been held that a bankrupt may be committed by the court for answers upon his examination, which on the whole are unsatisfactory, and which do not really and truly impart information, which the bankrupt must possess; as where his answers are so clearly of an improbable character that they can not be

[65] Gen. Ord. 27; B. A. 1898, Sec. 39, clause 5. *In re* Cliffe, 3 Am. B. R. 257, 97 Fed. Rep. 540; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; *In re* Shera, 114 Fed. Rep. 207, 7 Am. B. R. 552; *In re* Lipset Levittan & Co., 9 Am. B. R. 32.

[66] Gen. Ord. 27, Official Form 56, see Form No. 136 *post*.

B. A. 1898, Sec. 39, clause 5; *In re* Reakirt, No. 11614, Fed. Cas., s. c. 7 N. B. 329; *In re* Patterson, No. 10814, Fed. Cas., s. c. 1 Ben. 448; *In re* Woodward, No. 17999, Fed. Cas., s. c. 3 N. B. R. 719; *In re* Pioneer Paper Co., No. 11178, Fed. Cas., s. c. 7 Ben. 250.

[67] B. A. 1898, Sec. 41*a* and *b*.

believed.[68] In one case [69] bankrupts were committed for contempt because they refused to account for more than twenty thousand dollars' worth of property which had been traced into their possession. Where a bankrupt withdraws from the office of the referee before the completion of his examination, he may be punished for contempt.[70] It has been held that a state court has no jurisdiction to punish a party for perjury committed in the course of an examination before a referee.[71]

When the examination is completed, the deposition must be read over to the witness and signed by him in the presence of the referee.[72] The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the costs of incompetent, immaterial and irrelevant depositions, or any parts of them, as may be just.[73]

The examination may be adjourned from time to time as may suit the convenience of the parties.

The testimony of a bankrupt should be admitted in evidence even where he failed to sign it.[74]

§ 209. Upon what topics the bankrupt may be examined.

The bankrupt may be examined concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.[75]

He must answer all questions relating to these subjects fully

[68] *Ex parte* Lord, 16 Mees. & W. 462; *In re* Bradbury, 11 Jur. 189, s. c. 14 C. B. 15; *In re* Taylor, 8 Ves. 328; *Ex parte* Nowlan, 6 Durn. & East, 58, s. c. 6 T. R. 118. As to the power of the English rule upon American cases, see *in re* Mooney, No. 9748, Fed. Cas., s. c. 14 Blatch. 204.

[69] *In re* Salkey, No. 12253, Fed. Cas., s. c. 6 Biss. 269, affirmed on petition for *habeas corpus* to discharge the prisoners, No. 12254, Fed. Cas., s. c. 6 Biss. 280.

Consult also *in re* How, No. 6747, Fed. Cas., s. c. 18 N. B. R. 565; *In re* Dresser, No. 4077, Fed. Cas., s. c. 3 N. B. R. 557; *In re* Mooney, No. 9748, Fed. Cas., s. c. 14 Blatch. 204.

[70] *In re* Vogel, No. 16984, Fed. Cas., s. c. 5 N. B. R. 393.

[71] State v. Pike, 15 N. H. 83. Consult Commonwealth v. Walker, 108, Mass. 309.

[72] Gen. Ord. 22.

[73] Gen. Ord. 22.

[74] *In re* Bard, 108 Fed. Rep. 208, 5 Am. B. R. 810.

[75] B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086.

and completely.[76] A large latitude of inquiry is allowed in the examination of the bankrupt and other persons closely connected with him in his business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor.[77] Where questionable proceedings have been disclosed greater latitude in the prosecution of inquiries should be allowed.[78] Where a bankrupt fails to testify fully and fairly and truthfully, the court or referee is at liberty to accept his testimony as it may seem to be supported by other witnesses, or if unworthy of credit it may be rejected altogether.[79]

The bankrupt may be examined with reference to property which has come into his possession and not been accounted for,[80] or with relation to his wife's property if it is shown that he may possibly have an interest in it,[81] or any other property in which he may possibly have an interest,[82] or in reference to matters which transpired before the creation of the debt,[83] or for the purpose of eliciting facts to be used in opposing his discharge.[84] When he seeks to be discharged, he must submit himself, if required, to be examined, with a view to show whether he has made a full and fair surrender of his property and statement of his debts.[85] But it is not competent for the referee to summon witnesses who may know, or be suspected of knowing, facts pertinent to or that might be serviceable in the preparation of specifications against his

[76] *In re* Salkey, No. 12253, Fed. Cas., s. c. 6 Biss. 269.

[77] *In re* Horgan (C. C. A., 2d Cir.) 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; People's Bank v. Brown (C. C. A., 3d Cir.) 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* Cliffe, 97 Fed. Rep. 540, 3 Am. B. R. 257.

[78] *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259.

[79] *In re* Tudor, 100 Fed. Rep. 796, 4 Am. B. R. 78; *In re* Leslie, 119 Fed. Rep. 406.

[80] *In re* Salkey, No. 12253, Fed. Cas., s. c. 6 Biss. 269; *In re* McBrien, No. 8666, Fed. Cas., s. c. 3 Ben. 481.

[81] *In re* Horgan (C. C. A., 2d Cir.) 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Craig, No. 3323, Fed. Cas., s. c. 4 N. B. R. 50; *In re* Clark, No. 2805, Fed. Cas., s. c. 4 N. B. R. 237.

[82] *In re* Bonesteel, No. 1628, Fed. Cas., s. c. 2 N. B. R. 330; *In re* Brundage, 100 Fed. Rep. 613, 4 Am. B. R. 47;

[83] *In re* Craig, No. 3322, Fed. Cas., s. c. 3 Ben. 353.

[84] *In re* Brandt, No. 1812, Fed. Cas., s. c. 2 N. B. R. 215; *In re* Price, 91 Fed. Rep. 635.

discharge.[85] In regard to such facts, a creditor is left to establish them on the trial as parties do in ordinary trials at law. It is not a sufficient excuse for not answering a question put to the bankrupt that he has replied to it at a former examination held at the instance of some other creditor or the assignee.[85]

On the other hand, a bankrupt can not be examined touching matter wholly irrelevant to and not bearing on his bankruptcy. The bankrupt must, however, plead his privilege, if any privilege legally exists, to the particular questions propounded.[86] He is privileged from being examined in respect to property, which he has acquired since the adjudication in the bankruptcy proceedings;[87] and also with reference to property which he does not own or have an interest in.[88] He can not be examined upon matters simply to gratify malice or curiosity.[89]

The bankrupt can not be compelled to answer a question the answer of which will tend to incriminate him.[90] The witness may rely on that portion of the fifth amendment of the constitution of the United States which declares that "'no person . . . shall be compelled in any criminal case to be a witness against himself."[91] The bankruptcy act provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."[92] The reason for the rule is that this provision does not grant him the immunity contemplated by Sec. 5 of the constitution. It can have no other effect than to protect the bankrupt against the use of his testimony in any prosecution in the courts of the United States.

[85] *In re* Vogel, No. 16984, Fed. Cas., s. c. 5 N. B. R. 393.

[86] *In re* Mellen, 97 Fed. Rep. 326, 3 Am. B. R. 226.

[87] *In re* Patterson, No. 10815, Fed. Cas., s. c. 1 Ben. 508; *In re* Levy, No. 8296, Fed. Cas s. c. 1 Ben. 496.

[88] *In re* Van Tuyl, No. 16880, Fed. Cas., s. c. 1 N. B. R. 636.

[89] *In re* Salkey, No. 12252, Fed. Cas., s. c. 5 Biss. 486.

[90] *In re* Nachman, 114 Fed. Rep. 995, 8 Am. B. R. 180; *In re* Kanter, 117 Fed. Rep. 356, 9 Am. B. R. 104; *In re* Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49; *In re* Shera, 114 Fed. Rep. 207, 7 Am. B. R. 552; *In re* Walsh, 104 Fed. Rep. 518; *In re* Franklin Syndicate, 114 Fed. Rep. 205; *In re* Rosser, 96 Fed. Rep. 305, 2 Am. B. R. 755.

But see Mackel v. Rochester (C. C. A., 9th Cir.) 102 Fed. Rep. 314, 4 Am. B. R. 1.

[91] Counselman v. Hitchcock, 142 U. S. 562.

[92] B. A. 1898, Sec. 7*a*.

It would be no answer to a prosecution which might be instituted in the state courts which are not created by acts of congress and which prescribe their own rules of proceeding independently of congress. It has been held that the bankrupt waives the privilege to refuse to deliver the books of account kept by him to his trustee on the ground that the matter contained therein might tend to incriminate him by filing a voluntary petition in bankruptcy.[93] He may be required to state whether he has played cards or faro or any other games of chance with certain persons prior to the proceedings in bankruptcy although the answer may tend to degrade him.[94]

§ 210. Upon what topics witnesses, other than bankrupts, may be examined.

When a witness is brought before the referee he may be examined concerning "the acts, conduct, or property of a bankrupt whose estate is in the process of administration."[95]

Such witnesses must answer all questions concerning the acts, conduct, or property of the bankrupt, and their dealings with him, even though their answers may furnish evidence to be used in a civil case brought, or to be brought, on behalf of the trustee.[96] In respect to the subject prescribed by the statute upon which he may be examined, the parties are entitled to a full discovery and disclosure by him.[97] Thus a person who has purchased claims against a bankrupt may be examined in respect to the consideration paid therefor and where he obtained the money.[98] A president may be required to give the consideration of a judgment obtained by his bank.[99]

[93] *In re* Sapiro, 92 Fed. Rep. 340, 1 Am. B. R. 296.

[94] *In re* Richards, No. 11769, Fed. Cas., 4 Ben. 303.

[95] B. A. 1898, Sec. 21*a* as amended Feb. 5, 1903, 32 Stat. at L. 797; People's Bank v. Brown (C. C. A., 3d Cir.) 112 Fed Rep. 652, 7 Am. B. R. 475; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[96] *In re* Fay, No. 4708, Fed. Cas., s. c. 3 Ben. 660; *In re* Pioneer Paper Co., No. 11178, Fed. Cas., s. c. 7 N. B. R. 250; Garrison v. Markley, No. 5256, Fed. Cas., s. c. 7 N. B. R. 246; *In re* Cliffe, 3 Am. B. R. 257, 97 Fed. Rep. 540.

[97] *In re* Stuyvesant Bank, No. 13582, Fed. Cas., s. c. 6 Ben. 33; *In re* Trask, No. 14141, Fed. Cas., s. c. 7 Ben. 60; *In re* Lathrop, No. 8106, Fed. Cas., s. c. 4 N. B. R. 93.

[98] *In re* Lathrop, No. 8106, Fed. Cas., s. c. 4 N. B. R. 93; *In re* Trask, No. 14141, Fed. Cas., s. c. 7 Ben. 60.

[99] *In re* Pioneer Paper Co., No. 11178, Fed. Cas., s. c. 7 N. B. R. 250.

It is no excuse for not answering, that his answer would reveal his own private business unnecessarily, and possibly to his prejudice in another suit then pending.[100] A witness may be required to produce books of account and other papers relating to the affairs of the bankrupt.[101] But a person is not required to answer an irrelevant question not relating to any matter of fact in issue where the answer would tend to degrade him.[102]

The amendment of 1903 provides "that the wife may be examined only touching business transacted by her and to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt." [103]

Although a witness is required to disclose all matters touching the trade, property and conduct of a bankrupt, he is entitled to the usual privileges and exemptions in regard to answering questions.[104] The question of privilege of communications most frequently arises with reference to attorneys at law. A person who claims to have acted as counsel for a bankrupt can not, on that ground, refuse to be sworn as a witness.[105] The privilege can not be interposed until a question is asked which invades the privilege. The privilege of attorneys extends only to information derived from their clients as such. Information derived from other persons, or sources, although derived or obtained while acting as attorney is not privileged.[106] The principle of the rule does not apply to the discovery of facts within the knowledge of the attorney, which

[100] *In re* Trask, No. 14141, Fed. Cas., s. c. 7 Ben. 60; *In re* Danforth, No. 3560, Fed. Cas., s. c. 1 Pa. Law J. 148.

[101] *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[102] *In re* Lewis, No. 8312, Fed. Cas., s. c. 4 Ben. 67.

[103] B. A. 1898, Sec. 20*a* as amended Feb. 5, 1903, 32 Stat. at L. 797; *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *In re* Worrell, 125 Fed. Rep. 159.

[104] *In re* Kreuger, No. 7942, Fed. Cas., s. c. 2 Low. 182.

[105] *In re* Woodward, No. 17099, Fed. Cas., s. c. 4 Ben. 102.

[106] People's Bank v. Brown (C. C. A., 3d Cir.) 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* O'Donohoe, No. 10435, Fed. Cas., s. c. 3 N. B. R. 245; *In re* Bellis, No. 1274, Fed. Cas., s. c. 3 Ben. 386 (partial report only), s. c. 3 N. B. R. 199; *In re* Aspinwall, No. 591, Fed. Cas., s. c. 7 Ben. 433; Spenceley v. Schulenberg, 7 East. 357.

were not communicated or confided to him by his client, although he became acquainted with the facts while engaged in his professional duty as the attorney of the client. Thus he may be required to answer questions in regard to the acts relating to a conveyance of land to and by him,[107] or the superintendence of an auction sale of a stock of goods and the disposition of the proceeds,[108] or whether he drew or directed the drawing of a certain deed,[109] or a certain declaration of trust between the bankrupt and certain persons named,[109] or whether at a certain date the witness received any checks drawn to the order of the bankrupt by a certain named person and what disposition was made of such checks so received,[109] or what affairs of the bankrupt were the subject of conversation between him and other persons.[109]

Where a witness declines to testify on the ground of privileged communication it is for the court, and not for the witness, to determine whether the communication is privileged.[110] For this purpose the witness may be subjected to such questions as may be necessary to enable the court to determine the question.

A person other than the bankrupt can not be compelled to give testimony which may tend to incriminate him.[111]

Evidence taken before a referee in bankruptcy may be used in civil suits pending in either state or federal courts for the purpose of impeaching a witness.[112]

§ 210a. Examination of witnesses residing without the district.

A witness, who resides beyond the district or state, and more than one hundred miles from the court, can not be compelled to appear for examination before a referee of the court in which bankruptcy proceedings are pending.[113] The examination of such witnesses may be by deposition.

[107] *In re* Bellis, No. 1274, Fed. Cas., s. c. 3 Ben. 386 (partial report only), s. c. 3 N. B. R. 199.

[108] *In re* O'Donohoe, No. 10435, Fed. Cas., s. c. 3 N. B. R. 245.

[109] *In re* Aspinwall, No. 591, Fed. Cas., s. c. 7 Ben. 433.

[110] People's Bank v. Brown, 112 Fed. Rep. 652, 7 Am. B. R. 475.

[111] *In re* Smith, 7 Am. B. R. 213, 112 Fed. Rep. 509.

[112] Knowlton v. Mosely, 105 Mass. 136.

[113] B. A. 1898, Sec. 41*a*.

The bankrupt act provides that the right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.[114] The United States laws make ample provision for such examinations. Depositions *de bene esse* may be taken,[115] or a *dedimus potestatum* or a commission may be issued,[116] or depositions may be taken under the equity rules.[117] Ample provision is made for the issuance of a subpœna by the clerk of any court of the United States where the witnesses reside, to take the testimony of such absent witnesses before a commissioner appointed by the court where the proceedings are pending and a neglect or refusal to attend or testify can be enforced by the judge of the court which issues the subpœna.[118] A subpœna *duces tecum* may be had and enforced in such an examination.[119] The subpœna may run to any district within one hundred miles of the place of holding court.[120]

It seems therefore that a court having charge of the administration of a bankrupt's assets, may order that any person having knowledge "concerning the acts, conduct or property of a bankrupt," but who resides beyond the district or state and more than one hundred miles from the court, shall be examined before a commissioner appointed for the purpose.[121] Any officer, bankrupt or creditor may apply to the court administering the bankrupt's assets for an order to take the depositions of absent, as well as resident, witnesses.[122] The court will then make an order, in a proper case, for a commission to issue to a referee or other person residing in the same district as the witnesses, authorizing him to take the depositions. Notice of the taking of the depositions must be filed with the referee in every case.[123] When depositions are to be taken in opposition to the allowance of a claim notice must also be

[114] B. A. 1898, Sec. 21*b*.
[115] R. S. Sec. 863.
[116] R. S. Sec. 866.
[117] R. S. Secs. 862, 917; Eq. Rules 67 and 71.
[118] R. S. Sec. 868.
[119] R. S. Secs. 868, 869.
[120] R. S. Sec. 876.
[121] *In re* Williams, 123 Fed. Rep. 321; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.
[122] B. A. 1898, Sec. 21*a* as amended Feb. 5, 1903, 32 Stat. at L. 797.

served upon the claimant, and when in opposition to a discharge notice must be served upon the bankrupt.[123]

If the witness refuses to answer a question the judge of the bankruptcy court in the district in which the examination is being had is the proper person to whom to apply to compel the witness to answer.[124]

§ 210b. When testimony upon an examination may be used.

Testimony taken upon the examination of the bankrupt is taken in the whole pending proceeding and may be introduced and read upon the hearing of a petition for a discharge.[125] But where a claimant was not in fact a party and could not exercise the right of cross examination at the time the witnesses were examined, the witnesses, including the bankrupt, must be recalled unless the party consents to the use of the testimony as it appears in the proceedings.[126]

Evidence taken before a referee in bankruptcy may be used in civil suits pending in either state or federal courts for the purpose of impeaching a witness. But testimony taken in one proceeding can not be used as evidence in another proceeding except by the consent of parties.[127]

[123] B. A. 1898, Sec. 21*c*.

[124] *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; R. S. Secs. 868, 869.

[125] *In re* Wilcox (C. C. A., 2d Cir.) 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Cooke, 109 Fed. Rep. 631, 5 Am. B. R. 434; *In re* Bard, 108 Fed. Rep. 208, 5 Am. B. R. 810.

[126] *In re* Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334.

[127] *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624.

CHAPTER XX.

THE BANKRUPT—DUTIES, PROTECTION AND EXTRADITION.

§ 211. Who is a bankrupt.

The word "bankrupt" as used in the bankrupt act is defined to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."[1]

§ 212. His duty to attend meetings.

The bankrupt must attend the first meeting of his creditors, if directed by the court, or a judge thereof, to do so.[2] But he is not required to attend the first or any subsequent meeting[3] of his creditors unless specially ordered to do so. And in no case can he be required to attend such meeting at a place more than one hundred and fifty miles distant from his home or principal place of business.[3] The bankrupt is entitled to his actual expenses from the estate when required to attend at any place other than the city, town, or village of his residence.[4] But he can not be allowed illegitimate expenses, for gambling and traveling expenses.[5]

It is the duty of the bankrupt to attend the hearing upon his application for a discharge, if filed, without an order of court, or service of notice, or process.[6] He can not object to attending on account of the distance, where the hearing is at the regular place of holding court.

§ 213. Duty to comply with the orders of the court.

It is expressly made the duty of the bankrupt to comply with all lawful orders of the court.[7] The courts of bank-

[1] B. A. 1898, Sec. 1, clause 4.

[2] B. A. 1898, Sec. 7, clause 1; *In re* Eagles, 99 F. 695, 3 Am. B. R. 733.

[3] See *in re* Dumahaut, No. 4124, Fed. Cas., s. c. 15 Blatch. 20.

[4] B. A. 1898, Sec. 7 (proviso clause).

[5] *In re* Tudor, 100 Fed. Rep. 796, 4 Am. B. R. 78; *In re* Wilson, 116 Fed. Rep. 410, 8 Am. B. R. 612.

[6] B. A. 1898, Sec. 7, clause 1.

[7] B. A. 1898, Sec. 7, clause 2. Compare R. S. Sec. 5104.

ruptcy are empowered to enforce obedience by bankrupts to such orders by fine or imprisonment or by fine and imprisonment.[8]

An order of court "does not mean a written order always, but only an exercise of authority constituting a requirement."[9] Where an order has actually been made by the court including a referee[10] it is binding upon the bankrupt until it is set aside or reversed, even though the court making it is without jurisdiction.[11] It is not for the bankrupt to decide whether the order is lawful or not and then act according to his own decision,[12] or under the advice of counsel.[13] Where a bankrupt has used due diligence to comply with an order of court he is not guilty of contempt.[14]

A person is subject to the orders of a court of bankruptcy whenever he has been duly served with process or a legal notice, or whenever he has voluntarily submitted himself to the jurisdiction of the bankruptcy court. This he may do by filing a petition[15] or by proving a debt[16] or by entering a voluntary appearance.[17]

The statute expressly authorizes a court of bankruptcy to make the order adjudging a person to be a bankrupt;[18] to direct him to attend meetings of creditors[19] and to examine claims,[20] to execute papers,[21] or order him to be arrested and kept in custody,[22] or to appear for examination;[23] and generally to make such orders, issue such process, and enter such

[8] B. A. 1898, Sec. 2, clause 13. See Contempt, Chap. XXII.

[9] Bridges v. Sheldon, 7 Fed. Rep. 45.

[10] B. A. 1898, Sec. 1; clause 7, and Sec. 41.

[11] See Worden v. Searles, 121 U. S. 14; *In re* Eaton, 51 Fed. Rep. 804.

[12] See Atlantic Co. v. Dittman Co., 9 Fed. Rep. 317.

[13] Burr v. Kimback, 29 Fed. Rep. 432; U. S. v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Muller, No. 5577, Fed. Cas., s. c. 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Distilling Co., 42 Fed. Rep. 96.

[14] *In re* Carpenter, No. 2427, Fed. Cas., s. c. 1 N. B. R. 299.

[15] *In re* Harris, 3 N. Y. Leg. Obs. 152.

[16] *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414.

[17] *In re* Ulrick, No. 14327, Fed. Cas., s. c. 3 Ben. 355; *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515.

[18] B. A. 1898, Sec. 2, clause 1.

[19] B. A. 1898, Sec. 7, clause 1.

[20] B. A. 1898, Sec. 7 (next to last clause).

[21] B. A. 1898, Sec. 7, clause 4.

[22] B. A. 1898, Sec. 9.

judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act.[24] Thus the court may order a bankrupt to deliver to the trustee money or other property, which is properly a part of his assets and apparently in his possession.[25] The different lawful orders which a court of bankruptcy may make with reference to the bankrupt are much too numerous to be collated at this point, even if it were possible to do so. When such an order is made it is the duty of the bankrupt to comply with its terms.

§ 214. Duty with respect to claims against his estate.

It is made the duty of a bankrupt to examine the correctness of all proofs of claims filed against his estate.[26] But he can not be required to examine them except when presented to him, unless ordered by the court, or a judge thereof, for cause shown.[27] In case any person has to his knowledge proved a false claim against his estate it is his duty to disclose that fact immediately to his trustee.[28] In fact, it is his duty immediately to inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of the act, coming to his knowledge.[29]

§ 215. Duty to execute papers.

It is the duty of the bankrupt to execute and deliver such papers as may be ordered by the court.[30] Under this provision the court may order the bankrupt to execute and deliver to the trustee the proper papers, to enable him to prosecute or defend suits pending in the state courts, in his own name

[23] B. A. 1898, Sec. 7, clause 9, and Sec. 21*a*.

[24] B. A. 1898, Sec. 2, clause 15.

[25] *In re* Rosser (C. C. A., 8th Cir.) 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 209; *In re* Schlesinger (C. C. A., 2d Cir.) 102 Fed. Rep. 117, 4 Am. B. R. 361; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Greenberg, 106 Fed Rep. 406, 5 Am. B. R. 840; *In re* Purvine (C. C. A., 5th Cir.) 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Felson, 124 Fed. Rep. 288.

[26] B. A. 1898, Sec. 7, clause 3.

[27] B. A. 1898, Sec. 7 (last clause but one).

[28] B. A. 1898, Sec. 7, clause 7; *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

[29] B. A. 1898, Sec. 7, clause 6.

[30] B. A. 1898, Sec. 7, clause 4. Compare R. S. Sec. 5051.

in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt.[31]

As the bankrupt statute has no extra-territorial effect, real estate situated in a foreign country does not vest in the trustee by virtue of the act.[32] It is therefore made the duty of the bankrupt to execute to his trustee transfers of all of his property in foreign countries.[33]

§ 216. Duty to prepare a schedule of his debts and assets.

For the purpose of advising the court, its officers and persons interested in his estate, the bankrupt is required to file a statement of his financial condition. The act makes it his duty to "prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee." [34]

The requisites of a schedule are further considered in connection with the proceedings in voluntary and involuntary bankruptcy.[35]

§ 217. Duty to submit to an examination.

It is made the duty of the bankrupt, when present at the first meeting of his creditors, and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount,

[31] See *in re* Clark, No. 2798, Fed. Cas., s. c. 4 Ben. 88; Clark v. Binninger, 39 How. Prac. 363; Samson v. Burton, No. 12285, Fed. Cas., s. c. 5 Ben. 325.

[32] Okey v. Bennett, 11 How. 33; Barnett v. Poole, 23 Texas, 517.

[33] B. A. 1898, Sec. 7, clause 5.

[34] B. A. 1898, Sec. 7, clause 8.

[35] In voluntary bankruptcy, Chap. IX, *ante*; in involuntary bankruptcy, Chap. X, *ante*; in bankruptcy of partnership, Chap. XI, *ante*. See also *in re* Soper, 1 Am. B. R. 193; Gen. Ords. V and IX.

kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.[36] This subject is further considered in another place.[37]

§ 218. Protection from arrest.

A bankrupt is exempt from arrest upon civil process except in the following cases: *First*, when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; *second*, when issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release; and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.[38]

The object of this provision is obviously to protect a bankrupt from arrest in a suit founded on a debt from which a discharge in bankruptcy will be a release.[39] A court of bankruptcy has no power to cause the arrest of a bankrupt for debt. A state court can cause the arrest of a bankrupt only on judgments not affected by bankruptcy proceedings, when such arrest is permitted by laws of the state where the process is

[36] B. A. 1898, Sec. 7, clause 9.

[37] See Examination of the Bankrupt, Chap. XIX, *ante*.

[38] B. A. 1898, Sec. 9*a*, Gen. Ord. 30. Compare R. S. Sec. 5107. *In re* Dresser, 124 Fed. Rep. 915; *In re* Lewensohn, 99 Fed. 73, affirmed in 104 Fed. Rep. 1006, 44 C. C. A. 309.

[39] Gen. Ord. 30 provides for the release if a debtor is committed after the filing of his petition upon process in any civil action founded upon a *claim provable in bankruptcy*. It is clear that claims may be provable in bankruptcy which are not released by discharge. In this respect the general order must give way to the terms of the statute. This was the interpretation of general order 27 under the act of 1867, from which the language of general order 30 is evidently taken. *In re* Glaser, No. 5474, Fed. Cas., s. c. 2 Ben. 180, it was held that the provisions of general order 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim was one from which his discharge in bankruptcy will not release him, were not warranted by the bankruptcy act of 1867.

That the bankrupt can not be released from imprisonment if the arrest is based upon any debt from which a discharge would not be a release, consult *in re* Kimball, No. 7767, Fed. Cas., s. c. 2 Ben. 38; *In*

issued and served.[40] In such cases he is exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of duty imposed by the bankruptcy act. A bankrupt is not protected from arrest on execution on a judgment for costs rendered against him in a state court after adjudication in bankruptcy.[41]

The protection of a debtor from arrest upon civil process is co-extensive, in point of time, with the proceedings in bankruptcy. The exemption is limited to bankrupts. The protection begins as soon as the debtor is deemed bankrupt under the statute. The act itself defines the word "bankrupt" to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."[42] It is therefore clear that it is not necessary that the debtor shall have been adjudged a bankrupt. The protection from arrest begins immediately upon filing a petition, either in voluntary or involuntary bankruptcy. It extends during the whole period of the pendency of the proceedings in bankruptcy.[43] The debtor is not entitled to protection from arrest, or to relief if arrested, by virtue of the provision quoted above, after the termination of the proceedings for discharge.[44]

The protection of a bankrupt is expressly stated to be an exemption from arrest upon civil process. The exemption extends to arrests upon any civil process. There is no distinction between an arrest on mesne and final process.[45] But there

re Whitehouse, No. 17564, Fed. Cas., s. c. 1 Low. 429; *In re* Migel, No. 9538, Fed. Cas., s. c. 2 N. B. R. 481; *In re* Kimball, No. 7769 Fed. Cas., s. c. 6 Blatch. 292, affirming No. 7768, Fed. Cas., s. c. 2 Ben. 554; *In re* Seymour, No. 12684, Fed. Cas., s. c. 1 Ben. 348; *In re* Robinson, No. 11939, Fed. Cas., s. c. 6 Blatch. 253; *In re* Patterson, No. 10817, Fed. Cas., s. c. 2 Ben. 155; *In re* Williams, No. 17700, Fed. Cas., s. c. 2 Biss. 233.

[40] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Marcus, (C. C. A., 1st Cir.) 105 Fed. Rep. 907, 5 Am. B. R. 365.

[41] *In re* Marcus (C. C. A., 1st Cir.) 105 Fed. Rep. 907, 5 Am. B. R. 365.

[42] B. A. 1898, Sec. 1, clause 4.

[43] *In re* Lewensohn, 99 Fed. Rep. 73; affirmed, 104 Fed. Rep. 1006, 44 C. C. A. 309.

[44] *In re* Kimball, No. 7768, Fed. Cas., s. c. 2 Ben. 554, 6 Blatch. 292; see also *in re* Dole, No. 3964, Fed. Cas., s. c. 11 Blatch. 499.

is nothing in the statute to prevent a bankrupt being arrested and imprisoned upon criminal process.[46]

The protection afforded a bankrupt, by section 9 of the act, does not apply, where the arrest was made prior to the commencement of the bankruptcy proceedings, although he may be in custody, or in prison after the petition is filed.[47] It is a bankrupt, and not a debtor, who is exempt from arrest. The bankrupt is exempt from arrest only and not from imprisonment. Section 9, therefore, does not authorize a court of bankruptcy to release a bankrupt from custody or imprisonment where he was arrested prior to the filing of the petition.[47] Where the arrest is made after the petition is filed, the court may release him on a writ of *habeas corpus*.[48] A bankrupt out on bail is deemed under arrest, to all intents and purposes, the same as if he had not been released upon bail.[49] He may be surrendered to the jailor by his bail. A court of bankruptcy can not, in such case, order his release. So also the restoring a debtor to confinement, from which he had obtained a temporary relief, pending an appeal, is not an arrest within the meaning of the clause under consideration.[50] And a jailor has the right to pursue a bankrupt, who has escaped, and retake him. Such a person is still, in law, and for the benefit of the jailor, considered to be in custody.[51]

[45] *In re* Wiggers, No. 17623, Fed. Cas., s. c. 2 Biss. 71; *In re* Mifflin, 1 Penn. Law Jour. 146.

[46] See Stockwell v. Silloway, 105 Mass. 517.

[47] *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812; *In re* Walker, No. 17660, Fed. Cas., s. c. 1 Low. 222; Hazleton v. Valentine, No. 6287, Fed. Cas., s. c. 1 Low. 270; Minon v. Van Nostrand, No. 9642, Fed. Cas., s. c. 1 Low. 458, affirmed in No. 9641, Fed. Cas., s. c. Holmes, 251; *In re* Cheney, No. 2636, Fed. Cas., s. c. 5 Law Rep. 19; *In re* Rank, No. 11566, Fed. Cas., s. c. Crabbe, 493; *In re* Hoskins, No. 6712, Fed. Cas., s. c. Crabbe, 466; Bank v. Hatch, 57 N. H. 460; Hussey v. Danforth, 77 Me. 17.

[48] Sec. 220, *post*.

[49] *In re* Cheney, No. 2636, Fed Cas., s. c. 5 Law Rep. 19; Hazleton v. Valentine, No. 6287, Fed. Cas., s. c. 1 Low. 270; *In re* Rank, No. 11566, Fed. Cas., s. c. Crabbe, 493; Stockwell v. Silloway, 100 Mass. 287. But see Foxall v. Levi, No. 5015, Fed. Cas., s. c. 1 Cranch, C. C. 139; Lingan v. Bayley, No. 8370, Fed. Cas., s. c. 1 Cranch, C. C. 112.

[50] Stockwell v. Silloway, 100 Mass. 287.

[51] Anderson v. Hampton, 1 B. & Ald. 308.

§ 219. When a bankrupt may be arrested.

A bankrupt may be arrested upon a criminal process issued from a court of bankruptcy, or other court of the United States, or a state court. His exemption is limited to arrests on civil process.[52] Power is expressly conferred upon the courts of bankruptcy,[53] and the circuit courts,[54] to arraign, try, and punish bankrupts for violations of the bankrupt statute. There is no limitation or restriction upon state courts with respect to arrests or punishment of bankrupts convicted of crimes or misdemeanors under the state laws.[55]

A bankrupt may be arrested upon civil process, either mesne or final, in three classes of cases.

First: For Contempt.— A bankrupt may be arrested upon civil process, when issued from a court of bankruptcy, for contempt or disobedience of its lawful orders.[60] This includes contempts committed before a referee and the disobedience of a lawful order, process, or writ of a referee.[61] The power to enforce obedience by bankrupts to all lawful orders, by fine or imprisonment, or by fine and imprisonment, is expressly conferred upon courts of bankruptcy.[62] Thus, the bankrupt is brought, at all times, within the control and disposition of the court.

Second: Upon a Debt not Released by a Discharge.— A bankrupt may be arrested upon civil process, issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he is exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.[63] Such

[52] B. A. 1898, Sec. 9.

[53] B. A. 1898, Sec. 2, clause 4, and Sec. 29.

[54] B. A. 1898, Sec. 23*c*.

[55] See Stockwell v. Silloway, 105 Mass. 517.

[60] B. A. 1898, Sec. 9*a*.

[61] B. A. 1898, Sec. 41*a*, and Sec. 2, clause 16.

"Its" equals "court's" and is defined to "mean the court of bankruptcy in which the proceedings are pending, and may include the referee." B. A. 1898, Sec. 1, clause 7.

[62] B. A. 1898, Sec. 2, clauses 13 and 16.

[63] B. A. 1898, Sec. 9*a*; *In re* Marcus (C. C. A., 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

arrests can be made only in states where such proceedings are authorized by the state law.

In order that a bankrupt may be arrested on civil process issued by a state court, *first*, it must be served within the state in which the court issuing it is held; and, *second*, the suit must be founded upon a debt or claim from which a discharge in bankruptcy will not release him. The statute provides [64] that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts,[65] except such as, *first*, are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; *second*, are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for willful and malicious injuries to the person or property of another; *third*, have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or, *fourth*, were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Where the debt is one from which a discharge will not release the bankrupt, and the process is served within the state in which the court is held, he can not be relieved by a court of bankruptcy.[66] This rule is subject to an important exception, namely, that a bankrupt can not be arrested when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act.[67] This exemption is not

[64] B. A. 1898, Sec. 17. What debts are not discharged are further considered in another place. See Secs. 288, *et seq.*, *post*.

[65] As to what debts are provable, see Chap. XIII.

[66] *In re* Marcus (C. C. A., 1st Cir.) 105 Fed. Rep. 907, 5 Am. B. R. 365; *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Glaser, No. 5474, Fed. Cas., s. c. 2 Ben. 180; *In re* Kimball, No. 7767, Fed. Cas., s. c. 2 Ben. 38; *In re* Seymour, No. 12684, Fed. Cas., s. c. 1 Ben. 348; *In re* Patterson, No. 10817, Fed. Cas., s. c. 2 Ben. 155; *In re* Pettis, No. 11046, Fed. Cas., s. c. 7 Am. Law Reg. 695; Harter v. Harlan, 2 N. B. R. 238; *In re* Devoe, No. 3843, Fed. Cas., s. c. 1 Low. 251; *In re* Alsberg, No. 261, Fed. Cas., s. c. 16 N. B. R. 116.

[67] B. A. 1898, Sec. 9*a*, clause 2.

restricted to particular occasions when the bankrupt's physical attendance in court is required, or he is actually engaged upon some required duty and the court may release him from arrest upon his furnishing bond to obey the orders of the court and not depart from the jurisdiction during the continuance of such exemption.[68]

THIRD: FOR AN EXAMINATION.— A bankrupt may be arrested, under certain circumstances, and held in custody for purposes of examination. The statute provides "the judge may at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination." [69]

It will be observed that this provision providing for the arrest and detention of a bankrupt is quite limited. There is no provision for the seizure of property. The bankrupt can only be arrested when he is about to leave the district to avoid an examination and thereby defeat the proceedings. It has been held that an order can not be made after the bankrupt has actually fled from the district as a ground for an order of extradition.[70] If he is about to depart for other purposes, such as to better his condition, it would seem that this provision would not apply to him. The warrant must be issued within one month after the qualification of the trustee. He can not be held in custody more than ten days, and can not be imprisoned during that period.

[68] *In re* Dresser, 124 Fed. Rep. 915; *In re* Lewensohn, 99 Fed. Rep. 73, affirmed 104 Fed. Rep. 1004, 44 C. C. A. 309.

[69] B. A. 1898, Sec. 9*b*. Compare R. S. Sec. 5024.

[70] *In re* Hassenbusch (C. C. A., 6th Cir.) 108 Fed. Rep. 35, 47 C. C. A. 177.

Proceedings for a warrant are properly instituted by a petition or motion supported by affidavits or depositions of at least two persons. The prayer should not be included in the petition in bankruptcy, but should be a separate motion or petition.[1] The affidavits or depositions should show the facts, and not mere opinions or belief of the affiants or deponents. The material facts should be stated upon personal knowledge, and not upon information and belief.[2]

Satisfactory proof of this character must be introduced to show, *first,* that the bankrupt is about to leave the district in which he resides or has his principal place of business;[3] *second,* that he is leaving the district to avoid examination; and, *third,* that his departure will defeat the proceedings in bankruptcy.

The court will probably admit counter affidavits to be filed by the bankrupt, if he desires to take issue with the petitioning creditors. This was manifestly the intent of congress. It is provided that the warrant issue only "upon satisfactory proof," and also "if upon hearing the evidence of the parties it shall appear to the court or judge thereof that the allegations are true, and that it is necessary, he shall order the marshal," etc. This implies that evidences may be introduced by both parties, and that a hearing shall be had. The intent of congress, with reference to the arrest and detention of a bankrupt, as gathered from the whole provision, is not to permit persecution of the bankrupt or a detention for an unreasonable time, nor an arrest, unless the proof shows conclusively the three elements mentioned above. At least a bankrupt is entitled to a hearing before he is ordered to be kept in custody.

[1] *In re* McKibben, No. 8859, Fed. Cas., s. c. 12 N. B. R. 97; *In re* Hadley, No. 5894, Fed. Cas., s. c. 12 N. B. R. 366.

[2] *In re* McKibben, No. 8859, Fed. Cas., s. c. 12 N. B. R. 97; *In re* Hadley, No. 5894, Fed. Cas., s. c. 12 N. B. R. 366.

[3] As to the meaning of the words "about to leave," consult Jackson v. Burke, 4 Heiskell (Tenn.) 614; Meyers v. Farrell, 47 Miss. 283; Elliott v. Keith, 32 Mo. App. 585; Bennet v. Avant, 2 Sneed (Tenn.) 152.

The affidavits or depositions may be taken before a referee; an officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.[1]

"If upon hearing the evidence of the parties it shall appear to the court or the judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto."[2] The arrest is in no manner for security or satisfaction of a creditor's debt. It is simply to secure the attendance of the respondent from time to time, for a period of ten days, as the court shall order, for an examination. It is to that purpose and no other that bail is required of him.[2]

§ 220. Proceedings to release a bankrupt from imprisonment. Habeas corpus.

A bankrupt may apply to a court of bankruptcy for a release from imprisonment, when he has been arrested after the commencement of proceedings in bankruptcy.[3] It is immaterial whether the process for arrest was issued by a state or a federal court. It has been held that when the arrest is made by a state court the application for release should be made to that court, in order to avoid a conflict of jurisdiction.[4] The refusal of a state court to grant a release

[1] B. A. 1898, Sec. 20.

[2] B. A. 1898, Sec. 9*b*; *In re* Sheehan, No. 12737, Fed. Cas., s. c. 8, N. B. R. 345.

[3] *In re* Glaser, No. 5474, Fed. Cas., s. c. 2 Ben. 180; *ex parte* Millin, No. 9537, Fed. Cas., s. c. 1 Penn. Law J. 146; *In re* Winthrop, No. 17900, Fed. Cas., s. c. 5 Law Rep. 24; U. S. v. Dobbins, No. 14971, Fed. Cas., s. c. 5 Law Rep. 81; *In re* Wiggers, No. 17623, Fed. Cas., s. c. 2 Biss. 71.

[4] *In re* O'Mara, No. 10509, Fed. Cas., s. c. 4 Biss. 506; *In re* Migel, No. 95387, Fed. Cas., s. c. 2 N. B. R. 481.

can not be considered as final and binding.[1] It is the duty of the court of bankruptcy to see that a suitor within its jurisdiction is protected in the manner contemplated by law. After a bankrupt has received his discharge in bankruptcy, the state court will, ordinarily, upon proper application, release him from arrest,[2] or the bankrupt may apply to the court of bankruptcy.[3] A court of bankruptcy of one district may enjoin a creditor from proceeding with an arrest made in another district, if the creditor is within the jurisdiction of the court making the order.[4]

The proper course to pursue is to apply for a writ of *habeas corpus*.[5] The application for a writ is regularly made to the judge of the bankruptcy court by a petition signed by the bankrupt, for whose relief it is intended, setting forth the facts concerning the detention of him, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint should be verified by the oath of the person making the application.

The judge, to whom the application is made, will award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled to it.[6] The writ, so issued, is directed to the person in whose custody the party is detained. The person to whom the writ is directed makes a return of it by certifying the true cause of the detention of the bankrupt. He then brings the bankrupt before the judge who granted the writ. A day is set for the hearing of the case. At this hearing the bankrupt may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Such denials or allegations should be made under oath. The return and all suggestions made against it may be amended by the leave of the court before or after they are filed, so that thereby the

[1] *In re* Wiggers, No. 17623, Fed. Cas., s. c. 2 Biss. 71; *In re* Williams, No. 17700, Fed. Cas., s. c. 6 Biss. 233.

[2] Jones v. Emerson, 1 Caines (N. Y.) 487; Comstock v. Grout, 17 Vt. 512.

[3] *In re* Simpson, No. 12879, Fed. Cas., s. c. 2 N. B. R. 47.

[4] Hazelton v. Valentine, No. 6287, Fed. Cas., s. c. 1 Low. 270.

[5] *Ex parte* Williams, No. 17700, Fed. Cas., s. c. 6 Biss. 233.

[6] *Ex parte* Milligan, 4 Wall. 110.

material facts may be ascertained. The court or judge proceeds in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice requires.

Where the arrest is made upon process issued from a state court it is not clear how far a court of bankruptcy will go behind the face of the papers, if at all, to determine questions of fact on which the petitioner's right to discharge or the creditor's right to continue the imprisonment depends. The statute contains no directions as to the specific evidence required. There is a conflict of authority on this point in the decision under the act of 1867.

Some judges were of the opinion that the scope of inquiry should be limited to the question whether the state court had founded its arrest on a claim which, on the face of the papers which were filed before it as the foundation for the arrest, was a claim from which the debtor would not be discharged in bankruptcy.[1] The theory of this position was that the complaint or affidavits and facts stated therein in the state proceedings were binding upon the bankruptcy court. Judge Bradford, after referring to the cases tending to limit the scope of the inquiry, aptly observed:[2]

"Where the liberty of the prisoner depends upon the fact that his debt is dischargeable by his discharge in bankruptcy, and he tenders proof to maintain the allegation, is it not a strange proposition that he shall be denied the right to prove his right to release from imprisonment, because an *ex parte* affidavit has been made in the state courts that he had contracted the debt under such circumstances of fraud as that his debt would not be released by his discharge in bankruptcy? This appears strange, because it affects the personal liberty of the bankrupt. But the rights of the creditors to arrest for debts not dischargeable in bankruptcy are equally sacred, and the proposition to me is equally strange that they should be denied the power to hold under arrest one legally

[1] *In re* Valk, No. 16814, Fed. Cas., s. c. 3 Ben. 431; *In re* Robinson, No. 11939, Fed. Cas., s. c. 6 Blatch. 253; *In re* Kimball, No. 7768, Fed. Cas., s. c. 2 Ben. 554, affirmed in No. 7769, Fed. Cas., s. c. 6 Blatch. 292; *In re* Devoe, No. 3843, Fed. Cas., s. c. 1 Low. 251.

[2] *In re* Alsberg, No. 261, Fed. Cas., 16 N. B. R. 116.

arrested for other reasons filed than those which will release the debt, when they make the allegation, and offer to sustain it by proof, that the petitioner can not bring himself within the exemption from arrest granted by congress, by reason of the fact that the debt on which he was arrested was contracted in fraud."

On the other hand, there were judges who thought that it was the duty of the court of bankruptcy to examine diligently all legal evidence brought before it, from any quarter whatever, tending to show that a debt, not dischargeable by the discharge of the bankrupt, had or had not been contracted.[1] The theory of this position was that the cases in which the bankrupt was exempt from arrest, and also cases in which the creditor was entitled to have his imprisonment continued, were expressly stated in the bankrupt law. The liability to imprisonment or immunity from the same depended upon whether the debt, for which the bankrupt was arrested by the state authority, was dischargeable or not by the discharge in bankruptcy. It did not depend in any degree upon the reason or grounds of arrest given in the affidavits filed in the state court. What was the nature of the debt, upon which the arrest was founded, was deemed a question which the bankruptcy court had a right to determine. The bankrupt law being paramount, and giving exclusive jurisdiction to the bankruptcy court, it was considered the duty of that court to see that a suitor within its jurisdiction was protected in the manner contemplated by law. The statements made in a declaration or complaint or affidavit filed in a state court were therefore held not to be binding upon the court of bankruptcy.

It should be observed, however, that where a judgment has been rendered in an action for fraud in a state court, the bankruptcy court is bound by the judgment.[2] The bank-

[1] *In re* Williams, No. 17700, Fed. Cas., s. c. 6 Biss. 233; *In re* Alsberg, No. 261, Fed. Cas., s. c. 16 N. B. R. 116; *In re* Glaser, No. 5474, Fed. Cas., s. c. 2 Ben. 180; *In re* Kimball, No. 7767, Fed. Cas., s. c. 2 Ben. 38. Judge Blatchford, who decided these last two cases, afterwards expressly disapproved of his decision in these cases. See *in re* Kimball, No. 7768, Fed. Cas., s. c. 2 Ben. 554.

[2] *In re* Patterson, No. 10817, Fed. Cas., s. c. 2 Ben. 155; *In re* Whitehouse, No. 17564, Fed. Cas., s. c. 1 Low. 429; Shuman v. Strauss, 52 N. Y. 404.

ruptcy court will not reverse the finding of a state court. In such cases the court will look to the record of the state court to see if material and traversable allegations of fraud appear, which must have been found true in order to render the judgment.

When a bankrupt is arrested upon civil process, issuing from a court of bankruptcy, pending bankruptcy proceedings, the order of the court should be to release the prisoner. The only exception to this rule is when the arrest and commitment is for contempt or disobedience of its lawful orders.

When the bankrupt is arrested, by the authority of the state law, and claims immunity and privilege from arrest, he must make it appear to the satisfaction of the court that his case comes within the exemption or privilege granted. If he does, he should be discharged from arrest.[1] If he does not, he should be remanded into custody.[2] If he makes it appear that his debt is dischargeable; that is, that it is not tainted with any of the kinds of frauds enumerated in section 17 of the act, which prevent its being released by the discharge of the bankrupt, or if the arrest was made when he was in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act, he is within the exemptions extended by section 9. If he can not do this, he is not within the privilege or exemption, and must be remanded into custody.

If a court of bankruptcy orders the release of a bankrupt in custody of a state officer, such officer is obliged to release him and can not be punished therefor by the state court.[3]

§ 221. Extradition of bankrupts.

Whenever a warrant for the apprehension of a bankrupt has been issued, and he is found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another.[4]

[1] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80.

[2] *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812; *In re* Marcus (C. C. A., 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

[3] *In re* Kimball, No. 7767, Fed. Cas., s. c. 2 Ben. 38; *Ex parte* Hurst, No. 6924, Fed. Cas., s. c. 1 Wash. C. C. 186, 4 Dall. 387; Lyell v. Goodwin, No. 8616, 4 McLean, 29; Thomas v. Hudson, 13 Mees. & W. 353, 816, 884; Norton v. Walker, 3 Ex. 480.

[4] B. A. 1898, Sec. 10 and Sec. 2 clause 14; *In re* Hassenbusch (C. C. A., 6th Cir.) 108 Fed. Rep. 35, 47 C. C. A. 177.

The extradition of a bankrupt may be required when a warrant is issued for his arrest, in case he is accused of or indicted for an offense under the bankrupt act, or in case he is charged with contempt, or for the purpose of detaining him for any examination. In order to support extradition proceedings it is necessary that a warrant shall have been issued for his arrest, and that he be found beyond the jurisdiction of the court issuing it and within the jurisdiction of another court of bankruptcy. Proceedings in extradition cases, under a treaty between the United States and a foreign government, stands on a wholly different footing.[1] Such proceedings are not expressly adopted by the bankrupt act.

The bankrupt statute adopts the provisions relating to transferring a person under an indictment, from one district to another. The only authority for holding a person under indictment, to bail in one district to answer in another disdistrict, or upon his failure to give bail to order him to be removed into another district where the offense is to be tried, is found in section 1014 of the revised statutes. This provision is as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeable to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such a court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal

[1] R. S. Secs. 5270–5280; *In re* Henrich, No. 6369, Fed. Cas., s. c. 5 Blatch. 414; *In re* Manning, 44 Fed. Rep. 275.

to execute, a warrant for his removal to the district where the trial is to be had."

When a warrant for the arrest of a bankrupt has been issued, and he is found in another district, he may be reached by proceedings under this section. He may be arrested there and transferred in the usual manner under this section. He can not, however, be arrested upon the warrant originally issued, because it will not run into another district.[1] All proceedings for arrest, bail, commitment and removal are held in the district in which the bankrupt is found, and not in the district in which the original warrant was issued.[2]

§ 222. Proceedings to remove a bankrupt from one district to another.

The proceeding contemplated in section 1014 is an original and independent proceeding in the district where the bankrupt is found. It is based upon the order of court for a warrant or upon an indictment previously issued by the court having jurisdiction of the cause. The section expressly provides that the proceeding shall be "agreeably to the usual mode of process against offenders in such state." It seems that the effect of the section is to adopt the familiar common law proceeding upon complaint for the arrest and commitment of offenders by the committing magistrates, subject to this provision, adopting procedure of the several states, which is, of course, itself subordinate to the provisions of the constitution of the United States.[3] Although the procedure is not exactly the same in all states, it is substantially so.

§ 223. Proceedings before a United States commissioner.

The proceedings are regularly instituted by a complaint under oath, made before a United States commissioner,[4] or any magistrate mentioned in section 1014. The oath may

[1] *Ex parte* Graham, No. 5657, Fed. Cas., s. c. 3 Wash. C. C. 456; *In re* Manning, 44 Fed. Rep. 275; *In re* Dana, 68 Fed. Rep. 886.

[2] *In re* Dana, 68 Fed. Rep. 886; *In re* Manning, 44 Fed. Rep. 275; *In re* Burkhardt, 33 Fed. Rep. 25; U. S. v. Fowkes, 49 Fed. Rep. 50, affirmed, 53 Fed. Rep. 13, s.c. 3 C. C. A. 394; U. S. v. Brawner, 7 Fed. Rep. 86.

[3] West v. Cabell, 153 U. S. 87; U. S. Const., 4th Amend't.

[4] For form of complaint, see Loveland's Forms of Federal Practice, No. 870.

be made by any person having knowledge of the facts. Ordinarily, a certified copy of the indictment or the order of court, and a warrant furnished to the United States attorney for the district in which the bankrupt is found, is sufficient to justify a referee in bankruptcy or other person making the required affidavit. Thereupon the commissioner issues a warrant, directed to the marshal of the district, commanding him to arrest the bankrupt and bring him before a committing magistrate. A commissioner is not authorized to issue a warrant except upon a complaint on oath.[1] The oath should be made within the district. An indictment found by a grand jury, or an information or an order of court, in another district, is not such a complaint on oath as is required to authorize a warrant for arrest.[2]

The bankrupt is then arrested and brought before the commissioner. He thereupon pleads. If his plea is guilty he should be held to bail or committed. If his plea is not guilty he may waive examination or demand a hearing. Unless he waives examination he is entitled to a speedy hearing. At the examination before the commissioner evidence may be introduced for and against the bankrupt and counsel may be heard. The magistrate must determine the identity of the prisoner, and his probable guilt. If he is satisfied as to these two questions, it is his duty to admit the bankrupt to bail for trial before such court, as by law is cognizant of the offense.[3] If the bankrupt fails to tender a sufficient bail, the magistrate may then commit him to the custody of the marshal to await a warrant for his removal. If, on the other hand, there is no probable cause of his guilt or his identity is not established, the bankrupt is entitled to be discharged by the commissioner. When the bankrupt is discharged or admitted to bail by the magistrate, extradition proceedings are at an end. Further steps are necessary only when the bankrupt is committed to custody.[3]

[1] The fourth amendment to the constitution of the United States provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation." See U. S. v. Tureaud, 20 Fed. Rep. 621.

[2] Bagnall v. Ableman, 4 Wis. 184. For form of warrant, see Loveland's Forms of Federal Practice, No. 871.

[3] U. S. v. Jacobi, No 15460, Fed. Cas., s. c. 1 Flip. 108; *In re* Bailey, No. 730, Fed. Cas., s. c. 1 Woolw. 422; U. S. v. Shepard, No. 16273, Fed. Cas., s. c. 1 Abb. U. S. 431.

§ 224. **Proceedings before the judge for an order of removal.** When the bankrupt has been committed to the custody of the marshal, the United States attorney appears before the judge, usually attended by the marshal with the prisoner, and makes an application for an order or a warrant of removal. This should be done as soon as possible after the commitment by the commissioner.

The order or warrant of removal is not issued as a matter of course. It is the duty of the judge to determine judicially whether the prisoner ought to be taken to another district for trial or whether he is entitled to his freedom. The practice in the several districts is not uniform as to how far the judge will go in his inquiry before he takes action in the shape of an order, either granting or refusing the transfer of the prisoner. He must, in any case, be satisfied with the proof of the identity of the prisoner. And if no opposition is made he may rely upon the finding of the commissioner in respect to probable cause of guilt. But he is not obliged to do so. The judge may allow an examination *de novo* before him upon the facts to determine this question.[1] At such a hearing it seems to be not only the right but the duty of the judge to look into the indictment and probably into an order of court so far as to be satisfied that an offense is charged, which may be lawfully tried in the forum to which it is claimed the accused should be removed.[2]

The Indictment as Evidence.—How much weight should be given an indictment as evidence of probable guilt has been frequently considered by the courts. After reviewing most of the cases on this point, Judge Brown thus states the rule *in re* Dana:[3]

"An indictment found in another district, though not primary evidence of the facts stated in it, may, however, be secondary evidence of a more or less persuasive character. It contains the finding of a body specially constituted by law

[1] *In re* Dana, 68 Fed. Rep. 886; *In re* Wolf, 27 Fed. Rep. 606.

[2] Horner v. U. S., 44 Fed. Rep. 677, s. c. 143 U. S. 214; Callan v. Wilson, 127 U. S. 540; *In re* Palliser, 136 U. S. 261; *In re* Terrell, 51 Fed. Rep. 213; *In re* Doig, 4 Fed. Rep. 193; U. S. v. Brawner, 7 Fed. Rep. 86; U. S. v. Rogers, 23 Fed. Rep. 658.

[3] 68 Fed. Rep. 896.

to inquire into offenses; it is required to be based either upon examination of witnesses, or upon the knowledge of the grand jury itself; it is a record of their presentment or complaint, and purports to be made upon oath, and is delivered to the court upon their oath to make true presentments. Beyond that jurisdiction it may, therefore, be received as any complaint on information and belief would be received, and its sufficiency should be judged by the same rules. The question of probable cause, the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission to the offense charged, I think it may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and as such, sufficient evidence for the issue of the warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable; and hence it is also sufficient for commitment, if examination is waived, or when the averments of the indictments are not contradicted.

"But indictments are often of quite different character. An indictment is not, in fact, prepared or designed as an affidavit or a deposition. It is, in reality, a charge, an accusation, a pleading, designed to put the defendant on trial. Though presumed to embody the material facts proved before a grand jury, it is not necessarily confined to those facts. It is drawn up by the district attorney as a legal accusation. It is not formally verified. The matters stated in it are not necessarily stated as they were proved before the grand jury; they may be pleaded according to their legal effect; *i. e.*, as the district attorney may understand their legal effect. Legal inferences are often stated as facts—facts and law indistinguishably blended; and in the use of different counts for the same actual offense, although by a legal fiction the different counts are supposed to relate to different offenses, the law tolerates such inconsistencies and even contradictions in indictments, as in a deposition would constitute perjury. An indictment that appears on its face to be of this character

can not be deemed or treated as equivalent to a deposition or an affidavit of facts, because it plainly is not designed to be so treated, and its form and contents forbid it to be so regarded. It must be judged by its statements altogether, and if taken as a whole, it is contradictory on material points; it becomes worthless as an affidavit of facts, however perfect as a pleading; and such an indictment is, therefore, insufficient as a foundation for removal proceedings."

In view of this ruling *in re* Dana, it would seem that a United States attorney must be prepared to prove substantially the same facts upon an extradition proceeding that he must prove upon an examination of a person charged with a criminal offense, but not indicted.

§ 225. The order of court granting or refusing a warrant.

If the judge is satisfied with the proof of the identity of the prisoner and of the probable cause of his guilt, he issues an order or warrant for removal.[1] This warrant is directed to the marshal of the district within which the prisoner is found and the extradition proceedings had. It commands him to remove the prisoner to the particular district where the offense is to be tried and deliver him to the United States marshal of the district or some other proper officer authorized to receive the prisoner. Only one writ or warrant is necessary to remove a prisoner from one district to another.[2] A marshal of the district where the prisoner is found may deputize the marshal of the district in which the trial is to be held to execute the warrant of removal.[3]

If upon the hearing it appears that the removal should not be made, the judge will refuse the warrant and order the prisoner discharged.[4] He may admit the party to bail, and should do so if the party can furnish bail, and to this end he may reduce or increase the bail fixed by the commissioner.[5]

[1] For form of warrant, see Loveland's Forms of Federal Practice, 872.

Horner v. U. S. 143, U. S. 207; *In re* Burkhardt, 33 Fed. Rep. 25; U. S. v. White, 25 Fed. Rep. 716.

[2] R. S. Sec. 1029.

[3] U. S. v. Fletcher, 147 U. S. 664.

[4] *In re* Dana, 68 Fed. Rep. 886; U. S. v. Rogers, 23 Fed. Rep. 658.

[5] U. S. v. Brawner, 7 Fed. Rep. 86; U. S. v. Rogers, 23 Fed. Rep. 661; *In re* Wolf, 27 Fed. Rep. 615.

§ 226. Habeas corpus.

If a bankrupt is unlawfully held in custody he may be released upon a writ of *habeas corpus*.[1] General order 30 provides that if the debtor is "committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."

This general order, like general order 27 under the act of 1867, provides for a release when the debtor is committed in a civil action founded upon a claim *provable in bankruptcy* instead of claims *released by a discharge* as provided by the statute.[2] In this respect the order and statute conflict, and the statute must control.[3]

§ 227. Abatement.

The death or insanity of a bankrupt does not abate the proceedings, but the same are conducted and concluded in the same manner, so far as possible, as though he had not died or become insane. *Provided*, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence.[4]

[1] Gen. Ord. 30; *In re* Terrell, 51 Fed. Rep. 213; U. S. v. Fowkes, 49 Fed. Rep. 50, affirmed in 53 Fed. Rep. 13, s. c. 3 C. C. A. 394.

In Bagnall v. Ableman, 4 Wis. 163, a writ was granted by a state court releasing a prisoner in the custody of a U. S. marshal.

[2] B. A. 1898, Sec. 9*a*. Compare Sec. 26 of the act of 1867, R. S. Sec. 5107.

[3] See Protection from arrest, page 635, note 39, *ante*.

[4] B. A. 1898, Sec. 8. As to practice in case of insanity of bankrupt, *In re* Burke, 107 Fed. Rep. 674, 5

Proceedings do not abate where a bankrupt died after the filing of a petition and before the return day.[5] In such cases time may be allowed the administrator and creditors to appear and answer the petition.[6]

The death or removal of a trustee does not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.[6]

Am. B. R. 843; *In re* Eisenberg, 117 Fed. Rep. 786, 8 Am. B. R. 551.

[5] *In re* Hicks, 107 Fed. Rep. 910, 6 Am. B. R. 182.

[6] B. A. 1898, Sec. 46.

CHAPTER XXI.

OFFENSES.

§ 228. Generally.

The bankrupt statute prescribes that certain acts shall constitute offenses, and provides penalties therefor.[1] The crimes or offenses defined in the act are misdemeanors[2] as distinguished from felonies.

A person may be liable to prosecution under a state or federal law, if the offense has been committed in bankruptcy proceedings, as perjury. Where a person makes himself liable to such punishment or penalty, it is probable that he may be proceeded against under such state or federal statute or under the bankrupt act.[3] But he can not be punished twice for the same offense.

It will be observed that the present act does not make it an offense to obtain goods by false pretenses prior to being adjudged a bankrupt. It seems that congress has left such offenses to be dealt with under the state law. The rule was otherwise under the act of 1867.[4]

§ 229. Misappropriation of property by the trustee.

It is made an offense under the bankrupt statute for any person to knowingly and fraudulently appropriate to his own use, embezzle, spend or unlawfully transfer any property or secrete or destroy any document belonging to a bankrupt estate which came into his charge as trustee.[5]

The object of this provision is to protect the bankrupt and the creditors in case of a dishonest trustee. But it should be observed that the perversion of the assets must be tainted

[1] B. A. 1898, Sec. 29. Compare R. S. Sec. 5132.

[2] U. S. v. Block, No. 14609, Fed. Cas., s. c. 4 Saw. 211; U. S. v. Prescott, No. 16084, Fed. Cas., s. c. 2 Biss. 325; U. S. v. Latorre, No. 15567, Fed. Cas., s. c. 8 Blatch. 134.

[3] Commonwealth v. Walker, 108 Mass. 309. But see State v. Pike, 15 N. H. 83.

[4] R. S. Sec. 5132, clauses 9 and 10.

[5] B. A. 1898, Sec. 29*a*.

with fraud or done unlawfully or with evil intent to be an offense. An honest mistake is not sufficient to warrant an infliction of the penalty, although the results to the assets are equally disastrous.

The penalty for this offense is imprisonment for a period not exceeding five years.[1]

A trustee can not be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt's estate.[2]

§ 230. Concealment of property by a bankrupt.

Another offense is to knowingly and fraudulently conceal while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy.[3] To conceal is defined by the act to "include secrete, falsify and mutilate."[4]

The act of concealment must be done knowingly and fraudulently.[5] Thus, where property is, in fact, concealed *in specie*, or where the title is concealed by a colorable conveyance to prevent it passing into the possession of the trustee, it clearly comes within this provision, and is an offense under the act. If, however, the bankrupt actually transfers his property, although it is done fraudulently to keep it from his creditors, still, if he does not reserve any right to a reconveyance or any beneficial interest, that is, unless a secret trust in favor of himself is established, there is no concealment if the property is omitted from his schedules,[6] but if the facts show that the bankrupt reserved any beneficial interest for himself, there is

[1] B. A. 1898, Sec. 29*a*.

[2] *In re* Smith, 112 Fed. Rep. 509, 7 Am. B. R. 213.

[3] B. A. 1898, Sec. 29*b*, clause 1.

[4] B. A. 1898, Sec. 1, clause 22.

[5] *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597.

[6] *In re* Dauchy, 122 Fed. Rep. 688; *In re* McGurn, 102 Fed. Rep. 743, 4 Am. B. R. 459; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; *In re* Cornell, 97 Fed. Rep. 29, 3 Am. B. R. 172; *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; *In re* Howell, 105 Fed. Rep. 594, 5 Am. B. R. 414*a*. But see *in re* Skinner, 97 Fed. Rep. 190, 3 Am. B. R. 163.

a concealment.[7] Where a preference has been given or a transfer made within four months prior to the filing of the petition, it is not in itself *male fides*, and under the present act, the bankrupt is not guilty of the offense of concealment in not setting forth such property in his schedule.

It is not an offense punishable under the act to omit to name property in the schedule by accident or mistake,[8] or property which the debtor did not know that he owned,[9] or a mass of obsolete and worthless claims and demands on which no action could be maintained,[10] or property which the bankrupt, in good faith, thought did not pass to the trustee,[11] or where the evidence does not show a legally consummated gift or transfer.[12] The fact that a bankrupt's interest in land is doubtful and if it exists may be exempt does not prevent its omission from the schedule being a concealment, but is evidence to be considered in determining whether or not there was fraudulent intent.[13]

A claim for alimony which has not gone to judgment is not property which passes to the trustee and its omission from the schedule is therefore not an offense,[14] nor is the concealment of property acquired after adjudication;[15] it has also been said that there can be no concealment under the act when the title to all the bankrupt's property passed to a receiver before bankruptcy proceedings.[16] The offense of concealment can not be imputed, so where the husband of an innocent bankrupt conceals property the bankrupt is not guilty of an offense.[17]

The failure to include in the schedule money in bank, after

[7] *In re* Welch, 100 Fed. Rep. 65, 3 Am. B. R. 93; *In re* Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; *In re* Becker, 106 Fed. Rep. 54, 5 Am. B. R. 438; Bragasa v. St. Louis Cycle, 107 Fed. Rep. 77, 5 Am. B. R. 700; *In re* Wilcox (C. C. A., 2d Cir.) 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Gammon, 109 Fed. Rep. 312, 6 Am. B. R. 482; *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274.

[8] *In re* Whetmore, 99 Fed. Rep. 703, 3 Am. B. R. 700; *In re* Morrow, 97 Fed. Rep. 574, 3 Am. B. R. 263.

[9] *In re* Parker, No. 10720, Fed. Cas., s. c. 4 Biss. 501.

[10] *In re* Pearce, 21 Vt. 611.

[11] Rugely v. Robinson, 19 Ala. 404; *In re* Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696.

[12] *In re* Leeuw, 3 Am. B. R. 418.

[13] *In re* Todd, 112 Fed. Rep. 315, 7 Am. B. R. 770.

[14] *In re* Le Claire, 124 Fed. Rep. 654.

[15] *In re* Parish, 122 Fed. Rep. 553.

[16] *In re* Lesser (C. C. A., 2d Cir.), 114 Fed. Rep. 83, 8 Am. B. R. 15.

[17] *In re* Meyers, 105 Fed. Rep. 353,

the bankrupt's attention has been called to it, amounts to a concealment although if it had been included the assets would not amount to the exemptions,[18] or be sufficient to pay for the proceedings.[19] In the absence of any explanation, the omission of property of value from the schedule after being advised that it should include all property, is sufficient to show a fraudulent concealment.[20] So also is the failure to schedule an interest in remainder under a will and the knowingly sending to a false address the notice to a creditor,[21] and the selling of goods at wholesale as soon as purchased and paying the proceeds to a friend,[22] and the payment of debts due to relatives when such debts were not kept in books of account.[23] An unexplained shrinkage of assets is evidence of concealment [24] and is held to raise a presumption and to throw the burden strongly on the bankrupt.[25] If accompanied by a failure to keep account books there is sufficient proof of a concealment,[26] but a decision based merely on the fact that there was an unexplained shrinkage is incorrect when the only evidence to show that there ever were such assets is a statement to a mercantile agency.[27]

Circumstances to establish concealment depend more or less upon the circumstances of each particular case.[28] Speaking of

5 Am. B. R. 4; *In re* Hyman, 97 Fed. Rep. 195, 3 Am. B. A. 169.

[18] *In re* Royal, 112 Fed. Rep. 135, 7 Am. B. R. 106.

[19] *In re* Lowenstein, 106 Fed. Rep. 51, 2 Am. B. R. 193. See also *in re* Roy, 96 Fed. Rep. 400, 3 Am. B. R. 37.

[20] Osborn v. Perkins (C. C. A., 1st Cir.), 112 Fed. Rep. 127, 7 Am. B. R. 250.

[21] *In re* Roosa, 119 Fed. Rep. 542, 9 Am. B. R. 531.

[22] *In re* Holstein, 114 Fed. Rep. 794, 8 Am. B. R. 147.

[23] *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94.

[24] *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561.

[25] *In re* Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; *In re* Finklestein, 101 Fed. Rep. 418, 3 Am. B. R. 800; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402.

[26] *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; *In re* Ablowich, 99 Fed. Rep. 81, 3 Am. B. R. 586; *In re* O'Gara, 97 Fed. Rep. 932, 3 Am. B. R. 349.

[27] *In re* Lesser (C. C. A., 2nd Cir.) 114 Fed. Rep. 83, 8 Am. B. R. 15.

[28] In the following cases the bankrupt was held to have concealed property: *In re* Otto, 115 Fed. Rep. 860, 8 Am. B. R. 305, 753; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; *In re* Bullwinkle, 111 Fed. Rep. 364, 6 Am. B. R. 756; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re* Hoffman, 102 Fed. Rep. 979, 4 Am. B. R. 331; *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; *In re* Bra-

a charge of concealing property to defeat a discharge, Judge Blatchford said:[29]

"A fraud of the kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. The determination of the question of fraud or no fraud must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, and there was no fraud, there will not be found in their testimony any badges and indicia of fraud sufficient to overbear such positive testimony." The charge of concealment ought to be substantiated either by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken to be true upon any slight or ambiguous presumptions, nor upon any state of facts which do not clearly, and, indeed, almost necessarily, call for such an inference.[30] It should be borne in mind that the degree of

gasa, 103 Fed. Rep. 936, 4 Am. B. R. 519; *In re* Heyman, 104 Fed. Rep. 677, 4 Am. B. R. 735; *In re* Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572; *In re* Semmel, 118 Fed. Rep. 487, 9 Am. B. R. 351.

In the following cases the bankrupt was held not to have concealed his property: Fields v. Karter (C. C. A., 5th Cir.) 115 Fed. Rep. 950, 8 Am. B. R. 351; *In re* Miner, 114 Fed. Rep. 998, 8 Am. B. R. 248; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Bryant, 104 Fed. Rep. 789, 5 Am. B. R. 114; *In re* Conn, 108 Fed. Rep. 525; 6 Am. B. R. 217; *In re* Hansen, 107 Fed. Rep. 252; 5 Am. B. R. 747; *In re* Slingluff, 105 Fed. Rep. 502, 5 Am. B. R. 76; *In re* Adams, 104 Fed. Rep. 72, 4 Am. B. R. 606; *In re* Locks, 104 Fed. Rep. 783, 5 Am. B. R. 136; Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. —

[29] *In re* Goodridge, No. 5547, Fed. Cas., s. c. 2 N. B. R. 324.

[30] *In re* Lafleche, 109 Fed. Rep. 307, 6 Am. B. R. 483; *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B.

proof here spoken of is not that necessary to convict the bankrupt, but that necessary to sustain specifications in opposition to discharge. To convict, the proof must be beyond a reasonable doubt.

The penalty for this offense is imprisonment for a period not to exceed two years.[31]

§ 231. False oath or account.

It is an offense to knowingly and fraudulently make a false oath or account in, or in relation to, any proceeding in bankruptcy.[31*] An oath includes an affirmation.[32]

An offense under this provision may arise in connection with any oath or affirmation made in any part of the proceedings, as an oath to a schedule filed by a bankrupt, an oath to prove the debt of a creditor, an oath made to an account by a trustee, or a deposition or testimony given by any person in the course of the proceedings. The essential elements are that it be made knowingly and fraudulently,[33] that it be false, and that it be in, or in relation to, a proceeding in bankruptcy.[34] It is not an offense punishable under the act to unintentionally make a false statement under oath, and it would seem that Sec. 7, sub. 9, protects the bankrupt if he intentionally makes a false oath on his examination.[35] The mere understatement or overstatement in schedule, of the amount of debts does not warrant the conclusion that the bankrupt was misrepresenting the condition of his estate;[36] nor is proof that the bankrupt made

R. 94; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Ferris, 105 Fed. Rep. 356, 5 Am. B. R. 246; *In re* Gaylord, 106 Fed. Rep. 833, 5 Am. B. R. 410; *In re* Corn, 106 Fed. Rep. 143, 5 Am. B. R. 478; *In re* Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Leslie, 119 Fed. Rep. 406; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266.

[31] B. A. 1898, Sec. 29*b*.

[31*] B. A. 1898, 29*b*, clause 2.

[32] B. A. 1898, Sec. 1, clause 17.

[33] *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597.

[34] *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

[35] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 400; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Marx, 102 Fed. Rep. 676, 4 Am. B. R. 52.

[36] *In re* Miner, 114 Fed. Rep. 988, 8 Am. B. R. 248.

statements contrary to his oath, proof that the oath was false.[37] The fact that the bankrupt files amended schedules including property left out of the first schedules is evidence that the false oath to the first was not knowingly made, but is not conclusive, and if the first was knowingly made, the amended schedule would not work a cure.[38] Where the offense of concealment is committed by omitting assets from the schedule there must necessarily be a false oath as the schedule must be verified by the bankrupt.[39] An indictment charging perjury for omitting assets from schedules is defective unless it charges directly that there was other property.[40]

So also a person who is required to make an account is guilty of an offense punishable under the act who knowingly and fraudulently makes a false one, not necessarily under oath. This includes the schedule of a bankrupt, the reports of the trustee, receiver and other officers of the court, and any person or persons required by the court to furnish an account of propety or funds. An honest mistake or an omission is not sufficient evidence of guilt. It must have been intentional, and for the purpose of deceiving to render the person making it guilty of an offense.

The penalty for this offense is imprisonment for a period not exceeding two years.[41]

§ 232. Presenting false claims.

It is an offense punishable under the bankrupt statute to knowingly and fraudulently present under oath any false claim for proof against the estate of a bankrupt, or use any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney.[42]

The essential elements of this offense are: *First*, the presenting of a false claim under oath for proof against the estate of the bankrupt or to use any such claim in composition; and, *secondly*, to do so knowingly and fraudulently. If either of these elements is wanting, it is not a punishable offense. The offense may be committed not only by the per-

[37] Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

[38] *In re* Eaton, 110 Fed. Rep. 731, 6 Am. B. R. 531.

[39] *In re* Stoddart, 114 Fed. Rep. 486, 7 Am. B. R. 762.

[40] Bartlett v. United States (C. C. A. 9th Cir.), 106 Fed. Rep. 884, 5 Am. B. R. 678.

[41] B. A. 1898, Sec. 29*b*.

[42] B. A. 1898, Sec. 29*b*, clause 3.

son, who owns the claims, or who is to be benefited by proving it, but may be committed by any agent, proxy or attorney who actually presents the false claim, knowing it to be false and with intent to practice a fraud upon the real creditors.

The penalty for this offense is imprisonment for a period not to exceed two years.[1]

§ 233. Receiving property from a bankrupt.

It is a punishable offense to knowingly and fraudulently receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act.[2]

The gist of the offense created by this clause is to receive property from a bankrupt after bankruptcy proceedings have been commenced, with intent to keep property from the trustee. The bankrupt, who so transfers property, is guilty of the offense of concealing property under the first clause of section 29. This clause makes the person receiving such property also guilty of an offense punishable under the act. The offense can not be committed unless a petition has been filed in a court of competent jurisdiction in which a trustee can be appointed.[3] It is also essential that the person receiving the property does so knowingly and fraudulently with intent to defeat the act.

The penalty for this offense is imprisonment for a period not to exceed two years.[4]

§ 234. Extorting money for forbearing to act.

It is a punishable offense under the bankrupt act to knowingly and fraudulently extort or attempt to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[5]

Under the former acts it was held that acting or forbearing to act in bankruptcy proceedings was not such a consideration as would support a note.[6] But the present statute goes further; it makes it an offense punishable by imprisonment for a period not to exceed two years.[7]

[1] B. A. 1898, Sec. 29*b*.

[2] B. A. 1898, Sec. 29*b*, clause 4.

[3] See U. S. v. Latorre, No. 15567, Fed. Cas., s. c. 8 Blatch. 134.

[4] B. A. 1898, Sec. 29*b*.

[5] B. A. 1898, Sec. 29*b*, clause 5.

[6] Rice v. Maxwell, 13 Smeads & M. (21 Miss.) 289; Bell v. Leggett, 3 Selden (7 N. Y.) 178.

[7] B. A. 1898, Sec. 29*b*.

§ 235. Offenses by referees.

The bankrupt statute specifies three offenses which may be committed by a referee. They are, if he knowingly, *first*, acts as a referee in a case in which he is directly or indirectly interested; or, *second*, purchases, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or, *third*, refuses, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.[1]

It is not an offense to refuse to permit an inspection of books, etc., unless such an inspection has been ordered by the court. If an inspection is denied by the referee or trustee it is assumed that the refusal is based on some good ground. If it is not, upon application to the court, an inspection will be allowed. A refusal by the referee or trustee after the order of court is an offense.

The penalty in case of any of the offenses mentioned in this section is a fine not to exceed five hundred dollars and a forfeiture of the office of referee.[1] The office becomes vacant immediately upon conviction.

§ 236. What court has jurisdiction of criminal proceedings.

Proceedings to punish for offenses under the bankrupt act may be instituted in a court of bankruptcy or a circuit court of the United States. In the general grant of powers, conferred by section two of the act, upon the courts of bankruptcy, it is provided that they "are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to . . . . *fourth*, arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this act, in accordance with the laws of procedure

[1] B. A. 1898, Sec. 29*c*.

of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States," and section twenty-three *c* provides that "the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

The court for the district within which the offense is committed has jurisdiction to punish for the offense.

§ 237. Practice and procedure.

Proceedings to punish a person for an offense under the bankrupt act are criminal in their nature. In such trials and proceedings the bankrupt act expressly adopts "the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States."[1] So also the right to submit an alleged offense under the act to a jury is determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted, in relation to trials by jury.[2]

Criminal proceedings in bankruptcy are regularly instituted by an indictment found by a grand jury. But it has been held that where the crime is not infamous, within the meaning of that term as used in the fifth amendment to the constitution, the person committing it may be prosecuted by information.[3] It would seem that all offenses under the present bankrupt act, except those punishable by fine only, are infamous within the definition of that term given by the supreme court.[4] It has been said that "the question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous

[1] B. A. 1898, Sec. 29*c*.

[2] B. A. 1888, Sec. 19*c*.

[3] U. S. v. Block, No. 14609, Fed. Cas., s. c. 4 Saw. 211.

[4] See the discussion of this subject by Mr. Justice Gray in *ex parte* Wilson, 114 U. S. 424, *et seq.* See also Medley, Petitioner, 134 U. S. 160; Mackin v. U. S., 117 U. S. 348; Parkinson v. U. S. 121 U. S. 281; U. S. v. De Walt, 128 U. S. 393.

punishment if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury."[1]

General averments in an indictment are not sufficient. It must show an offense, and must convey to the accused the information necessary to enable him to make his defense.[2] It is not sufficient in an indictment to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the bankruptcy court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.[2] The word "feloniously" should not be used, as the offense is only a misdemeanor. It has been held that a failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication, was a formal defect and not fatal.[3] The proceedings subsequent to the indictment are such as are regularly had in criminal cases in federal courts, a general consideration of which is not within the scope of this work.

The language with reference to who may be punished by a court of bankruptcy includes bankrupts, officers, and other persons, and the agents, officers, members of the boards of directors, trustees and other similar controlling bodies, of corporations.[4] This language is undoubtedly broad enough to include all persons who conspire with the bankrupt to commit the offenses mentioned in the act.[5] The indictment must be found or information filed within one year from the commission of the offense.[6]

[1] In *ex parte* Wilson, 114 U. S. 426.

[2] Bartlett v. U. S., 106 Fed. Rep. 884, 5 Am. B. R. 678; U. S. v. Latorre, No. 15567, Fed. Cas., s. c. 8 Blatch. 134; U. S. v. Prescott, No. 16084, Fed. Cas., 2 Biss. 325.

Consult also Reg. v. Lands, 33 Eng. Law and Eq. 536; Rex v. Jones, 24 E. C. L. 156; Reg. v. Ewington, 41 E. C. L. 178; Reg. v. Boyd, 5 Cox Cr. Cas. 502.

[3] U. S. v. Jackson, 2 Fed. Rep. 502.

[4] B. A. 1898, Sec. 2, clause 4.

[5] See U. S. v. Bayer, No. 14547, Fed. Cas., s. c. 4 Dill. 407.

Consult U. S. v. Stevens, 44 Fed. Rep. 132; U. S. v. Snyder, 8 Fed. Rep. 805, s. c. 14 Fed. Rep. 554; U. S. v. Houghton, 14 Fed. Rep. 544.

[6] B. A. 1898, Sec. 29*d*.

CHAPTER XXII.

PROCEEDINGS TO PUNISH FOR CONTEMPT.

§ 238. The power to commit.

The power to punish for contempt is inherent in all courts of the United States.[1] But the power is expressly conferred upon courts of bankruptcy to enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment, and to punish persons for contempts committed before referees.[2] A referee has no power to punish a contempt.[3]

A court of bankruptcy may undoubtedly punish a person who has misbehaved in the presence of the court;[4] or so near thereto as to obstruct the administration of justice, as on a piazza adjoining the court-room,[5] or in a jury-room or hall,[6]

[1] *Ex parte* Robinson, 19 Wall. 510.

[2] B. A. 1898, Sec. 2, clauses 13 and 16, and Sec. 41.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court construing this section said:

"By reference to section 41 it will be seen that 'the things forbidden in this section,' concerning which the referee is required to certify the facts to the judge, include only those things which would be punishable as contempts by all courts of record. They are the common and familiar heads for the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court. Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter, or thing which cannot be punished as a contempt by other United States courts cannot be punished as such by a court of bankruptcy."

[3] B. A. 1898, Sec. 41.

[4] U. S. v. Patterson, 26 Fed. Rep. 509; Blight v. Fisher, No. 1542, Fed. Cas., s. c. Pet. C. C. 41.

[5] United States v. Carter, No. 14740, s. c. 3 Cranch, C. C. 423; *Ex parte* Salkey, No. 12253, Fed. Cas., s. c. 6 Biss. 269, affirmed on petition for *habeas corpus*, No. 12254, Fed. Cas., s. c. 6 Biss. 280.

[6] See *In re* Savin, 131 U. S. 267.

or before a referee,[7] or where there has been misbehavior of any officer of the court in his official transactions, as where one of its officers refuses to pay over money due from him in his official capacity,[8] or where a witness refuses to be sworn according to law,[9] or where a witness refuses to answer questions in court or before a referee,[10] or where there has been disobedience or resistance by a bankrupt, officer, or other person, to any lawful writ, process, order, rule or decree, or command of the court,[11] or where the bankrupt after filing petition surrendered mortgaged property to the mortgagee,[12] or where the bankrupt withdraws from the office of the referee before the completion of his examination.[13]

It is a contempt to disobey or resist any lawful process of the court duly served, as a subpœna to a witness to testify in court,[14] or before a referee,[15] or to produce written documents,[16] or a final decree or interlocutory order of the court.

Where a person has used due diligence to comply with the orders of the court, he is not guilty of contempt.[17] It has been said that an order of court "does not mean a written order always, but only an exercise of authority constituting a requirement."[18] The question as to whether the act constitutes a contempt of an order of court usually arises however upon a writing, as upon an order to deliver property by

[7] B. A. 1898, Sec. 2, clause 16; Sharon v. Hill, 24 Fed. Rep. 726; United States v. Anonymous, 21 Fed. Rep. 761.

[8] *In re* Pittman, No. 11184, Fed. Cas. s. c. 1 Curtis 186; Jeffries v. Laurie, 27 Fed. Rep. 198; *In re* Pascal, 10 Wall. 491; Bogart v. Supply Co., 27 Fed. Rep. 722.

[9] B. A. 1898, Sec. 21*a*; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

[10] B. A. 1898, Sec. 21*a*.

[11] B. A. 1898, Sec. 2, clause 13; Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

[12] *In re* Arnett, 112 Fed. Rep. 770, 7 Am. B. R. 522.

[13] *In re* Vogel, No. 16984, Fed. Cas., s. c. 5 N. B. R. 393.

[14] B. A. 1898, Sec. 21*a*; Carmen v. Emerson, 71 Fed. Rep. 264, s. c. 18 C. C. A. 38; United States v. Caldwell, 2 Dall. 333; Norris v. Hassler, 23 Fed. Rep. 581; *In re* Ellerbe, 13 Fed. Rep. 530.

[15] B. A. 1898, Sec. 21*a* and Sec. 41; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; *In re* Spofford, 62 Fed. Rep. 443; Johnson Steel Co. v. N. B. Steel Co., 48 Fed. Rep. 191; *In re* Allen, No. 208 Fed. Cas., s. c. 13 Blatch. 271.

[16] B. A. 1898, Sec. 41.

[17] *In re* Carpenter, No. 2427, Fed. Cas., s. c. 1 N. B. R. 299.

[18] Bridges v. Sheldon, 7 Fed. Rep. 45.

the bankrupt,[19] or an order of injunction. It should be observed that it is only lawful orders, the disobedience of which may be punished for contempt. The court has power to order a bankrupt to pay over to his trustee money found to be in his possession or control and properly belonging to his estate, and if the bankrupt fails to obey such order, the court may commit him for contempt until he complies.[20] The same rule has been applied in cases of an agent or bailee of property of the bankrupt,[21] or in case of failure to produce books of account when ordered.[22] If, however, the court is without power to make the order it is without power to punish for a disobedience of it.[23] Where the person having possession of property claimed by the bankrupt, sets up an adverse claim in himself to the property, he is entitled to a plenary suit.[23] In such cases he can not be required to answer a rule to show cause in a summary proceeding for disobedience of an order to turn over to the trustee such property.[23]

The courts have frequently been called upon in the exercise of general jurisdiction to determine what constitutes contempt of court in the disobedience or resistance of an injunction order. Generally, to do the thing enjoined is contempt, and it has been held to be a violation of an injunction for the person enjoined to be present at the commission of the act aiding and abetting, although not actually taking part in it,[24] or to do the act enjoined as agent or servant of

[19] Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; *In re* Salkey, No. 12254, Fed. Cas., s. c. 6 Biss. 280; *In re* Peltasohn, No. 10912, Fed. Cas., s. c. 4 Dill. 107; *In re* Speyer, No. 13239, Fed. Cas., s. c. 6 N. B. R. 255.

[20] *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299; *In re* Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Gerstel, 10 Am. B. R. 411.

[21] Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

[22] *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

[23] Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421.

[24] Dunks v. Gray, 3 Fed. Rep. 868; St. John's College v. Carter, 8 Law Journ. Eq. N. S. 218; Societe v. Distilling Co., 42 Fed. Rep. 96.

In *In re* Wall, 13 Fed. Rep. 818, the court sid: "I am too well aware of his influence in this community not to know that his presence would be ample encourage-

another person.[25] The mere fact that a person did not think that his act amounted to a violation of the injunction is no defense,[26] nor the fact that he acted under advice of counsel.[27] But where the violation of an injunction order is not willful this fact may be considered in mitigation of the punishment to be imposed.[28] It is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer.[29] It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights or committed before the court took jurisdiction of the matter; the court can not compel an impossibility.

The power of the court of bankruptcy to punish for the disobedience of its orders extends only to such orders as actually exist,[30] and after the person enjoined has had notice.[31] An order actually made by the court is binding until reversed or set aside, even though the court making it is without jurisdiction.[32]

ment to others on such an occasion. It is not alone by words that one advises and encourages, and the fact of his presence and action is sufficient not only to find an encouraging thereby, but raise the presumption on his doing the same by words."

[25] Dunks v. Gray, 3 Fed. Rep. 868; 41 Vt. 246.

[26] Atlantic, etc., Co. v. Dittmar Co., 9 Fed. Rep. 316.

[27] Burr v. Kimbark, 29 Fed. Rep. 432; United States v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Mullee, No. 5577, Fed. Cas., s. c. 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Distilling Co., 42 Fed. Rep. 96.

[28] Morss v. Sewing Machine Co., 38 Fed. Rep. 482; Iowa Barb Wire Co. v. Southern Co., 30 Fed. Rep. 615.

[29] Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393; *In re* Felson, 124 Fed. Rep. 288; *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, 814, per Lowell and Nelson, Judges; *In re* Chiles, 22 Wal. 157, 168; Kane v. Haywood, 66 N. C. 1; *In re* Hausman (C. C. A. 2d Cir.), 121 Fed. Rep. 984.

[30] *Ex parte* Buskirk, 72 Fed. Rep. 14; s. c. 18 C. C. A. 410.

[31] *In re* Cary, 10 Fed. Rep. 622. See notes to this case for discussion of contempt; *In re* Schwartz, 14 Fed. Rep. 787; Ulman v. Ritter, 72 Fed. Rep. 1000; Toledo, etc., R. R. Co. v. Penn. Co., 54 Fed. Rep. 746.

[32] Worden v. Searls, 121 U. S. 14; *In re* Eaton, 51 Fed. Rep. 804; Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596.

In the ordinary case of advising clients if an attorney gives it in good faith and in the honest belief that his advice is well founded and in the just interest of his client, he can not be held for contempt for error in judgment.[33] Where judicial action is alleged to have been induced by the advice of counsel complained of, on the ground that there is conspiracy between the state court and the attorneys to obstruct the administration of justice, the attorneys can not be punished for contempt.[33]

§ 239. Nature of the proceedings.

Proceedings for contempt are of a twofold nature, criminal and civil. For the purpose of punishing the guilty party for his disrespect to the court or its order the proceeding is criminal.[34] As a means of compelling obedience to some lawful order requiring the party to perform some act or duty required of him, and which he refuses to perform, the proceedings may be civil or criminal.[35] Thus if the respondent had in his possession property, and is ordered to deliver it to the court, or some person named by the court, within a fixed time, and he willfully refuses to obey the order, it being within his power to do so, then a civil process of contempt may be resorted to as a means of compelling obedience to the order of the court, and the party refusing to obey may be confined and imprisoned until he performs the act required of him or shows that it is not in his power to do it.[36]

[33] *In re* Watts and Sachs, 190 U. S. 1.

[34] New Orleans v. Steamship Co., 20 Wall. 393; *Ex parte* Kearney, 7 Wheat. 38; *In re* Manning, 44 Fed. Rep. 275; United States v. Berry, 24 Fed. Rep. 780; *In re* Ellerbe, 13 Fed. Rep. 530.

[35] See Worden v. Searls, 121 U. S. 26; Hays v. Fischer, 102 U. S. 122; *In re* Graves, 29 Fed. Rep. 60; 4 Blackstone's Com. 285; Wells, Fargo & Co. v. Oregon Co., 19 Fed. Rep. 20.

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, on page 813, Judge Lowell observed: "If the proceeding should be criminal in form it would make no difference. A criminal sentence for the benefit of a private person is to be treated as civil to all intents and purposes." See also observation of Mr. Justice Miller in *In re* Chiles, 22 Wall. 168.

[36] *In re* Salkey, No. 12254, Fed. Cas., s. c. 6 Biss. 280; *In re* Peltasohn, No. 10912, Fed. Cas., s. c. 4 Dill. 107; *In re* Speyer, No. 13239, Fed. Cas., s. c. 6 N. B. R. 255; *In re* Graves, 29 Fed. Rep. 60; Hendryx v. Fitzpatrick, 19 Fed. Rep. 813; *In re* Chiles, 22 Wall. 168.

He may also be proceeded against criminally, because the disrespect being willful, it is an offense against the government.

§ 240. Practice, pleadings and procedure.

The mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and what is legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy.[37]

It is proper and probably better practice to bring the question of contempt to the attention of the court by a petition or motion for rule to show cause. The practice in the federal courts in contempt proceedings has been far from uniform in this respect.

In case the proceedings are instituted to punish a contempt committed before a referee they are commenced by a certificate of the referee.[38] The judge thereupon, in a summary manner, hears the evidence as to the acts complained of, and if it is such as to warrant him in so doing, punishes such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commits such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.[38]

The petition or motion may be entitled and filed in the original action.[39] Where the proceeding is criminal, and punishment is asked for, it may be instituted in the name of the United States.[40] The petition should state the names of the persons to be attached;[41] the specific acts of commission

[37] Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[38] B. A. 1898, Sec. 41*b*. See U. S. v. Anonymous, 21 Fed. Rep. 761.

[39] See Creditors v. Cozzens, No. 3378, Fed. Cas., s. c. 3 N. B. R. 281.

[40] As in United States v. Atcheson R. S. Co., 16 Fed. Rep. 853; United States v. Murphy, 44 Fed. Rep. 30.

[41] Creditors v. Cozzens, No. 3378, Fed. Cas., s. c. 3 N. B. R. 281; American Construction Co. v. Rail Road Co., 52 Fed. Rep. 937.

or omission which constitute the contempt;[42] when and where committed;[43] that the order, if any, was lawful, and the date made and by whom; the allowance or grant of an injunction, if any, when and by whom, and that it had been issued on the terms specified and within the limits imposed, and had been duly served in the mode required by it, and by the proper officer. In some cases it is necessary to charge that the acts complained of were done "willfully and contemptuously," and "with full notice and knowledge."[44]

The prayer or request of the petition or motion should be for an order or rule requiring the contemnor to appear in court at a certain time and place, and show cause why he should not be attached and punished for contempt.

The facts stated in the petition should be verified by an affidavit, and a motion should be supported by affidavits setting forth the facts. A copy of the petition or motion and affidavits should generally be served upon the contemnor personally.[45]

The court will ordinarily order a rule to show cause to issue if a *prima facie* case is made. It is not necessary that the matter alleged as the foundation for the charge appear in the rule to show cause, because the rule is served merely as a basis for process. The rule to show cause should be personally served on the contemnor. The attachment to take the body of the contemnor is rarely resorted to, for the reason that if he appear on the day specified it is not necessary, and if he does not appear the rule may be made absolute, and if convicted he may be arrested under a warrant or a mittimus. But when there is danger that the con-

[42] Toledo C. C. R. Co. v. Penn. Co., 54 Fed. Rep. 747. See also *In re* Swan, 150 U. S. 637; *In re* Sawyer, 124 U. S. 207.

[43] See United States v. Berry, 24 Fed. Rep. 780; *In re* Litchfield, 13 Fed. Rep. 868-9.

[44] See statement in affidavits charging *In re* Sawyer, 124 U. S. 207; Toledo, etc., Ry. Co. v. Penn. Co., 54 Fed. Rep. 751.

[45] American Construction Co. v. Rail Road Company, 52 Fed. Rep. 938; United States v. Murphy, 44 Fed. Rep. 40; Gray v. Chicago, etc., R. R. Co., No. 5713, Fed. Cas., s. c. Woolw. 63. But see Fanshawe v. Tracy, No. 4643, Fed. Cas., s. c. 4 Biss. 490.

In Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291, the want of notice was held error.

temnor will flee from the district, the attachment has been issued immediately upon instituting the proceedings.[46] In one case, at least, a rule has been issued requiring him "to appear in court forthwith to show cause."[47]

To the rule to show cause, the contemnor may make return or answer under oath before the day set for hearing, in which he may deny the allegations of the petition or admit them, or admit them and justify his action.[48] The denials in the return or answer are not conclusive.[49] At common law the sworn answer was not to be controverted as to mat-

[46] This was done in Thomas v. C. N. O. & T. P. R. R. Co., *in re* Phelan, 62 Fed. Rep. 817, and the person was brought directly to court and admitted to bail, although this does not appear in the report of the case.

But consult the observation of Judge Drummond in Fanshawe v. Tracy, No. 4643, Fed. Cas., s. c. 4 Biss. 490.

[47] This was done in Toledo, etc., R. Co. v. Penn. Co., 54 Fed. Rep. 751. But see Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[48] This was done *In re* Swan, 150 U. S. 639; *In re* Sawyer, 124 U. S. 207; *In re* Ayers, 123 U. S. 456.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court said: "Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt."

[49] 2 High on Injunctions, 1455; United States v. Anonymous, 21 Fed. Rep. 767.

In Ripon Knitting Works, 101 Fed. Rep. 810, 4 Am. B. R. 299, Judge Hanford said: "One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it." See also U. S. v. Sweeney, 95 Fed. Rep. 434; *In re* Purvine, 2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. Rep. 192; *In re* Mayer, 3 Am.

ters of fact.[50] Mr. Justice Curtis, however, adds to this statement, "there were certain precedents for the introduction of other kinds of proof."[51] The court may pronounce judgment and make the rule absolute if no answer is filed, or if the answer admits facts which, in the opinion of the court, constitute contempt, or if a justification is deemed insufficient.

When a sufficient return or answer has been made, the parties appear before the court at the time specified for the hearing. Both parties may present testimony by witnesses examined orally[52] or by affidavits.[53] The contemnor may appear in person or by counsel, and may file his own affidavit in his own behalf, or with his consent be examined upon written interrogatories.[54] But he can not be compelled to testify against himself. After the evidence has been adduced, the court will hear arguments of counsel and determine the facts for itself, of it may refer them to a referee. The question of commitment can not be left to the discretion of the referee.[55]

If the court finds the proofs do not support the charge of contempt, the proper judgment is to dismiss the rule, and if the contemnor has been arrested and is in the custody of the marshal or admitted to bail, also to discharge the person. If no cause is shown why he should not be punished for contempt, the court should order the rule to be confirmed and made absolute, and adjudge the person guilty of contempt and fix his punishment. It is good practice for the judgment to

B. R. 533, 98 Fed. Rep. 839; *In re* Gerstel, 10 Am. B. R. 411; *In re* Shachter, 9 Am. B. R. 449.

[50] *In re* Pittman, No. 11184, Fed. Cas., 1 Curtis, 186, per Mr. Justice Curtis; United States v. Dodge, No. 14975, Fed. Cas., s. c. 2 Gall. 313; 4 Blackstone's Com. 286-7; *In re* May, 1 Fed. Rep. 743.

[51] *In re* Pittman, No. 11184, Fed. Cas., s. c. 1 Curtis, 186, and cases collated.

[52] Savin, petitioner, 131 U. S. 267, 279; Cuddy, petitioner, 131 U. S. 281; Randall v. Brigham, 7 Wall. 540.

[53] Mexican Ore Co. v. Mexican Co., 47 Fed. Rep. 353; United States v. Anonymous, 21 Fed. Rep. 767; United States v. Atcheson, etc., R. S. Co., 16 Fed. Rep. 855; United States v. Justices, 10 Fed. Rep. 461.

[54] See Savin, petitioner, 131 U. S. 269; Cuddy, petitioner, 131 U. S. 281.

[55] Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

recite the offense, but it is not necessary, if it describes the offense charged by reference to other proceedings.[56]

The power of the court to punish contempts of their authority is limited to fine or imprisonment or fine and imprisonment;[57] but there is no limit to the extent of either fine or imprisonment. But it has been held that a bankrupt can not be imprisoned indefinitely, when it is not certainly known that he has property which he has been ordered to surrender.[58] A court can not disbar an attorney for contempt.[59] It can not punish contempt committed in any other court.[60]

When a fine is imposed as punishment, the contemnor may be ordered to stand committed until the fine and cost be paid,[61] and such an order is not in conflict with statutes prohibiting imprisonment for debt.[62]

When the judgment of the court be imprisonment or fine and commitment until paid, a warrant or mittimus is issued. It recites that the contemnor has been convicted of a contempt of court, and should specify particularly where and how long the contemnor is to be imprisoned, and what he is to do to entitle him to discharge. Thus it may command the marshal to take the body of the contemnor and keep him in custody until he shall have paid into court the amount of the fine, together with the fees of the marshal thereon,[63] or it may specify a particular place and term of imprisonment, and command the marshal to take the body of the person and commit the same to such place of confinement.[64]

The rule with reference to the power of the court committing a contemnor to release him by a subsequent order seems to be, that in case of a criminal contempt, being an offense against the United States, and the commitment but

[56] Fischer v. Hayes, 6 Fed. Rep. 70; Loveland's Forms Fed. Prac., Nos. 718-729.

[57] B. A. 1898, Sec. 2, clause 13.

[58] *In re* Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410.

[59] *Ex parte* Robinson, 19 Wall. 512.

[60] *Ex parte* Bradley, 7 Wall. 372.

[61] See *In re* Tyler, 149 U. S. 180.

[62] Bogart v. Supply Co., 27 Fed. Rep. 722; Jeffries v. Lauric, 27 Fed. Rep. 198; Fischer v. Hayes, 6 Fed. Rep. 63; Ripon Knitting Works v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299.

[63] Fischer v. Hayes, 7 Fed. Rep. 98. For form of mittimus, see Loveland's Forms Fed. Prac., Nos. 730, 731.

[64] Loveland's Forms Fed. Prac., No. 731.

an execution of the judgment of conviction, the court has no power to discharge or remit the sentence.[65] But it falls within the pardoning power of the president by the constitution.[66] Where the proceeding is of a civil nature, the court has power to release the person.[67]

Where a person has been imprisoned for contempt, relief is usually sought by *habeas corpus*.[68] The person may be discharged if the order of commitment was utterly void,[69] otherwise not.[70]

An order to pay over to a trustee money or property of the estate of the bankrupt and adjudging the party disobeying such an order to be in contempt may be reviewed as to matters of law by the circuit courts of appeals.[71] It has been held that contempt proceedings are not a part of the original case, but separate and distinct therefrom, and the order of the court, a judgment in a criminal case, and therefore reviewable upon a writ of error by the court of appeals.[72]

[65] *In re* Mullee, No. 9911, Fed. Cas., s. c. 7 Blatch. 23.

[66] Dixon's Case, 3 Atty. Gen. Opp. 622; Rowan's Case, 4 Atty. Gen. Opp. 458; Conger's Case, 4 Atty. Gen. Opp. 317.

[67] Hendryx v. Fitzpatrick, 19 Fed. Rep. 810.

[68] *In re* Watts and Sachs, 190 U. S. 1; *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812.

[69] *Ex parte* Terry, 128 U. S. 289; *Ex parte* Fisk, 113 U. S. 713.

[70] *In re* Tyler, 149 U. S. 180; Savin, petitioner, 131 U. S. 267; Cuddy, petitioner, 131 U. S. 280, 286; *Ex parte* Kearney, 7 Wheat. 38; *In re* Eaton, 51 Fed. Rep. 804.

[71] Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; Boyd v. Glucklich, 116 Fed. Rep. 131, 8 Am. B. R. 393.

[72] Gould v. Sessions (C. C. A., 2d Cir.), 67 Fed. Rep. 163; Butler v. Fayerweather (C. C. A., 2d Cir.), 91 Fed. Rep. 458; Cary Mfg. Co. v. Acme Co. (C. C. A., 2d Cir.), 108 Fed. Rep. 873; Westinghouse Air Brake Co. v. Christianson Engineering Co. (C. C. A., 2d Cir.), 123 Fed. Rep. 632; Bullock Electric & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. (C. C. A., 6th Cir.), 127 Fed. Rep. —.

CHAPTER XXIII.

COMPOSITIONS AND ARBITRATIONS.

§ 241. The general nature of a composition.

The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts.

The bankrupt presents a list of the names of his creditors and the amount due each of them, the amount of his assets and the rate *per centum* he is willing to pay on these debts as a compromise, in consideration of his discharge from the balance due each creditor. His creditors consider the subject, thus presented, after the debtor has been examined under oath.[1] The whole matter being thus before them, they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage of their debts, they will accept it in satisfaction and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay.

Some one must decide the question of the amount of the dividend and of the discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full. Congress has provided that the debtor and a majority of his creditors, in number and amount, may determine these questions if they can agree upon a compromise.[1] The minority of the creditors must submit to the terms agreed upon by the majority. The terms of the compromise are subject to be approved or disapproved by the judge. The rights of those who are not called upon or who dissent may be fully protected by objections properly taken and presented to the judge at the time of the application for an order confirming the composition. The property is distributed under the direction of the court.

[1] B. A. 1898, Sec. 12. Compare R. S. Sec. 5103.

This is a much shorter and less expensive method of settling the bankrupt's estate than if the whole machinery of the court, in a full bankruptcy proceeding, is called into use. Where the bankrupt and a majority of his creditors fail to agree upon terms of compromise, or where the court refuses to approve the terms agreed upon, the estate is administered in bankruptcy as otherwise provided by the statute.

§ 242. The power of congress to provide for compositions. Provisions for facilitating arrangements between bankrupts and their creditors by composition was first introduced in the United States by an amendment to the act of 1867, passed June 22, 1874.[1] The bankrupt acts of 1800, 1841, and the original act of 1867 contained no provisions for a composition by a bankrupt with his creditors.

As soon as the amendment of 1874 was passed, it was attacked upon the ground that congress had exceeded its power and was not authorized by the constitution to provide for a composition by a bankrupt with his creditors for less than the full amount of his debts. The question came before Mr. Justice Hunt, who sustained the validity of the provision in the amendment of 1874.[2] Upon principle, as well as authority, the present provision for a composition can not be successfully attacked on the ground of being in contravention of the constitution of the United States.[3]

§ 243. Composition provisions should not be construed broadly. It has been said[4] that "the composition clause of the law should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just as much upon their claims as the debtor and the requisite majority see fit to resolve that all shall accept. It takes from the minority the common

[1] 18 Stat. at L. 182, Sec. 17. The provision of this amendment, relating to compositions, is set out in parallel columns with the English act of 1868, *in re* Scott, No. 12519, Fed. Cas., s. c. 15 N. B. R. 73.

[2] *In re* Reiman, No. 11675, Fed. Cas, s. c. 12 Blatch. 562; *in re* Chamberlin, No. 2580, Fed. Cas., s. c. 9 Ben. 149.

[3] As to the extent of the power of congress to pass bankrupt laws generally, consult Chap. II.

[4] *In re* Shields, No. 12784, Fed. Cas., s. c. 4 Dill. 588; *In re* Frear, 10 Am. B. R. 199; *In re* Rider, 90 Fed. Rep. 808, 3 Am. B. R. 178.

right of making their own terms with their debtor, and releases the obligation of the latter to them against their will, and upon terms imposed by the majority. Certainly, therefore, the provisions of this clause should not be extended by construction to embrace more than the words clearly and manifestly import." If the proceedings are not had in accordance with the provisions the court can not confirm a composition.[1]

§ 244. When a bankrupt may offer terms of composition.

A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.[2]

The statute does not limit the right to offer terms of composition to any particular class of bankrupts. Any bankrupt is entitled to offer terms of compromise to his creditors. The right extends to corporations[3] and to partnerships.[4] Any member of a partnership, which has been adjudged bankrupt, may submit a proposition of composition to the creditors of the firm and to his individual creditors.[5]

It will be observed that there is a limitation in respect to the time at which such an offer may be made. A bankrupt is not entitled to make such an offer before he has been examined in open court or at a meeting of his creditors, and filed in court a schedule of his property and a list of his creditors. Such an offer may be made at any time after he has complied with these conditions.

A further limitation exists in actual practice. No composition can be effected until claims have been proved by creditors, with whom the compromise may be made.[6] Creditors

[1] *In re* Frear, 10 Am. B. R. 199.

[2] B. A. 1898, Sec. 12*a*.

[3] *In re* Weber, No. 17330, Fed. Cas., s. c. 13, N. B. R. 529.

[4] Pool v. McDonald, No. 11268, Fed. Cas., s. c. 15 N. B. R. 560; *In re* Spades, No. 13196, Fed. Cas., s. c. 6 Biss. 448.

[5] Pool v. McDonald, No. 11268, Fed. Cas., s. c. 15 N. B. R. 560.

[6] *In re* Rider, 90 Fed. Rep. 808, 3 Am. B. R. 178; *In re* Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

seldom prove claims before the first meeting, at which the bankrupt is regularly examined and a trustee appointed. Hence, in practice, a composition can rarely be effected until after an adjudication and appointment and qualification of a trustee.

The debtor will not ordinarily be permitted to make a second application for confirmation in case the first one is denied. Where the court refused to permit a composition on the ground that the offer was not sufficiently large, the debtor was permitted in one case to make a better offer and a second application for confirmation, which was granted. He was not permitted to make the second application in that case until he had shown good reason for not having previously made a better offer. Under the act of 1867 it was held that a refusal to grant a discharge was not an estoppel to proceedings in composition.[8] It may be doubted, however, if such is the rule under the present statute. Section 12*d* of the act provides that "the judge shall confirm a composition if satisfied that . . . . . the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which shall be a bar to a discharge." It would therefore seem that if a discharge had been refused, that such an adjudication would be a bar to a subsequent application for confirmation of a composition.

§ 245. Creditors' meeting to consider terms of composition.

Whenever a bankrupt is satisfied that a sufficient number of creditors will accept his offer of terms of composition he may apply to the court for a meeting of the creditors to consider the proposition for composition. The application is made by petition.[9] The petition should be entitled in the court and cause, and state the *per centum* which the bankrupt offers to pay, and that he believes it will be accepted by a majority in number and in value of the creditors whose claims are allowed, and pray that a meeting of the creditors

[7] *In re* Whipple, No. 17513, Fed. Cas., s. c. 11 N. B. R. 524.

[8] *In re* Odell, No. 10427, Fed. Cas., s. c. 9 Ben. 247; *In re* Joseph, 24 Fed. Rep. 137.

[9] Official Form No. 60. See Form No. 107, *post.*

may be duly called to act upon such proposal for a composition. The petition should be signed by the bankrupt.

This petition may be presented to the judge or to the referee. Upon such petition an order is regularly passed directing a meeting of the creditors to be called. Thereupon the referee should give the creditors at least ten days' notice by mail of the time and place of holding the meeting.[10] At this meeting the proposal for a composition is voted upon by the creditors. All unsecured creditors and secured creditors, to the extent of the balance of their debts after having deducted the amount of their securities, which have been proved and allowed, are entitled to vote.

In the case of an offer of compromise by a partnership or one of the partners, both the firm and individual debtors may vote.[11] The state of the respective debts and funds may be such as to justify this course, and where they are so, it simplifies the proceeding very materially. But if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition he can demand a separate vote and so protect himself by calling to his assistance those who compose the class to which he belongs.[12]

The creditors are required to pass the resolution for a composition by a majority vote in number and amount of the claims allowed.[13] The resolution must be reduced to writing and should be signed by the creditors, who accept the terms

[10] B. A. 1898, Sec. 58*a*. But see *In re* Frear, 10 Am. B. R. 199.

[11] Pool v. McDonald, No. 11268, Fed. Cas., s. c. 15 N. B. R. 560; *In re* Spades, No. 13196, Fed. Cas., s. c. 6 Biss. 448.

[12] *In re* Spades, No. 13196, Fed. Cas., s. c. 6 Biss. 448.

[13] B. A. 1898, Sec. 56*a*.

In *In re* Rider, 99 Fed. Rep. 808, 3 Am. B. R. 178, Judge Coxe said: "After the bankrupt has been examined and filed a list of his creditors he 'may offer terms of composition to his creditors.' This plainly implies that the offer should be made to all his creditors, whether they have proved their debts or not. It is not essential that proofs shall be made before, or at the first meeting. They may be made at any time within a year. . . . After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not. But in order to qualify themselves to vote upon the proposition they are required to prove their claims. The reason for this is obvious; it excludes from the voting all but *bona fide* creditors; it excludes all those who are too indifferent to present their claims and all whose claims are unliquidated, fictitious or exorbitant; it gives all creditors no-

offered, together with the amount of each claim proved and allowed.[14]

If not a sufficient number of creditors attend this meeting the bankrupt may circulate the resolution among the creditors, who have proved claims, and thus secure a majority in number of all the creditors whose claims have been allowed, which number represents a majority in the amount of such claims. The statute requires the acceptance to be in writing. It is not necessarily obtained at a meeting of creditors.[15] Creditors having once accepted a composition offered will not be permitted to withdraw their consent, in the absence of fraud or misrepresentations.[16]

§ 246. Application for confirmation.

The court is expressly authorized to confirm or reject composition between debtors and their creditors.[16*] The bankrupt must apply to the judge and not to the referee for the order confirming the composition.[17]

Before such an application can be made the bankrupt is required to do three things.

First. He must file an acceptance of his offer of compromise in writing by a majority in number of all creditors whose claims have been allowed, which must represent a majority in amount of such claims.[18] The manner of obtaining the consent of his creditors is considered in the last section and need not be repeated.

Second. He must deposit the consideration to be paid by

tice, no matter what may be the nature of their claims, and permits them to qualify, if they desire to do so, and assent to the compromise or oppose it, or if they so elect, they may simply withhold their assent."

See also *In re* Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[14] *In re* Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978.

[15] Consult *In re* Spillman, No. 13242, Fed. Cas., s. c. 13 N. B. R. 214; *In re* Scott, No. 12519, Fed. Cas., s. c. 15 N. B. R. 73.

As to adjourning the meeting when the best interests of the creditors require it, see *In re* Cheney, No. 2637, Fed. Cas., s. c. 19 N. B. R. 16.

[16] *In re* Levy, 6 Am. B. R. 299.

[16*] B. A. 1898, Sec. 2, clause 9; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[17] B. A. 1898, Sec. 38, clause 4; Gen. Ord. 12.

[18] B. A. 1898, Sec. 12*b*; *In re* Frear, 10 Am. B. R. 199.

the bankrupt to his creditors in such a place as may be designated by the judge, and the same must be subject to the order of the judge.[18]

Third. He must also deposit the money necessary to pay all debts which have priority, and the costs of the proceedings, in such place as may be designated by the judge, and the same must be subject to the order of the judge.[18]

If the bankrupt fails to do any of these things before applying for an order of confirmation his application should be disregarded.

The consideration should be substantially equivalent to the cash value of the bankrupt's estate, that is, what his estate would pay in bankruptcy. Otherwise the object of a composition is evaded. The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts. It is established by all experience that a man can make more out of his own assets than a trustee of more general capacity than he, and entirely honest, can possibly realize. There may be a margin in many cases which the debtor may save by offering less than he might offer, and more than his creditors could obtain by process of law.[19]

The statute does not declare of what the consideration must consist. Manifestly it should be of such a nature that it can be readily distributed by the judge. The most convenient form of consideration is money. But an honest debtor has no money. He has paid in all his money as well as his other property as a part of his estate. If he is required to deposit a money consideration in all cases, few compositions could be effected. In such cases he is usually dependent upon his friends.

A practicable consideration consists in promises to pay money at specified dates, secured by notes, reorganization bonds, or other negotiable paper,[20] or possibly stock in a new

[18] *Ex parte* Jewett, No. 7302, Fed. Cas., s. c. 2 Low. 393; *In re* Whipple, No. 17513, Fed. Cas., s. c. 11 N. B. R. 524; *In re* Weber Furniture Co., No. 17330, Fed. Cas., s. c. 13 N. B. R. 529.

[20] Consult *In re* Langdon, No. 8058, Fed. Cas., s. c. 2 Low. 387; *In re* Reimen, No. 11673, Fed. Cas., s. c. 7 Ben. 455, affirmed in No. 11675, Fed. Cas., s. c. 12 Blatch. 562; *In re* Lewis, No. 8314, Fed.

company. Creditors who have confidence in their debtor may be willing, and may consider it for their own best interests to accept a paper consideration and permit the bankrupt to continue his business. That negotiable paper may be used is implied by section 14*c* of the act, which provides that "the confirmation shall discharge the bankrupt from his debts other than those agreed to be paid by the confirmation of the composition." It is significant that the word "consideration" is used, and in the next clause relating to debts having priority and the cost of the proceedings the word "money" is used, as if congress intended to make a distinction in the character of the two deposits.

It will be observed that money only can be deposited for the purpose of paying debts which have priority and the cost of the proceeding.[21] A sufficient sum to pay the debts which have priority and the costs of the proceeding must be deposited. This is one of the conditions precedent to obtaining a confirmation of the composition.[22] The rule seems to have been otherwise under the act of 1867.[23]

When the bankrupt has complied with the conditions mentioned above he may apply for a confirmation of the composition. The application is made by petition addressed to the judge.[24] It should state that the bankrupt has been examined in open court or at a meeting of his creditors; that he has filed in court a schedule of his property and list of his creditors; that he has offered terms of composition to his creditors, which have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in the amount of such claims; and that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts, the costs of the proceedings, and the amount thereof, have been deposited subject to the order of the judge, in a

Cas., s. c. 14 N. B. R. 144; *In re* Hurst, No. 6925, Fed. Cas., s. c. 1 Flipp. 162; *In re* Wronkow, No. 18105, Fed. Cas., s. c. 15 Blatch. 38.

[21] B. A. 1898, Sec. 12*b*.

[22] *In re* Harris, 9 Am. B. R. 20, 117 Fed. Rep. 575.

[23] *In re* Chamberlin, No. 2580, Fed. Cas., s. c. 9 Ben. 149.

[24] Gen. Ord. 12; Official Form No. 61; see Form No. 111, *post;* B. A. 1898, Sec. 38, clause 4.

certain depository, naming it, and conclude with a prayer that the court confirm the said composition. The petition is signed by the bankrupt without verification.

The judge fixes a date and place, with reference to the convenience of the parties in interest, for the hearing of such application for the confirmation of the composition. The creditors are entitled to have at least ten days' notice by mail of such hearing.[25] This notice may be served by the referee or by the clerk as the judge may direct. The notice is usually in the form of an order to show cause why the composition should not be confirmed.

§ 247. Objections to a confirmation.

General creditors are entitled to object to a confirmation of a composition but secured creditors are not entitled to object. They have no interest in the general fund. A trustee is not authorized to interfere in such proceeding beyond furnishing such information concerning the estate under his charge and the administration thereof as may be requested. He can not object to a confirmation.[26] If the creditors interested in composition proceedings fail to attend to their interest in time the courts will not relieve them from the consequences of their neglect, except they made a clear case for equitable interference in their behalf.[27]

When a creditor desires to oppose the application of a bankrupt for the confirmation of a composition he must enter his appearance in opposition thereto on the day when the creditors are required to show cause, and must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.[28] The form of the specification in opposition to a confirmation is substantially the same as in opposition to a discharge.[29]

[25] B. A. 1898, Sec. 58*a*.

[26] Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[27] *In re* Wronkow, No. 18105, Fed Cas., s. c. 15 Blatch. 38; the objecting creditor did not attend the meeting called to consider the proposal for composition.

[28] Gen. Ord. 32.

[29] Sec. 280, *post;* Official Form No. 58; see Form No. 157, *post;* City National Bank of Dallas v. Doolittle (C. C. A. 5th Cir.), 107

There are three general grounds for opposing the confirmation of composition by a bankrupt by his creditors. They are:

First. That the composition is not for the best interests of the creditors.

Second. That the bankrupt has been guilty of an act or failed to perform some of the duties which would be a bar to his discharge and

Third. That the composition has been procured by fraud.[30]

First: Because not for the Interest of the Creditors.— The first ground of opposition to a confirmation is that it is not for the interest of the creditors.[31] The interest to be considered is that of all the general creditors and not any particular creditor or class of creditors. It is the creditors who have proved their claims at the time the matters are being considered.

The statute evidently imposes upon the judge the duty of examining the offer and acceptance and ascertaining whether the composition is for the best interests of the creditors. The question is, not whther the debtor might have offered more, but whether his estate would pay more in bankruptcy.[32] In determining this question the court should consider the amount of debts, the amount and character of the assets, the nature of the business that is to be carried on, and many other circumstances. If the court is satisfied upon the hearing that the composition offered would pay creditors very considerably less than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interest of creditors. In determining this question the courts will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in

Fed. Rep. 236, 5 Am. B. R. 736; Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

[30] B. A. 1898, Sec. 12*d*.

[31] B. A. 1898, Sec. 12*d*.

[32] *Ex parte* Jewett, No. 7303, Fed. Cas., s. c. 2 Low. 393; *In re* Whipple, No. 17513, Fed. Cas., s. c. 2 Low. 404; *In re* Weber Furniture Co., No. 17330, Fed. Cas., s. c. 13 N. B. R. 529, reversed on appeal, No. 17331, Fed. Cas., s. c. 13 N. B. R. 559; *In re* Reiman, No. 11673, Fed. Cas., s. c. 7 Ben. 455, on appeal, No. 11675, Fed. Cas., s. c. 12 Blatch. 562.

course of judicial proceedings with compulsory sales and expense of administration.[33] In England the determination of the creditors is final, in the absence of fraud, and it has been said that[34] "it will be found that the practical administration of our law must be very similar." The fact that a majority of the creditors have consented to the terms offered by the bankrupt, is *prima facie* evidence that it is for the best interest of all, and the burden of proof is then upon the dissenting creditors to show cause for not confirming the composition.[35]

How far congress intended to protect creditors against each other, and how far the court is to inquire into motives are questions of no little difficulty. The law which enables a majority of creditors to accept a composition with their debtor, to which other creditors do not consent, and so to bind such dissentients, assumes as an essential condition that it shall be in all respects just. Some creditors may agree to the composition without much inquiry, upon the ground that bankruptcy is to be avoided at all risks; some out of kindness to the bankrupt; some from a conviction that the offer is for their own interest as distinguished from general interest. Mr. Bacon, chief judge in bankruptcy, speaking on this point, said,[36] "benevolence, generosity and forbearance may be well exercised — with this restriction, however, that the practice of these moral virtues is not made at the expense of other people. To hold the contrary would be

[33] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245; *In re* Arrington Co., 8 Am. B. R. 64, 113 Fed. Rep. 498.

[34] *Ex parte* Jewett, No. 7303, Fed. Cas., s. c. 2 Low. 393, and quoted with approval in *In re* Weber, No. 17331, Fed. Cas., s. c. 13 N. B. R. 559.

[35] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245. *In re* Arrington Co., 8 Am. B. R. 64, 86 out of 89 creditors accepted the terms of composition, and only one objected. *In re* Weber Furniture Co., No. 17330, Fed. Cas., s. c. 2 Low. 404, reversed on appeal on the ground that the composition was *prima facie* evidence which was not rebutted by the evidence; No. 17331, Fed. Cas., s. c. 13 N. B. R. 559. As to the weight to be given an acceptance by the requisite majority of creditors, who are acquainted with all the facts, see also *In re* Greenebaum, No. 5769, Fed. Cas., s. c. 1 Chi. Law. Jour. 599.

[36] *Ex parte* Williams, 10 L. R. Eq. 61.

directly opposed to the commonest principles of justice and honesty."

Whether the composition is for the best interests of the creditors usually turns upon the question of the adequacy or inadequacy of the terms offered.[37] Where the court was satisfied that the net assets would amount to eighteen thousand dollars, and the debtor offered to divide eleven thousand dollars, the court refused to confirm the composition.[38] Where it was shown that a debtor could pay more than seven shillings in the pound and offered to pay one shilling, and four creditors out of five had agreed to the arrangement, the court set aside the deed of arrangement.[39]

In determining the question whether the proposed composition is for the best interests of creditors the judge is vested with the exercise of discretion. It is nevertheless a sound judicial discretion.[40]

Second: Because of Grounds which would Bar a Discharge.— The second ground for opposing a confirmation is that the bankrupt has been guilty of an act or failed to perform some of the duties which would be a bar to his discharge.[41] A bankrupt is not entitled to a discharge when he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.[42] These grounds are discussed in connection with an application for a discharge, to which the reader is referred.[43]

[37] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

[38] *In re* Whipple, No. 17513, Fed. Cas., s. c. 2 Low. 404. See also *ex parte* Jewett, No. 7303, Fed. Cas., s. c. 2 Low. 393; *In re* Reiman, No. 11673, Fed. Cas., s. c. 7 Ben. 455.

[39] *Ex parte* Williams, 10 L. R. Eq. 57. Consult also *ex parte* Cowen, 2 L. R. Chan. App. 563; Hart v. Smith, 4 L. R. Q. B. 61; *Ex parte* Greaves, 5 L. R. Chan. App. 326; *Ex parte* Duigman, 11 L. R. Eq. 604; *Ex parte* Levy & Co., 11 L. R. Eq. 619.

[40] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

[41] B. A. 1898, Sec. 12*d*; *In re* Goodwin, 10 Am. B. R. 252, 122 Fed. Rep. 111. The rule under the act of 1867 was otherwise. *In re* Haskell, No. 6192, Fed. Cas., s. c. 11 N. B. R. 164; *In re* Becket, No. 1210, Fed. Cas., s. c. 2 Woods, 173.

[42] B. A. 1898, Sec. 14*b*.

[43] Secs. 281-283.

By the amendment of Feb. 5, 1903,[44] the grounds for refusing a discharge were amended to prevent a discharge when the bankrupt has, *first,* committed an offense punishable by imprisonment as herein provided; or, *second,* with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or, *third,* obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or, *fourth,* at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or, *fifth,* in voluntary proceedings been granted a discharge in bankruptcy within six years; or, *sixth,* in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. These objections can be made to confirming a composition only in cases begun since the amendment.

The statute does not limit the time for making a composition to that within which a discharge may be granted. It would therefore seem that an objection to the confirmation upon the ground that a discharge was barred by limitation of time would not be sufficient to prevent the confirmation of a composition. The refusal to confirm a composition must be founded upon acts or an omission to perform duties which would bar a discharge, and not merely for the reason that an application for a discharge can not be made.

THIRD: BECAUSE IT WAS OBTAINED BY FRAUD.— It is an essential condition to the validity of a composition that it shall be in all respects just. Any taint of fraud, whether it consists in concealment, misrepresentation, inequality or injustice wholly vitiates the composition and frees the persons who would otherwise be bound by it.

The court will not hesitate to refuse to confirm a composition when the debtor has deceived the creditors into an agreement, which they would probably not have made had

[44] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

the facts been honestly and fairly before them. Thus it is a good ground for opposing a confirmation that a creditor is induced to sign an acceptance by reason of a present consideration or an expectation of advantage offered by the bankrupt,[44*] or by a third person, without the actual knowledge of the bankrupt, when the relation of such person to the bankrupt is such as to arouse suspicion, as an employee or a relation.[45] But the mere fact that a brother procures an assignment of claims openly will not prevent a confirmation when it appears after throwing out his claims that a majority of the creditors have accepted the terms offered.[46] A bankrupt may induce his friends to pay more in composition than his estate would pay in bankruptcy. Such a composition should be confirmed.[47] A creditor may purchase claims for the purpose of using them in opposing a composition.[48]

Where the requisite majority of the creditors agree to a composition for much less than the bankrupt is able to pay, fraud may be presumed. Either the assenting creditors know, or they do not know, that the debtor is able to pay a composition of a larger amount than that which he has proposed. If they do not know the debtor's means, it can only be by reason of the debtor's suppression of facts material and essential to the exercise by them of their free will, and in such a case they would be entitled to repudiate the consent, which was obtained from them by such suppression. If on the other hand they do know the extent of the debtor's ability to satisfy the debts due to them and other creditors, and agree to release — and join in compelling unwilling creditors to release — the debtor upon payment of a composition grossly

[44*] *In re* Sawyer, No. 12395, Fed. Cas., s. c. 2 Low. 475; *In re* Jacobs, No. 7159, Fed. Cas., s. c. 18 N. B. R. 48.

[45] *In re* Bennett, No. 1312, Fed. Cas., s. c. 8 Ben. 561.

[46] *In re* Walshe, No. 17118, Fed. Cas., s. c. 2 Woods, 225.

[47] *In re* Snelling, No. 13140, Fed. Cas., s. c. 19 N. B. R. 120.

[48] *In re* Jewett, No. 7303, Fed. Cas., s. c. 2 Low. 393, the court refused to confirm a composition with leave to call a new meeting. Between the order of the court and the time of calling a new meeting an opposing creditor purchased a sufficient number of claims to defeat the confirmation. Judge Lowell said: "I think some illegal motive should be shown beyond the mere desire to defeat the composition upon the ground that it is not for the best interests of the creditors to accept it."

disproportionate to the debtor's means, they willingly and intentionally make themselves parties to a fraud by which the dissentient creditors are prejudiced. In such cases the court should refuse to confirm.[49] Where a bankrupt's assets are so trifling that practically there would be no dividend, a composition may be successfully opposed against an attempt by friendly creditors to force a composition upon opposing creditors.[50]

It is undoubtedly a good ground for not confirming a composition if any person has used a false claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney.[51] Such person also is liable to imprisonment for a period not to exceed two years for the offense.[51]

Where fraud exists the creditors are not bound to raise the question at the time of confirmation. Fraud vitiates the whole confirmation and constitutes the ground for setting it aside. The objections founded upon fraud may be raised either at the time of confirmation or upon an application to set aside a confirmation previously made. Cases upon the question of whether a confirmation may be set aside or not may be profitably consulted in this connection.[52] It is obvious that fraud sufficient to set aside a composition is sufficient to prevent a confirmation.

§ 248. The hearing of objections.

When objections are properly taken to the confirmation of a composition there should be a hearing before the judge.[53] The creditors are entitled to a ten days' notice by mail of such hearing.[54] At this hearing evidence may be introduced before the judge, as he may direct, either orally or by depositions or affidavits; and counsel may be heard in support of and against the specification of the grounds of opposition.

[49] As to what is too great a margin, see "because it is not for the interest of creditors" above, in this section.

[50] *In re* Russell, 10 Chan. Ap. 255, 263; *In re* Hannahs, No. 6033, Fed. Cas., s. c. 8 Ben. 533, the court refused to confirm a composition of fifty cents for every hundred dollars where the bankrupt had been refused a discharge.

[51] B. A. 1898, Sec. 29, clause 3.

[52] As to when a composition may be set aside, see Sec. 252, *post*.

[53] B. A. 1898, Sec. 12*c*, and Sec. 38, clause 4. Gen. Ord. 12, par. 3.

[54] B. A. 1898, Sec. 58*a*.

The judge may refer the matter to a referee with directions to report the facts but the judge must make the order.

The object of this hearing is to satisfy the judge that the composition is for the best interests of the creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge and that the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden.[55] If satisfied of these things it is his duty to confirm the composition.[55] Otherwise he should refuse to confirm it.

§ 249. The order of confirmation.

The statute provides that the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden.

Where the proceedings have been regular, and the bankrupt has complied with all the conditions specified in the statute, and no opposition is made by the creditors, a *prima facie* case is made which ordinarily satisfies the court that the bankrupt is entitled to have a composition confirmed. The court will thereupon regularly pass an order confirming the composition.[56] This order usually recites the several conditions which have been complied with by the bankrupt. The order concludes "it is therefore hereby ordered that the said composition be and the same is hereby confirmed."[56]

In case there is opposition to the confirmation, and it appears from the evidence that the acceptance of the offer of terms was duly made by the requisite number of creditors, and the court is satisfied that the creditors were fully and honestly advised of the true condition of the bankrupt's af-

[55] B. A. 1898, Sec. 12*d*.

[56] Official Form No. 62; see Form No. 113, *post; In re* Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978.

fairs, so that they acted intelligently and understandingly in full view of the facts, it will ordinarily confirm the composition.[57] On the other hand, if the court is satisfied from the evidence that the composition has not been honestly made as between the debtor and the creditors, or that it is not for the best interest of them all, or that it appears that the bankrupt has committed or omitted to do some act which would bar his discharge, or if the proceedings have been irregular,[58] the court should refuse to pass an order of confirmation. Whenever a composition is not confirmed, the estate is administered in bankruptcy as otherwise provided by the statute.[59] Whether the order shall be granted or refused, rests in the sound judicial discretion of the judge. The judge may provide for a disputed or an unliquidated claim in composition cases.[60]

A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[61]

It has been held that an appeal lies in favor of a bankrupt from an order refusing a confirmation of a composition.[62]

§ 250. The effect of a confirmation of a composition.

The confirmation of a composition has the effect:

First, to revest in the bankrupt the title to his estate and property and discharge the trustee;[63] *second*, to discharge the bankrupt from his debts, other than those agreed to be paid

[57] *In re* Reiman, No. 11675, Fed. Cas., s. c. 12 Blatch. 562; *In re* Greenebaum, No. 5769, Fed. Cas., s. c. 1 Chi. L. J. 599; *In re* Walshe, No. 17118, Fed. Cas., s. c. 2 Woods 225; *In re* Weber Furniture Co., No. 17331, Fed. Cas., s. c. 13 N. B. R. 599; *In re* Spades, No. 13196, Fed. Cas., s. c. 6 Biss. 448.

[58] *In re* Asten, No. 594, Fed. Cas., s. c. 8 Ben. 350; see also *in re* Henry, No. 6370, Fed. Cas., s. c. 9 Ben. 449; *In re* Rodger, No. 11992, Fed. Cas., s. c. 18 N. B. R. 381.

[59] B. A. 1898, Sec. 12*c*.

[60] *Ex parte* Trafton, No. 14133, Fed. Cas., s. c. 2 Low. 505.

[61] B. A. 1898, Sec. 21*f*. See also as to the conclusiveness of an order of confirmation, Smith v. Engle, 14 N. B. R. 481.

[62] U. S. v. Hammond, 104 Fed. Rep. 862, 4 Am. B. R. 736. But see Ross v. Saunders, 105 Fed. Rep. 915, 5 Am. B. R. 350.

[63] B. A. 1898, Sec. 70*f*; Ligon v. Allen, 56 Miss. 632.

by the terms of the composition and those not affected by a discharge.[64] No other discharge than an order of confirmation is needed.[65]

The confirmation of a composition releases the bankrupt from such debts only as a discharge.[66] A discharge in bankruptcy releases a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.[67]

The confirmation of a composition therefore will not discharge a debt created by fraud,[68] nor a debt or liability incurred in and by a bankrupt acting in a fiduciary capacity,[69] nor a stockholder's contingent liability not scheduled.[70] nor the liability of a person who is a co-defendant with or guarantor, or in any manner a surety for a bankrupt,[71] nor the debt of a creditor whose name does not appear in the statement of the debtor or otherwise in the composition proceedings and whose debt is not mentioned,[72] unless such person had actual knowledge of the proceedings in bankruptcy.

[64] B. A. 1898, Sec. 14*c*. Consult Liebke v. Thomas, 116 U. S. 605.

[65] *In re* Becket, No. 1210, Fed. Cas., s. c. 2 Woods, 173.

[66] Wilmot v. Mudge, 103 U. S. 217; Bayly v. University, 106 U. S. 11; *In re* Kahn, 9 Am. B. R. 107; Glover Grocery Co. v. Dorne (Sup. Ct. Ga.), —Ga. —, 8 Am. B. R. 702.

[67] B. A. 1898, Sec. 17.

[68] Wilmot v. Mudge, 103 U. S. 217.

[69] Bayly v. University, 106 U. S. 11.

[70] Flower v. Greenebaum, 2 Fed. Rep. 897.

[71] B. A. 1898, Sec. 16; Moore v. Stanwood, 98 Ill. 605; *In re* Burchell, 4 Fed. Rep. 406.

[72] Harrison v. Gamble, 69 Mich. 96; Robinson v. Soule, 56 Miss. 549. See also *In re* Blackmore, 11 Fed. Rep. 412.

That it binds all whose names appear in the schedule, see McGehee v. Hentz, No. 8794, Fed. Cas., s. c. 19 N. B. R. 136.

Where the consideration consists of negotiable paper, and the bankrupt does not fulfill his obligations and agreements in connection therewith, the creditor may recover his whole debt from the bankrupt.[73] The confirmation of a composition does not release the bankrupt from debts agreed to be paid by the terms of the composition. If the bankrupt fails to make good his part the consideration fails and the whole debt revives.

The order confirming a composition is not a bar to a suit to collect the whole debt, when the composition was procured by fraud.[74] The reason for this rule is that fraud vitiates the whole composition and leaves the debtor and the bankrupt in the same position that they were before the composition was attempted.

The composition proceedings will not operate to deprive a secured creditor of the right, after exhausting his own security, to assert against the bankrupt a claim for a deficiency.[75] Such proceedings will not affect a vested right or security.[76] Secured creditors are not parties to the composition.

An agreement or note entered into secretly for the purpose of obtaining a composition with creditors can not be enforced against the bankrupt, because the consideration is illegal.[77]

A composition may be pleaded in bar of actions upon debts discharged. In order to be available as defense it must be pleaded.[78]

§ 251. Proceedings after a confirmation of a composition.

Upon the confirmation of a composition the consideration is distributed as the judge shall direct, and the case dismissed.[79]

[73] *In re* Negley, 20 Fed. Rep. 499; *In re* Hurst, No. 6925, Fed. Cas., s. c. 1 Flip. 462; Ransom v. Geer, 12 Fed. Rep. 607.

[74] Brownsville Manufacturing Co. v. Lockwood, 11 Fed. Rep. 705; Pukpe v. Churchill, 91 Mo. 81; *Ex parte* Halford, 19 L. R. Eq. 436.

[75] Paret v. Ticknor, No. 10711, Fed. Cas., s. c. 4 Dill. 111, per Mr. Justice Miller; Cavanna v. Bassett, 3 Fed. Rep. 215.

[76] *In re* Stowell, 24 Fed. Rep. 468.

[77] Carey v. Hess, 112 Ind. 398; Tirrell v. Freeman, 139 Mass. 297; Blasdel v. Fowle, 120 Mass. 447; Woodman v. Stowe, 11 Bradw. (Ill. Ap. Ct.) 613; Tinker v. Hurst, 70 Mich. 159.

[78] *In re* Tooker, No. 14096, Fed. Cas., s. c. 8 Ben. 390. See Pleading a discharge, Sec. 301, *post.*

[79] B. A. 1898, Sec. 12*c*.

As to set-offs in composition, see *in re* Lissbarger, 2 Fed. Rep. 153; *In re* Purcell, No. 11470, Fed. Cas.,

The form of order for distribution on composition is prescribed by the supreme court.[80] It provides that the deposit shall be distributed by the clerk of the court as follows: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings;[81] 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in the case. Only those creditors who prove their claims within one year from the date of adjudication can have dividends from the estate, or assert a right to share in the funds paid in composition. The officers of the court cannot know what amount should be paid to a creditor, or, indeed, who are creditors, except upon proof of their claims in the time and manner provided by law. The bankrupt is entitled to the money remaining in court unclaimed after the expiration of the year in which proof of claims could be made, and the creditor cannot be heard to say that it was not in fault in respect to the failure to present its claim. The language of the statute permits no exceptions to its terms.[82] A claimant is entitled to property leased to bankrupt and which is not used in the composition.[83] The services of a trustee are dispensed with. When the property has thus been distributed, the case is dismissed by the judge and the proceedings are at an end.

Upon the confirmation of a composition offered by a bankrupt the title to his property thereupon revests in him.[84] The title is passed by operation of law, and no deed is necessary to convey. A certified copy of an order confirming a composition constitutes evidence of the revesting of the title of his property in the bankrupt, and if recorded imparts the same notice that a deed from the trustee to the bankrupt if recorded would impart.[85]

s. c. 18 N. B. R. 447; *Ex parte* Howard Nat. Bank, No. 6764, Fed. Cas., s. c. 2 Low. 487; *Ex parte* Harris, No. 6109, Fed. Cas., s. c. 2 Low. 568.

[80] Official Form No. 63; see Form No. 114, *post.*

[81] *In re* Harris, 9 Am. B. R. 20, 117 Fed. Rep. 575.

[82] *In re* Brown, 123 Fed. Rep. 336, 10 Am. B. R. 588.

[83] *In re* Winship Co. (C. C. A. 7th Cir.), 120 Fed. Rep. 93, 9 Am. B. R. 638.

[84] B. A. 1898, Sec. 70*f*.

[85] B. A. 1898, Sec. 21*g*.

§ 252. **Setting aside a confirmation.**

The courts of bankruptcy are expressly given power to set aside a composition and to reinstate the case.[86] The application to set aside a confirmation should be made to the judge, and not to the referee.[87]

No other court can set aside a composition except the court of bankruptcy which confirmed the composition. An order of confirmation of a composition can not be assailed collaterally in any other court. The statute expressly provides that "a certified copy of an order confirming or setting aside a composition, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." [88]

The application is made by petition, which should be entitled in the court and cause. It should set forth the grounds upon which the composition is asked to be set aside. The only ground upon which a composition can be set aside and the case reinstated is when it is made to appear upon the trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.[89] The petition should conclude with a prayer that the composition be set aside and be signed by a "party in interest." The word "creditors" was used in the former act.[90] The words "parties in interest" is a broader term, but in practice the application usually is made by a creditor. A secured creditor can not make an application because he has no interest in the composition.[91]

The petition must be filed in the clerk's office within six months after the composition has been confirmed.[92] A trial is had upon notice to all creditors.[93] Evidence may be introduced and counsel heard for and against the petition. If the allegations in the petition are supported by sufficient evidence the court will order the composition set aside and

[86] B. A. 1898, Sec. 2, clause 9; *In re* Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

[87] B. A. 1898, Sec. 13.

[88] B. A. 1898, Sec. 21*f*.

[89] B. A. 1898, Sec. 13.

[90] R. S. Sec. 5103.

[91] *In re* Scott, No. 12519, Fed. Cas., s. c. 15 N. B. R. 73.

[92] B. A. 1898, Sec. 13.

[93] *In re* Diggles, No. 3905, Fed. Cas., s. c. 8 Ben. 36; *Ex parte* Hamlin, No. 5993, Fed. Cas., s. c. 2 Low. 571.

the case reinstated,[94] and if not, it will order the petition dismissed.[95] A composition will not be set aside on the ground that a creditor had failed to get notice of the proceedings because his address was misstated in the bankrupt's schedule by mistake.[96]

Whenever a composition has been set aside the creditors, at their first meeting thereafter, must appoint one or three trustees of such estate,[97] and fix the amount of the bonds as in the first instance. The trustee, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition.[98]

The case then proceeds as if no composition had been made. The property is distributed in the same manner, except that in the event of the confirmation of a composition being set aside, the property acquired by the bankrupt, in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[99]

§ 253. Arbitration and compromise.

The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate,[100] or he may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.[101]

[94] B. A. 1898, Sec. 2, clause 9; Fairbanks v. Amoskeag Bank, 38 Fed. Rep. 630; *Ex parte* Williams, 10, L. R. Eq. 57.

[95] City Bank v. Doolittel (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736; *In re* Shaw, 9 Fed. Rep. 495; Pool v. McDonald, No. 11268, Fed. Cas., s. c. 15 N. B. R. 560.

[96] *In re* Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

[97] B. A. 1898, Sec. 44.

[98] B. A. 1898, Sec. 70*d*.

[99] B. A. 1898, Sec. 64*c*.

[100] B. A. 1898, Sec. 26*a*. Compare R. S. Sec. 5061.

[101] B. A. 1898, Sec. 27; *In re* Heyman, 108 Fed. Rep. 207, 5 Am. B. R. 808.

Whenever a trustee makes application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application must clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.[102]

Whenever it may be deemed for the benefit of the estate of a bankrupt to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which is given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.[103]

Under the act of 1867 it was held that such applications must be made to the judge.[104] Under the present act the referee is authorized, subject always to a review by the judge, within the limits of his district as established from time to time, to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges as are by the bankrupt statute conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as otherwise provided by statute.[105] It seems, therefore, that an application to compromise or to submit to arbitration any controversy arising in the administration of the estate may be made to the referee or to the judge.

In either case a ten days' notice should be given by mail

[102] Gen. Ord. 33.

[103] Gen. Ord. 28.

[104] *In re* Graves, No. 5709, Fed. Cas., s. c. 2 Ben. 100.

[105] B. A. 1898, Sec. 38, clause 4.

to the creditors, of the time and place of the hearing on the petition.[106] The notice is usually in the form of a rule to show cause. At the hearing the court may hear testimony and arguments of counsel in support of and against the petition, and pass an order granting or refusing to grant the prayer of the petition. It may be doubted if the court can by a general order authorize the trustee to compound all doubtful claims, with the consent of a committee of the creditors.[107] The proceedings should be in accordance with the provisions of the statute and general orders.

When leave is granted to submit a controversy to arbitration, three arbitrators are chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court appoints the third arbitrator.[108] The arbitrators, upon inquiry, consider the controversy, and should report their finding in writing. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court, and have like force and effect as the verdict of a jury.[109] It is subject to be set aside or adjudged upon by the court as a verdict would be.[110]

[106] B. A. 1898, Sec. 58*a*; *In re* Hoole, 3 Fed. Rep. 496.

[107] See *In re* Dibblee, No. 3885, Fed. Cas., s. c. 3 Ben. 354.

[108] B. A. 1898, Sec. 26*b*; *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

[109] B. A. 1898, Sec. 26*c*.

[110] *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

CHAPTER XXIV.

HOW TO REDUCE THE ESTATE TO MONEY.

§ 254. The general power of trustee to sell.

The estate of the bankrupt which passes to the trustee, if there are any assets, consists of real estate or personal property or both. The personal property may include a stock of goods, choses in action, horses and carriages, farming stock, implements, machinery, fixtures and tools used in business, patents, copyrights and trademarks, stocks, bonds, and personal property of every description. It is obvious that such property can not be distributed *pro rata* among the creditors of the bankrupt. It is therefore necessary to reduce the estate to money in order to make a fair and proper distribution of it.

The estate may come to the trustee loaded with burdens. There may be valid mortgages or other liens on it, and there may be liens and mortgages whose validity is doubtful. Whatever interest the bankrupt has in such property must be determined and reduced to money.

The courts of bankruptcy are given power to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as otherwise provided by the statute.[1] The trustees are required to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and to close up the estates as expeditiously as is compatible with the best interests of the parties in interest.[2] The authority conferred by these two provisions is very general in its nature. It would seem that, under the direction of the court, the trustee may sell any property interest of the bankrupt. When it is necessary for the best interest of the

[1] B. A. 1898, Sec. 2, clause 7; Compare R. S. Secs. 5062-5066; Act of June 22, 1874, 18 Stat. at L. 178.

[2] B. A. 1898, Sec. 47, clause 2, and Secs. 70*b* and *c*.

estate the court may also order a receiver, who is taking charge of the bankrupt's property until a trustee is appointed, to sell.[3]

It would seem that, where a great advantage will result to the estate and within a reasonable time, the trustee may be permitted to expend money for the purpose of putting the estate or any part of it in a merchantable form,[4] as by cutting timber, harvesting crops, and the like; and so of finishing unfinished goods. The court may authorize the trustee to conduct the business of the bankrupt for limited periods, if necessary for the best interests of the estate.[5]

Whenever it is necessary or advisable in the opinion of the trustee to make a sale, it would seem from the language of the statute that it must be done "under the direction of the court." He should apply to the judge or referee, usually the referee,[6] for permission to sell property, specifying particularly what property is to be sold. But where the trustee made a sale without authority and the sale was confirmed the confirmation was held equivalent to a prior order.[7] The supreme court has prescribed forms of petitions and orders for the sale by auction of real estate,[8] for the redemption of property from lien,[9] for the sale of property subject to lien,[10] for a private sale of property,[11] and for a sale of perishable property.[12] These forms of petitions and orders are prepared to be addressed to and made by the referee.

[3] *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412.

[4] Foster v. Ames, No. 4965, Fed. Cas., s. c. 1 Low. 313.

[5] B. A. 1898, Sec. 2, clause 5; and amendment of 1903, 32 Stat. at L. 797.

[6] *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 578, 9 Am. B. R. 643, 645; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[7] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 565.

[8] Official Form No. 42; see Form No. 72, *post.*

[9] Official Form No. 43; see Form No. 73, *post.*

[10] Official Form No. 44; see Form No. 77, *post.*

[11] Official Form No. 45; see Form No. 83, *post.*

[12] Official Form No. 46; see Form No. 84, *post.*

§ 255. Unencumbered property.

Under the general power conferred upon the court and trustee, such parts of the estate, real or personal, as come into the possession of the trustee unencumbered by mortgage or lien, may be sold by the trustee under the direction of the court.[13] The trustee may be authorized to compromise or sell and assign, in such manner as the judge or referee may order, any outstanding claims or other property in his hands due or belonging to the estate, which can not be collected or received by him without unreasonable or inconvenient delay or expense.[14]

The trustee may apply to the referee for permission to sell such property by auction or at private sale.[15] In the case of real estate, it may be sold in lots or parcels or as a whole, as the referee may direct.

The application for leave to sell property is made by petition.[16] The petition should be entitled in the court and cause and allege that it would be for the benefit of the estate that certain property, describing it and its estimated value, should be sold by auction or at private sale, as may be desired. In case it is desired to have it sold at private sale, the reasons or advantages to be obtained by selling at private sale should be set forth in the petition. The property to be sold, either at auction or at private sale, should be specifically described. The petition should conclude with a prayer that the trustee may be authorized to make the sale by auction or at private sale, as may be. The petition is dated and signed by the trustee without verification.

The referee, as soon as the petition is filed, should give ten days' notice by mail to the creditors of the bankrupt of the hearing on such petition.[17] At the time and place mentioned in the notice a hearing is had, at which evidence may be introduced and counsel heard in favor of the petition and in opposition thereto; on consideration whereof the referee may

[13] *In re* Goldsmith, 9 Am. B. R. 419, 118 Fed. Rep. 763; *In re* Mathews, 109 Fed. Rep. 603, 6 Am. B. R. 96.

[14] B. A. 1898, Sec. 27; Gen. Ord. 28. Compare R. S. Secs. 5061 and 5064.

[15] As to private sales, see *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Stevenson, 6 Fed. Rep. 710.

[16] Official Forms Nos. 42 and 45; see Forms Nos. 72 and 83, *post*.

[17] B. A. 1898, Sec. 58*a*.

pass an order that the trustee be authorized to sell the property as prayed in the petition, or may refuse to grant such leave as in his judgment is most advantageous to the estate. If leave for sale is given, the referee should require the trustee to keep an accurate account of each article or lot sold, and the price therefor and to whom sold, and that an account thereof shall be filed at once with the referee.

§ 256. Encumbered property.

Where the property of the bankrupt is burdened with liens and encumbrances, several courses are open.

First: Where these burdens are so great that the property is without value to the estate the trustee may elect not to take such property,[18] and for the court to authorize the sale of such property by the trustee is an abuse of its discretion.[19]

Second: Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which must be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition, authorizing such act on the part of the trustee.[20]

[18] See Trustee not bound to take encumbered interest, Sec. 151, *ante*, and cases cited in the notes.

[19] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Schaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424. In doubtful cases the court may in its discretion order the property turned over to the mortgagee or order it sold. Equitable Loan & Security Co. v. Moss & Co., 125 Fed. Rep. 609; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

[20] Gen. Ord. 28.

The value of securities held by secured creditors is determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct.[21]

The application for redemption of property from a lien is made by petition, which should be in the form prescribed.[22] The petition should be entitled in the court and cause. It should represent that certain portions of the bankrupt's estate, describing the property and its estimated value, is subject to a mortgage or other lien, setting forth or describing the mortgage or lien; and contain an allegation that it is for the benefit of the estate that such property should be redeemed and discharged of the lien. The petition concludes with a prayer that the trustee may be empowered to pay out of the assets of the estate in his hands the amount of the lien in order to redeem the property. The petition is dated and signed by the trustee, bankrupt, or creditor,[23] without verification.

The petition is regularly presented to the referee, who is required to give ten days' notice of the date of the hearing to the creditors of the bankrupt.[24] At the hearing, evidence may be introduced and counsel heard in favor of the petition and in opposition thereto. In consideration whereof, the referee may authorize the trustee to make such payment and redeem the property. If it appears to the referee that it is not for the advantage of the estate to redeem such property he may decline to grant the request to redeem the property.

Third: The trustee may sell the property, under the order and direction of the judge or the referee.[25] He may sell the property subject to a lien.[26] In this respect the trustee acts only in the interests of the general creditors. It is no part of

[21] B. A. 1898, Sec. 57*h*.

[22] Official Form No. 43; see Form No. 73, *post;* Gen. Ord. 28.

[23] Gen. Ord. 28.

[24] B. A. 1898, Sec. 58*a; In re* Mathews, 109 Fed. Rep. 603, 6 Am. B. R. 96.

[25] *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576; 9 Am. B. R. 643; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[26] *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

his duty to make such an application unless he believes the sale will create a larger fund for distribution among the unsecured creditors. He should not make an application for the sale of property which has no market value, or one that is clearly less than the debt secured by the lien.[27]

An application for the sale of such property, subject to a lien, is made by petition,[25] which should be in the prescribed form.[28] The petition should be entitled in the court and cause. It should describe the estate, or property to be sold, and its estimated value. It should set forth or describe the mortgage or other lien upon the property. It should contain an allegation that the sale would be for the benefit of the estate and that the property should be sold. It should conclude with a prayer that he may be authorized to make the sale of such property subject to the encumbrances thereon. The petition should be signed by the trustee, but need not be verified. The petition is presented to the referee.[25]

The referee should give ten days' notice of the date of the hearing of the petition for such sale by mail to the creditors of the bankrupt.[29] A hearing is had at the time and place named in the notice, at which arguments may be heard in favor and in opposition to the petition and evidence introduced. Upon consideration of which the referee may order the property sold at auction or at private sale, and require the trustee to keep an accurate account of the property sold, the price given therefor, to whom sold, and file the account thereof at once with the referee. If it appears to the referee that nothing is to be gained by the sale he may refuse to grant the prayer of the petition.[27]

The trustee may also apply for leave to sell encumbered property free from all encumbrances.[30] The application for

[27] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Schaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

[28] Official Form No. 44, see Form No. 77, *post.*

[29] B. A. 1898, Sec. 58*a*.

[30] Houston v. City Bank, 6 How. 486; Ray v. Norseworthy, 23 Wall. 128; *In re* Mathews, 109 Fed. Rep. 603, 6 Am. B. R. 96; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chancey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R.

such a sale is made by a petition substantially like that prescribed in form No. 44 for a sale subject to encumbrances, except that the prayer should be that he may be authorized to sell such property free from all encumbrances. The application is regularly made to the referee for leave to sell free of liens.[31] A ten days' notice should be given the general creditors.[32] The rights of the secured creditors being affected by the sale, they must likewise have notice to appear and protect their interests.[33] The trustee may be directed to sell such property at public auction or at private sale. When the sale is made, the lien is transferred to the fund in court.[34] The bankruptcy court having sold the property free from liens and the liens having attached to the funds in the court's custody the bankruptcy court will decide the rights of the different lien claimants,[35] and may call the claimants in by either notice or rule to show cause.[36] After deducting the expenses of the sale [37] the mortgages and other liens must be paid out of the

444; Carroll Co. v. Young (C. C. A. 3rd Cir.), 119 Fed. Rep. 576, 9 Am. B. R. 643; *In re* Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Waterloo Organ Co., 118 Fed. Rep. 904; 9 Am. B. R. 427; *In re* Keet, 11 Am. B. R. 117.

[31] *In re* Mathews, 109 Fed. Rep. 603, 6 Am. B. R. 96; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624.

[32] B. A. 1898, Sec. 58*a*.

[33] *In re* Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; Ray v. Norseworthy, 23 Wall. 128; Houston v. City Bank, 6 How. 486; Fowler v. Hart, 13 How. 373.

[34] *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; Trust Co. v. Benbow, 96 Fed. Rep. 514, 3 Am. B. R. 9.

[35] *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re* Byrne, 97 Fed. Rep. 762, 3 Am. B. R. 268; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608, the court said: "The only question here presented is whether or not the referee and the court had jurisdiction to determine the validity of the claim of the mortgagee to the property or its proceeds. The sale was valid. The court lawfully acquired and rightfully held the custody of the property. The conversion of it into money by the sale was a rightful proceeding in bankruptcy. The issue of the notice to the mortgagee to present his claim to the court and the adjudication of it were far within the jurisdiction of the referee and of the court below."

[36] *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608.

[37] McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am.

fund obtained from the sale before it is applied to the payment of other debts, even the debts which are given priority by the statute.[38]

It is not necessary for the lien claimant to prove his claims before he can subject the property or its proceeds to his debt,[39] nor is it necessary for him in any way to object to the sale.[40] Where the entire property is sold without any objection from a creditor who has a lien on a portion of it, he can not enforce his lien against the proceeds; he should make his claim before the sale and have the goods on which he has a lien sold separately.[41] The purchaser should be protected from being forced to pay taxes which though not yet levied have become a lien at the time of the sale.[42] Where the lien claimant is the purchaser, if the amount and validity of his lien is unquestioned, he should be allowed to deduct it from the purchase price; if the lien is doubtful he should pay the difference between the amount of the lien as claimed and the purchase and give the trustee an undertaking to pay the balance if it is decided against him.[43]

§ 257. When a secured creditor may apply to have property, on which he has a lien, sold.

The trustee may not see fit to institute proceedings for the sale of encumbered property. Whenever he does not, the secured creditor must do so, if it is to be sold in the court of bankruptcy.

Since all the property of the bankrupt passes to the trustee, as has been pointed out elsewhere,[44] subject to equities, property

B. R. 638; affirming *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384.

[38] *In re* Frick, 1 Am. B. R. 719; *In re* McConnell, No. 8712 Fed. Cas., s. c. 9 N. B. R. 387; but see *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; see also post sec. 267, last paragraph.

[39] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Oconee Milling Co. (C. C. A. 5th Cir.), 109 Fed. Rep. 866, 6 Am. B. R. 475.

[40] Carroll Co. v. Young (C. C. A. 3rd Cir.), 119 Fed. Rep. 576, 9 Am. B. R. 643.

[41] *In re* Klapholz, 113 Fed. Rep. 1002, 7 Am. B. R. 703; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[42] *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351.

[43] *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427.

[44] See Title to bankrupt's property, Sec. 149, *ante*.

on which there is a mortgage or other lien passes to the trustee, and is therefore in the custody of the court of bankruptcy.[45] This rule is subject to an exception in case the trustee elects not to take encumbered property. Whenever the secured creditor desires to enforce his mortgage or other lien, or to prove his claim against the estate, he must regularly apply to the court of bankruptcy for such leave. If it be decided there is no interest for the general creditors, then the bankruptcy court should not undertake to administer the property for an absent lienor. To undertake its administration is an abuse of discretion justly condemned by the authorities.[46]

In case the trustee elects not to take the encumbered property, it releases the jurisdiction of the bankruptcy court over such property, and the secured creditor may proceed to enforce his lien in a state court.

An attempt to enforce a lien in any other court is liable to be enjoined.[47] A sale so made may be set aside.[48] The court of bankruptcy may permit or authorize a secured creditor to enforce his security in a state court.[49] In such case the trustee must be a party to the proceeding.[50] Such a pro-

[45] *In re* Kellogg (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re* Kellogg, 6 Am. B. R. 389; Carter v. Hobbs, 92 Fed. Rep. 594, 1 Am. B. R. 215; *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *In re* Sabine, — Fed. Rep. —, 1 Am. B. R. 315; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770.

[46] *In re* Schaeffer, 5 Am. B. R. 248, 105 Fed. Rep. 352; *In re* Cogley, 5 Am. B. R. 731, 107 Fed. Rep. 73; *In re* Gibbs (D. C.), 6 Am. B. R. 485, 109 Fed. Rep. 627; *In re* Goldsmith, 9 Am. B. R. 419, 118 Fed. Rep. 765.

[47] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; *In re* Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Globe Cycle Works, 2 Am. B. R 447; Markson v. Heaney, No. 9098, Fed. Cas., s. c. 1 Dill. 497; McLean v. Lafayette Bank, No. 8885, Fed. Cas., s. c. 3 McLean, 185; *In re* Kerosene Oil Co. No. 7725, Fed. Cas., s. c. 3 Ben. 35; *In re* Wynne, No. 18117, Fed. Cas., s. c. Chase, 227.

See Clifton v. Foster, 103 Mass. 233.

[48] *In re* Davis, No. 3618, Fed. Cas., s. c. 2 N. B. R. 391; Davis v. Anderson, No. 3623, Fed. Cas., s. c. 6 N. B. R. 145.

[49] *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re* Cook, No. 3151, Fed. Cas., s. c. 3 Biss. 116; *In re* McGilton, No. 8798, Fed. Cas., s. c. 3 Bliss. 144.

[50] Cole v. Duncan, 58 Ill. 176;

ceeding in a state court, without authority, is not absolutely void.[51] The court of bankruptcy will not interfere with such proceedings unless an advantage may result to the bankrupt estate.[52] It may ratify the state proceedings upon application where the secured creditor shows that the estate and the other creditors will not be injured thereby.[53] The secured creditor may surrender his security or rely upon his security without proving his claim,[54] or if the entire debt is not secured, he may rely upon his security and prove for the balance.[55]

Where the secured creditor seeks to have a sale made in a court of bankruptcy he must first prove his claim in the manner prescribed.[56] Either his security or his debt may be disputed. The contest is made upon the proof of the debt in the same manner as contests upon the proof of unsecured debts.[57] If his claim is allowed, the property will regularly be sold upon application. The object of selling such property is to ascertain the value of the security.

It is not always necessary to resort to a sale for this purpose. The value of a security held by a secured creditor may be determined by converting the same into money according to the terms of the agreement pursuant to which such security was delivered to such creditor, by such creditor and the trustee, by agreement, arbitration or compromise, as well as by litigation.[58] Whichever method is re-

Truitt v. Truitt, 38 Ind. 16; Winslow v. Clark, 47 N. Y. 261; Barron v. Newberry, No. 1056, Fed. Cas., s. c. 1 Biss. 149.

[51] Whitridge v. Taylor, 66 N. C. 273; Truitt v. Truitt, 38 Ind. 16; Pierce v. Wilcox, 40 Ind. 70; Cole v. Duncan, 58 Ill. 176; Mays v. Fritton, 20 Wall. 414; Scott v. Kelly, 22 Wall. 57; Boese v. King, 108 U. S. 379.

[52] *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; *In re* Brinkman, No. 1883, Fed. Cas., s. c. 6 N. B. R. 541; *In re* Bowie, No. 1728, Fed. Cas., s. c. 1 N. B. R. 628; *In re* Iron Mountain Co., No. 7065, Fed. Cas., s. c. 9 Blatch. 320; Tichenor v. Allen, 13 Grat. (Va.) 15.

[53] Phelps v. Sellick, No. 11079 Fed. Cas., s. c. 8 N. B. R. 390.

[54] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

[55] See Rights of secured creditors, Sec. 202, *ante;* B. A. 1898, Sec. 56*b* and Sec. 57*h;* Wicks v. Perkins, No. 17615, Fed. Cas., s. c. 1 Woods, 383; Brown v. Gibbons, 37 Ia. 654; McKay v. Funk, 37 Ia. 661; Bentley v. Wells, 61 Ill. 59.

[56] Official Forms No. 32 and No. 36; see Forms Nos. 55 and 59 *post.*

[57] See Re-examination of claims, Sec. 140, *ante.*

[58] B. A. 1898, Sec. 57*h.*

sorted to for this purpose is subject to the direction of the court.[58] The selling of such property is a matter of judicial discretion. The court will take a course which, in its judgment, having due reference to the rights of the secured creditors, will be most beneficial to all the parties interested. A secured creditor can not demand, as a matter of right, that the trustee shall, upon his offer, convey the property, upon which he has a lien, to him on condition of his agreeing not to present a claim for any part of the debt against the estate.[59]

§ 258. Disputed property.

It would seem that, under the general power conferred upon the court of bankruptcy with reference to collecting, reducing to money and distributing the estates of bankrupts, and determining controversies in relation thereto,[60] that the court may order property, which is in dispute, sold. The title to a part of the real or personal property which comes into possession of the trustee or which is claimed by him may be in dispute. It may be for the advantage of all concerned that such property be sold, and the fund deposited in court until the court of bankruptcy shall determine to whom it belongs. This seems fairly a controversy in relation to the bankrupt's estate.

In such case the trustee should petition the judge or referee for leave to make such sale. Ten days' notice should be given to the creditors.[61] Notice should also be given to the claimant to appear and assert his right in the property. In practice, sales of this character can usually be arranged by agreement. The necessity of such a sale arises more particularly in respect to personal property in the hands of a mere bailee or carrier for safe-keeping or transportation, without claim of title or interest in the goods, and to the personal property subsequently discovered in the possession of the bankrupt which did not come into the possession of the trustee, and other cases of like character.

§ 259. Sale of perishable property.

Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate

[58] *In re* Ellerhorst, No. 4380, Fed. Cas., s. c. 2 Saw. 219.

[60] B. A. 1898, Sec. 2, clause 7.

[61] B. A. 1898, Sec. 58*a*.

is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.[62] The petition and order should be in the prescribed form.[63]

§ 260. The sale.

All sales must be by public auction unless otherwise ordered by the court.[64] Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale, in which case he must keep an accurate account of each article sold, and the price received therefor, and to whom sold, which account he must file at once with the referee.[65]

There is no provision of the statute or general orders requiring a sale to be advertised in a newspaper. The court, in granting an order, might make such a requirement if it thought it advisable. A reasonable public notice must be given to the public in some manner. A mistake in judgment by the trustee as to proper place and notice of a sale will not invalidate it, in the absence of fraud or collusion.[66]

Before the date of sale of real or personal property belonging to the bankrupt's estate it must be appraised by three disinterested appraisers.[67] The appraisers are appointed by and report to the judge or referee,[68] usually the referee. Where the trustee is acting under an order of sale, he should proceed in accordance with the provisions of the order. Anything which he may do in conflict with or in violation of such order is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed to sell to another person for a certain

[62] Gen. Ord. 18, par. 3. See also *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412.

[63] Official Form No. 46; see Form No. 84, *post*.

[64] Gen. Ord. 18.

[65] Gen. Ord. 18, par. 2; Official Form No. 45, see Form No. 83, *post; In re* Hawkins, 125 Fed. Rep. 633, 11 Am. B. R. 49.

[66] Hills v. Alden, No. 6507, Fed. Cas., s. c. 2 Hask. 299.

[67] B. A. 1898, Sec. 70*b*.

[68] B. A. 1898, Sec. 70*b*.

price, and to wait for an answer for a certain time, which period has not expired at the time of receiving the better bid.[69]

As a general rule, any person may bid and purchase at a public or private sale by a trustee. The bankrupt may purchase at such a sale.[70] The trustee,[71] or an attorney or agent of the trustee,[72] or a referee,[73] can not purchase at such a sale; but if the trustee, having purchased, makes improvements he is entitled to be reimbursed their value.[74] The trustee need not adjourn a sale for the purpose of giving a bidder time to search the title.[75] Where a sale is fairly made, and the bids are understood by the bystanders and the auctioneer, it will be a valid sale, although the trustee is present, but, in consequence of his negligence and inattention, fails to understand the terms thereof. Such a purchaser can compel a transfer of property to him by the trustee.[76]

It is not absolutely necessary that a sale be confirmed by the court, but all real and personal property must, when practicable, be sold subject to the approval of the court.[77] It can not be sold otherwise than subject to the approval of the court for less than seventy-five *per centum* of its appraised value.[78]

Where the sale has been confirmed by the court the title to the property is conveyed to the purchaser by the trustee.[79] Only the title to the bankrupt's interest is transferred, the title of third persons claiming adversely is in no way affected.[80] The conveyance of real estate is made by deed, which should recite the bankruptcy proceedings, the appointment and qualification of the trustee and the proceedings relating to the sale and the confirmation by the court and is executed by the trustee as other deeds in the state where the property is situated.[81]

[69] *In re* Ryan, No. 12182, Fed. Cas., s. c. 6 N. B. R. 235.

[70] Arnold v. Leonard, 20 Miss. 258.

[71] *In re* Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

[72] Citizens Bank v. Ober, No. 2731, Fed. Cas., s. c. 1 Woods, 80.

[73] B. A. 1898, Sec. 39*b*.

[74] *In re* Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

[75] Hills v. Alden, No. 6507, Fed. Cas., s. c. 2 Hask. 299.

[76] Ives v. Tregent, 29 Mich. 390; Russell v. Phelps, 42 Mich. 388; Voorheis v. Frisbie, 25 Mich. 476, and note 1 (annotated ed.).

[77] B. A. 1898, Sec. 70*b*.

[78] B. A. 1898, Sec. 70*b*.

[79] B. A. 1898, Sec. 70*c*.

[80] *In re* Muhlhauser (C. C. A., 6th Cir.), 121 Fed. Rep. 669, 10 Am. B. R. 236.

[81] For form of deed to real estate, see No. —, *post*.

§ 261. Setting aside a sale.

The contest, with reference to the validity of a sale, is usually made at the time of the application to the court to confirm the sale. The court will not refuse to confirm a sale or set it aside after it has been confirmed merely because a higher bid is offered,[82] or because the price is inadequate;[83] there must be circumstances impeaching the validity of the sale or such gross inadequacy as to shock the conscience.[84]

The court of bankruptcy has power, in its discretion, to set aside a sale even where such sale has been consummated by the delivery of a deed.[85] In case money has been deposited or paid, it should be ordered to be refunded by the trustee. Thus a sale may be set aside on the ground of fraud or collusion,[86] or because the sale is illegal, as in not selling to the highest bidder,[87] or selling property unlawfully in the possession of the trustee,[88] or made under an illegal or irregular order,[89] or any misconduct on the part of the trustee,[90] and this may be done although the purchaser is entirely innocent and although the sale was not made subject to the order of the court.[91] In deciding whether or not a sale shall be set aside the court will give much weight to objection on the part of the creditors.[92]

Under the present statute if a sale is made for less than seventy-five *per centum* of the appraised value it would seem

[82] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679.

[83] *In re* Thompson, 2 Am. B. R. 216.

[84] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; Magann v. Segal (C. C. A., 6th Cir.) 92 Fed. Rep. 252.

[85] *In re* Mott, No. 9878, Fed. Cas.; *In re* Stevenson, 6 Fed. Rep. 710; *In re* Hyde, 6 Fed. Rep. 587; *Ex parte* Bryan, No. 2061, Fed. Cas., s. c. 2 Hughes, 273.

[86] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; *In re* Conant, No. 3085, Fed. Cas., s. c. cited *in re* King, 3 Fed. Rep. 842; *In re* Hyde, 6 Fed. Rep. 592; Clark v. Clark, 17 How. 315; *In re* Stevenson, 6 Fed. Rep. 710.

But see Hills v. Alden, No. 6507, Fed. Cas., s. c. 2 Hask. 299, as to what is not evidence of fraud.

[87] *In re* Ryan, No. 12182, Fed. Cas., s. c. 6 N. B. R. 235.

[88] Davis v. R. R. Co., No. 3648, Fed. Cas., s. c. 1 Woods, 661.

[89] *Ex parte* Bryan, No. 2061, Fed. Cas., s. c. 2 Hughes, 273; *In re* Mott, No. 8978, Fed. Cas.

[90] *In re* Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481; *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679.

[91] *In re* Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481.

[92] *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679.

to be sufficient ground for setting aside the sale, irrespective of whether any fraud or collusion was shown, provided, it was made otherwise than subject to the approval of the court.[93] The mere nondelivery of a deed by the trustee is not sufficient cause for setting aside a sale, otherwise regular, and ordering a resale.[94]

§ 262. Costs of sale.

The expenses of a sale are ordinarily legitimate costs of administration, and should be paid first, out of the proceeds of the property sold.[95] Such costs are left by statute in the discretion of the court,[96] and questions arising in relation to them must be disposed of upon equitable principles.

Where a mortgage is apparently fraudulent, and creditors have endeavored to have it declared void, such creditors are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale.[97] Where a secured creditor seeks and enjoys the aid of the bankruptcy court in enforcing and releasing his lien, he should pay the costs incurred in obtaining this aid.[98] But with regard to the costs of general administration, in which he has no concern, and in which he can have no interest until his lien is either satisfied or released, it would be inequitable to require him to bear the burden of them.[98] Creditors who have failed to obtain a review of an order directing a private sale of the bankrupt's property may be required to pay the incidental expenses attending the sale.[99]

§ 263. Of preferences and debts.

The trustee may receive, as a part of the bankrupt's estate, property which has been transferred by the bankrupt prior to

[93] B. A. 1898, Sec. 70*b*.

[94] *In re* King, 3 Fed. Rep. 839. See also Owens v. Bruce (C. C. A., 4th Cir.) 109 Fed. Rep. 72, 6 Am. B. R. 322.

[95] *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in McNair v. McIntyre (C. C. A., 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638.

[96] B. A. 1898, Sec. 2, clause 18.

[97] *In re* Dumont, 4127, Fed. Cas., s. c. 4 N. B. R. 17.

[98] *In re* Hambright, No. 5973, Fed. Cas., s. c. 2 N. B. R. 498; *In re* Davenport, No. 3587, Fed. Cas., s. c. 3 N. B. R. 77; *In re* York, No. 18138, Fed. Cas., s. c. 3 N. B. R. 661.

[99] *In re* Johnston, No. 7424, Fed. Cas., s. c. 25 Pitts. Leg. J. 141.

the filing of the petition in fraud of the act. The transferee may decline to reconvey it. He may also receive as a part of the estate debts and accounts due the bankrupt which the debtors refuse to pay.

The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate,[100] or he may submit the claim to arbitration.[101] Whenever it may be deemed for the benefit of the estate of a bankrupt to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.[102] The creditors are entitled to ten days' notice by mail of the proposed compromise of any controversy.[103]

It may, however, be necessary for the trustee to resort to a suit to recover the preferred property or to compel the payment of such debts. The authority of the trustee to bring and prosecute such suits can not be questioned.[104]

The trustee was compelled at first to prosecute such suits in a state court, except upon consent of the defendant.[105] Since the amendment of February 5, 1903, he may prosecute such suits either in the courts of bankruptcy or a state court.[106]

[100] B. A. 1898, Sec. 27. Compare R. S. Sec. 5061. Consult *In re* Dibblee, No. 3885, Fed. Cas., s. c. 3 Ben. 354; *In re* Graves, No. 5709, Fed. Cas., s. c. 2 Ben. 100; *In re* Hoole, 3 Fed. Rep. 496; Estate of the Franklin Sav. Fund Soc., No. 5058, Fed. Cas., s. c. 31 Leg. Int. 173.

[101] B. A. 1898, Sec. 26; Gen. Ord. 33.

[102] Gen. Ords. 28 and 33; *In re* Hoole, 3 Fed. Rep. 496.

[103] B. A. 1898, Sec. 58*a*.

[104] B. A. 1898, Sec. 70*e* and Sec. 47, clause 2.

[105] For a discussion of this subject, see Sec. 20.

[106] B. A. 1898, Secs. 23, 60, 67 and 70, as amended Feb. 5, 1903, 32 Stat. at L. 797; Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343.

CHAPTER XXV.

THE DISTRIBUTION OF THE ESTATE.

§ 264. The general plan of distribution.

The trustee collects and reduces to money the property of the estate, for which he is trustee, under the direction of the court, and is required to account for and pay over to such estate all interest received by him upon the property of the estate.[1] The money so collected is deposited in one of the designated depositories. This constitutes the fund to be distributed. It should be deposited in the name of the court or judge [2] or to the credit of the trustee, naming the estate,[3] and should not be withdrawn on check signed by the referee only, but only when such check is countersigned by the judge or some one designated by him.[4]

The trustee is required to report to the court, the judge or referee, in writing, the condition of the estate and the amounts of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court.[5] All accounts of the trustee are referred, as of course, to the referee for orders, unless otherwise specially ordered by the court.[6]

The referee keeps a record of the claims which have been proved and allowed, and declares all dividends and prepares and delivers to the trustee dividend sheets showing the dividends declared and to whom payable.[7] The dividends are of

[1] B. A. 1898, Sec. 47, clauses 1 and 2.

[2] *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202.

[3] *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

[4] *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; Gen. Ord. 29. See also *in re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 310.

[5] B. A. 1898, Sec. 47, clause 10.

[6] Gen. Ord. 17.

[7] B. A. 1898, Sec. 30, clause 1; Official Form No. 40; see Form No. 98, *post.*

an equal *per centum*, and are declared and paid on all allowed claims except such as have priority or are secured.[8] The first dividend should be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority, and such claims as have not been but probably will be allowed, equals five *per centum* or more of such allowed claims.[9]

The trustee receives the list of claims and dividends prepared by the referee, and forthwith serves a notice[10] upon the creditors whose names are included in this list, of the time and place where payment of the dividends will be made. The creditors are entitled to have at least ten days' notice, by mail to their respective addresses, unless they waive notice in writing, of the declaration and time of payment of the dividends.[11] The creditors may, either personally or by some person authorized in writing,[12] obtain such dividends from the trustee at the time and place mentioned in the notice. Where payments are made to attorneys it should clearly appear on whose account the payment is made.[13]

Subsequent dividends are declared and paid upon like terms and in the same manner as the first dividend.[14] When the estate is ready to be closed, a final meeting of the creditors is called by the referee, of which at least a ten days' notice must be given to each creditor.[15] At this meeting the trustee is required to lay before the creditors detailed statements of the administration of the estate.[16] He is also required to make a final report and file final accounts with the referee or the judge at least fifteen days before the day fixed for the final meeting. This report and account must be rendered under oath,[17] and must be clear and show the disposition made of all money.[18] The referee audits the account, and, if regular and proper, passes an order allowing the account and discharg-

[8] B. A. 1898, Sec. 65*a*.

[9] B. A. 1898, Sec. 65*b*.

[10] Official Form No. 41; see Form No. 99, *post*.

[11] B. A. 1898, Sec. 58*a*.

[12] See Creditor's letter to trustee in Official Form No. 41; see Form No. 99, *post*.

[13] *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

[14] B. A. 1898, Sec. 65*b*.

[15] B. A. 1898, Sec. 58*a*.

[16] B. A. 1898, Sec. 47, clause 7.

[17] See Official Forms Nos. 49 and 50; see Forms Nos. 93 and 94, *post*.

ing the trustee.[18] This is the general plan of distributing the bankrupt's estate, provided by the bankrupt law. It is necessary to consider several of these steps more in detail, which will be done in the several sections of this chapter.

It may be observed that there is considerable difference between the method of distribution under this act and that pursued under the act of 1867. The principal point of difference is that the referee declares the dividends under the present statute instead of the creditors, as was done under the former act.[19]

§ 265. Who are entitled to share in the estate.

All creditors whose debts are duly proved and allowed are entitled to share in the bankrupt's property and estate. This includes creditors who have a priority or are secured as well as general creditors. Secured creditors are entitled to be paid to the extent of their security. Creditors having a priority are entitled to be paid in full. The general creditors share *pro rata*. There is no provision in the statute for paying dividends to creditors who have not proved their claims,[20] but a creditor who received an innocent preference and refused to surrender it has been held entitled to the surplus of the bankrupt's estate, not exceeding the balance due on his debt, after the other creditors have been paid in full.[21]

The persons entitled to share in a particular dividend are such only as have proved their debts prior to its being declared by the referee. A creditor is not entitled to have his debt brought in for a dividend if not proved until after the order declaring the dividend is made.[22] This construction of the act is the only one that can give bearing and consistency to the proceedings. If additional debts may be brought into the computation after the referee has prepared his list of claims and dividends it would be subject to incessant fluctuations and renewals; and what would render it still more inconvenient and

[18] Official Form No. 51; see Form No. 95, *post*.

[19] R. S. Secs. 5092 and 5093.

[20] See *in re* Hoyt, No. 6806, Fed. Cas., s. c. 3 N. B. R. 55.

[21] *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508.

[22] B. A. 1898, Sec. 65*c*; *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662; *In re* Miller, No. 9556, Fed. Cas., s. c. 1 N. Y. Leg. Obs. 180.

unequal in practice would be that even after the trustee had paid dividends under the rate to a part of the creditors, others might come in and arrest payments in progress to the residue, and, by presenting from day to day a new basis of distribution, dwindle down the *per centum* first established, and place those creditors to whom it was declared on a scale constantly descending in proportions. This would be in direct conflict with the evident intent of the statute.[23]

Where there are several funds, as in the case of a partnership, the firm creditors are entitled to be paid out of the firm property and the individual creditors out of the individual estates of the partners.[24] Should any surplus remain of the property of any partner after paying his individual debts, such surplus is added to the partnership assets and is applied to the payment of the partnership debts.[24] Should any surplus of the partnership property remain after paying the partnership debts, such surplus is added to the assets of the individual partners in the proportion of their respective interests in the partnership.[25] The distribution of a partnership estate and the individual estates of the partners is more fully discussed in another place, to which the reader is referred.[26]

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor, when known, by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable; but no dividend is paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.[27]

§ 266. How and when dividends are declared.

Creditors are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the

[23] B. A. 1898, Secs. 65*a* and *c*; *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[24] B. A. 1898, Sec. 5*f*.

[25] B. A. 1898, Sec. 5*f*.

[26] See Administration of partnership estates, Sec. 99, *ante*.

[27] Gen. Ord. 21, par. 4. B. A. 1898, Sec. 65*e*; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

papers in the case by the creditors, unless they waive notice in writing of the declaration and time of payment of dividends.[28]

The referee declares dividends and prepares and delivers to the trustee dividend sheets, showing the dividends declared and to whom payable.[29] From this provision it appears that the referee fixes and determines the rate of the dividend as well as makes the computation and calculations as to the amounts. The data for such calculations is in his possession, namely, the names of the creditors and the amount of each debt proved and allowed. The trustee is required to report to him, in writing, the condition of the estate and the amount of money on hand, and such other details as may be required by the court.[30] The first report must be made within a month after his appointment.[30] Other reports are required from him every two months thereafter, unless otherwise ordered by the judge or referee.[30] With this data the referee is prepared to declare the rate and compute the amount of each creditor's dividend.

Having determined upon the rate *per centum* the referee prepares a list of debts, proved and allowed, stating the rate of dividend and the name of each creditor, alphabetically arranged, together with the sum proved and allowed and the amount of the dividend to be paid thereon.[31] Where only one creditor has proved his claim he is entitled to be paid in full if there be enough for that purpose; if there be not enough he takes the whole.[32] This list of claims and dividends should be included by the referee in his record, and a copy delivered by him to the trustee. This is the authority for the trustee to make payments of dividends as set forth in such list.

Where a claim has been honestly and fairly disputed and the claimant finally prevails, interest upon the dividends should not be allowed from the time that like dividends were declared

[28] B. A. 1898, Sec. 58*a*.

[29] B. A. 1898, Sec. 39, clause 1; Form No. 40.

[30] B. A. 1898, Sec. 47, clause 10; Gen. Ord. 17.

[31] Official Form No. 40; see Form No. 98, *post*.

[32] *In re* Haynes, No. 6269, Fed. Cas., s. c. 2 N. B. R. 227; *In re* James, No. 7175, Fed. Cas., s. c. 2 N. B. R. 227.

upon undisputed claims.[33] Interest may be allowed on all claims from the date of filing the petition if the bankrupt's estate is sufficient to pay the same to all.[34]

The rights of creditors, who have received dividends, or in whose favor final dividends have been declared, are not affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims are paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.[35] It is not necessary before declaring a final dividend to wait a year,— the time within which Sec. 57*n* of the bankrupt act requires all claims to be proved.[36] Where an order is entered, by the consent of all known creditors, for a distribution different from that provided by the bankrupt act it is subject to the rights of any unknown creditors who appear within the time allowed by the act.[37]

Where a person has recovered a judgment, which is pending review in an appellate court, the court of bankruptcy will see

[33] In Hersey, *et al.*, v. Fosdick, 20 Fed. Rep. 44, Judge Lowell, in considering this question, said: "I can see no reason why, because a creditor finally prevails in a claim honestly and fairly disputed by the assignees, he should have more than his dividend. Not, surely, as damages for withholding something due him, for there is nothing due him in bankruptcy until his debt, both as to its legality and its amount, has been ascertained. Not as a matter of contract, for there is no contractural relation between the parties. I am confident that the practice has always been against it, and that it is both just and expedient that the general creditors should be at liberty to investigate doubtful claims, without the liability to such a penalty as would be imposed upon them by granting the petition. I do not say that if funds have been set aside to meet a large claim of this kind, and have earned interest, the court has not power to order the precise amount of interest so earned on a sum which proves to be the creditor's money, to be paid to him."

But see *in re* Kitzinger, No 7862, Fed. Cas., s. c. 19 N. B. R. 238, and No. 7863, Fed. Cas., s. c. 19 N. B. R. 307.

[34] *In re* Hagan, No. 5898, Fed. Cas., s. c. 6 Ben. 407; *In re* Town, No. 14112, Fed. Cas., s. c. 8 N. B. R. 40.

[35] B. A. 1898, Sec. 65*c*; *In re* Hovey, 5 Fed. Rep. 356, affirmed, 8 Fed. Rep. 314. As to when domestic creditors are preferred in paying dividends to foreign creditors see B. A. 1898, Sec. 65*d*.

[36] *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[37] *In re* Lockwood, 104 Fed. Rep. 794, 4 Am. B. R. 731.

to it that no dividends are paid until the case is disposed of by the appellate court. It will then be ordered to be paid or expunged, or ordered suspended, as shall be indicated by the judgment of the appellate court.[38] The proceedings in bankruptcy may go on in the usual way to their final orderly termination. If the judgment creditor shall not, in the meantime, have succeeded in getting his debt in a condition to receive dividends upon it, he will not be able to participate in the distribution of the estate as a judgment creditor.

The first dividend is required to be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five *per centum* or more of such allowed claims.[39] Dividends subsequent to the first are declared upon like terms as the first and as often as the amount equals ten *per centum* or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.[39]

§ 267. Debts which have priority.

In the distribution of an estate a secured creditor, as a mortgagee or lien-holder, is entitled to be paid in full from a fund derived from the sale of property, which is subject to his specific lien or security.[40] The court must also order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors,[41] and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.[42]

[38] *In re* Sheehan, No. 12737, Fed. Cas., s. c. 8 N. B. R. 345.

[39] B. A. 1898, Sec. 65*b*.

[40] *In re* Frick, 1 Am. B. R. 719; *In re* McConnell, No. 8712, Fed. Cas. s. c. 8 N. B. R. 387; contra *in re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

[41] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567; *In re* Conhaim, 100 Fed. Rep. 268, 4 Am. B. R. 58; *In re* Stalker, 123 Fed. Rep. 961.

[42] B. A. 1898, Sec. 64*a*; U. S. v. Herron, 20 Wall. 251; *In re* Tilden, 91 Fed. Rep. 500.

Although the property on which the taxes are owing is exempt the trustee must pay them.[43] Where the taxes are by the state law made a lien on the property on which they are owing, prior to a mortgage lien, they should be paid out of the proceeds of such property and not out of the general fund in the hands of the trustee although the proceeds of the property are not sufficient to satisfy both the taxes and the mortgage lien.[44] Where a state statute makes a partner liable for partnership taxes, such taxes have priority when a partner is adjudged a bankrupt and there are no partnership assets.[44*]

The bankruptcy court will follow the decision of the state courts in determining whether or not a debt due the state is a tax; thus where the state court holds that a license is not a tax it will not be given priority,[45] and where the state court holds an assessment a tax it will be given priority.[46] A debt due the state on a judgment is not entitled to priority,[47] nor is a claim for taxes which the bankrupt agreed to pay on property which he leased, as his liability is entirely contractual.[48]

Funds of the bankrupt which have come into the hands of the trustee are subject to taxation in the district where they would be taxable if bankruptcy had not intervened.[49]

Where the bankrupt, as lessee, covenants to pay the water rates and charges accruing and assessed upon the leased premises, a claim for unpaid rates if classed as a tax, is against the property upon which the water was used in the name of the owner, and is not a tax against the bankrupt within the meaning of Sec. 64*a*, and failure to comply with the covenant to pay, neither gives to the municipality nor to the lessor a claim to priority of payment from the bankrupt estate.[50]

Certain other debts have a priority by virtue of express provisions of the statute, and should be paid in full before pay-

[43] *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300.

[44] *In re* Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112.

[44*] *In re* Green, 116 Fed. Rep. 118, 8 Am. B. R. 553.

[45] *In re* Ott, 95 Fed. Rep. 274, 2 Am. B. R. 637.

[46] *In re* Stalker, 123 Fed. Rep. 961.

[47] *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

[48] *In re* Broom, 123 Fed. Rep. 639.

[49] *In re* Sims, 118 Fed. Rep. 356, 9 Am. B. R. 162; United States v. Herron, 20 Wall. 251, 264.

[50] *In re* Broom, 10 Am. B. R. 427.

ing any debts of general creditors. Such debts are, and the order of payment is, as follows:

First. There should be paid the actual and necessary cost of preserving the estate subsequent to filing the petition.[51]

Second. There should be paid the filing fees paid by creditors in involuntary cases,[52] and, since the amendment of 1903, where property of the bankrupt, transferred or concealed by him, either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.[53] Such expenses were allowed by the court under its general equity powers before the amendment.[54] The premium paid by a trustee to a bonding company to act as surety on his official bond may be allowed as an expense of administration.

Third. There should be paid the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties by the statute prescribed, and to the bankrupt in voluntary cases, as the court may allow.[55] For the treatment of the subject of attorney's fees, see *ante,* Sec. 41*a.* The actual and necessary expenses incurred by officers in the administration of estates must, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.[56]

[53] 32 Stat. at L. 797.

[52] B. A. 1898, Sec. 64*b*, clause 2. *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105.

[51] B. A. 1898, Sec. 64*b*, clause 1;

[54] *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815, affirmed by C. C. A. 2d Cir. in 5 Am. B. R. 320; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

[55] B. A. 1898, Sec. 64*b*, clause 3.

[56] B. A. 1898, Sec. 62; Gen. Ord. 10 and 19; *In re* Barnes, 18 Fed. Rep. 158.

Fourth. There should be paid wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant.[57] The claim of a salesman employed in a shop is entitled to priority.[58] The claim of an apprentice for labor done after his apprenticeship under an agreement for a specific compensation is entitled to priority as the claim of a workman.[59] The fact that a laborer is paid by the piece does not do away with his right to priority.[60] A claim of one temporarily employed in adjusting the books and accounts of the bankrupt is entitled to priority as a clerk.[61] So long as a *bona fide* contract for hiring exists and the servant does all that the master requires of him, the wages are earned so vacation pay is "wages earned" and "due" although payment is deferred.[62] A father is entitled to priority for the services rendered by his minor son as a workman.[63] But where the claim arises under an entire contract for labor, including the services of a team, it can not be apportioned, and is not entitled to priority.[64] An assignee of labor claims has priority if the assignment was made after the filing of the petition;[65] but not if the assignment was made before the filing of the petition.[66] The claims of a traveling salesman,[67] an agent selling on commission,[68] the president [69] or general manager [70] of a corporation are not entitled to priority. An employee is not entitled to priority in payment of wages for an unexpired term of employment, where he was

[57] B. A. 1898, Sec. 64*b*, clause 4.

[58] *In re* Flick, 105 Fed. Rep. 503, 5 Am. B. R. 465.

[59] *In re* Steiner, No. 13354, Fed. Cas., s. c. 1 Pa. L. J. 368.

[60] *In re* Gurewitz (C. C. A. 2d Cir.), 121 Fed. Rep. 982.

[61] *Ex parte* Rockett, No. 11977, Fed. Cas., s. c. 2 Low. 522.

[62] *In re* Gladding Co., 120 Fed. Rep. 709, 9 Am. B. R. 700.

[63] *In re* Harthorn, No. 6162, Fed. Cas., s. c. 4 N. B. R. 103.

[64] *In re* Blackman, 6 Chi. Leg. News, 18.

[65] *In re* Campbell, 102 Fed. Rep. 686, 4 Am. B. R. 535.

[66] *In re* Westlund, 99 Fed. Rep. 399, 3 Am. B. R. 646.

[67] *In re* Greenewald, 99 Fed. Rep. 705, 3 Am. B. R. 696; *In re* Scanlan, 97 Fed. Rep. 26, 3 Am. B. R. 202.

[68] *In re* Mayer, 101 Fed. Rep. 227, 4 Am. B. R. 119.

[69] *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154.

[70] *In re* Grubbs-Wiley Grocery Co., 96 Fed. Rep. 183, 2 Am. B. R. 442.

wrongfully discharged.[71] The priority for wages extends to wages earned within three months immediately preceding the filing of the petition, and not the three months last employed.[72] A person having a labor claim entitled to priority does not lose his priority by having obtained a judgment on it within four months prior to the filing of the petition.[73]

Where a state statute gives priority to wages earned more than three months prior to insolvency proceedings such claims are not entitled to priority under Sec. 64*b*, clause 5, of the bankrupt act, as Sec. 64*b*, clause 4, is held to exclude claims for wages from Sec. 64*b*, clause 5.[74] Where, however, the state law gives not a priority, but a lien on the bankrupt's property and this lien becomes fixed before the petition in bankruptcy is filed, it will be respected.[75]

Fifth. There should be paid debts owing to any person who by the laws of the states or the United States is entitled to priority.[76] This clause does not adopt the state laws with reference to the priority of labor claims.[77]

Where a claimant has a lien he is preferred not because Sec. 64*b*, clause 5, of the bankrupt act, gives him priority, but because the bankrupt act recognizes all valid liens,[78] which it does not specifically dissolve. Thus where a state law gives a lien for one years' rent, on the goods on the premises, the landlord is entitled to the proceeds of the sale of such goods up

[71] *In re* Pevear, No. 11053, Fed. Cas., s. c. 17 N. B. R. 461.

[72] *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96.

[73] *In re* Anson, 101 Fed. Rep. 698, 4 Am. B. R. 231.

[74] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; *In re* Shaw, 109 Fed. Rep. 782, 6 Am. B. R. 501; *In re* Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 9 Am. B. R. 635.

[75] *In re* Lawler, 110 Fed. Rep. 135, 6 Am. B. R. 184; *In re* Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 6 Am. B. R. 1; see also *in re* City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 10 Am. B. R. 231.

[76] B. A. 1898, Sec. 64*b*, clause 5.

[77] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; *In re* Shaw, 109 Fed. Rep. 782, 6 Am. B. R. 501; *In re* Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 9 Am. B. R. 635. Where, however, the labor claimant has acquired a lien it may be valid against the trustee in bankruptcy; *In re* Lawler, 110 Fed. Rep. 135, 6 Am. B. R. 184; *In re* Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 6 Am. B. R. 1; see also *in re* City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706.

[78] B. A. 1898, Sec. 67*d*.

to that amount.[79] A mere judgment is not entitled to priority though due to the state;[80] and when a judgment becomes a lien depends upon the laws of the state in which it is asserted.[81] This clause of the bankrupt act does not make all liens under state laws equal but leaves them the priorities which the state law gives them.[82] So where the state statutes give a lien to both a landlord and a wage-earner their priority will be determined by the state law.[83] Where there is a debt due for taxes on certain real estate and a mortgage of more than its value on the same real estate and the state law gives precedence to the taxes, they should be collected from the real estate and not from the general assets in the hands of the trustee.[84] Where a landlord distrains for rent after adjudication he will not be entitled to the amount distrained for as the property is in *custodia legis*, but will be given the priority which the state law gives to a landlord in case of execution.[85] Where, as in Pennsylvania, the vendor has no lien on real estate for the purchase price, but a bare legal title, if the trustee of the vendee severs part of the structures and sells them, the proceeds go to the general creditors.[86]

The insolvency laws of the states are considered as remaining in force since the passage of the bankruptcy act, so where these laws give priority to certain debts when the estate is administered in insolvency, the same priorities will ordinarily be allowed when the estate is administered in bankruptcy.[87] If the state statute gives not a priority, but a lien, and the lien is dissolved by the bankruptcy proceedings, the lienor is en-

[79] *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

[80] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

[81] Pence v. Cochran, 6 Fed. Rep. 269; *In re* Lowe, 19 Fed. Rep. 589.

[82] Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

[83] *In re* Byrne, 97 Fed. Rep. 762, 3 Am. B. R. 268.

[84] *In re* Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112.

[85] *In re* Duble, 117 Fed. Rep. 794.

[86] *In re* Clark, 118 Fed. Rep. 358, 9 Am. B. R. 252. See also *in re* Hamilton, 102 Fed. Rep. 683, 4 Am. B. R. 543.

[87] *In re* Worcester Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496; *In re* Crow, 116 Fed. Rep. 110, 7 Am. B. R. 545; *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787, seems contra. Where the priority is given in the settlement of a partnership no priority will be given

titled to no priority.[88] Where the priority given by the state law was to claims for compensation and for expenses incurred by an assignee in insolvency, a doubtful question arose when the assignment was set aside by the bringing of bankruptcy proceedings within four months. It was held that such a general assignment was in fraud of the bankrupt act and therefore such debts were not only not entitled to priority but were not even provable claims.[89] This doctrine was repudiated by the supreme court in Randolph *v.* Scruggs,[90] and it is now settled that an assignee or his attorney are entitled to compensation for services rendered either before or after the filing of the petition, if the services rendered were beneficial to the estate, and that this claim is entitled to priority.[91]

The United States are entitled to priority, although they do not prove their debt, irrespective of the form of indebtedness.[92] Where a person purchases an article duty free, and is compelled to pay the duty in order to get possession of the property, he is entitled to be subrogated to the right of the United States to priority, although he proves his debt as unsecured.[93] Where a revenue officer had paid a dishonored check, received by him from a government debtor, he is entitled to be subrogated to the rights of the United States against such debtor.[94] Where the United States have obtained a judgment against persons composing a bankrupt firm, though for a debt on which one of the partners was liable as principal and the other as surety, they are entitled to priority over all partnership

in administration of the estate of one of the partners in bankruptcy, *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699.

[88] *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

[89] Sterns v. Flick, 103 Fed. Rep. 919, 4 Am. B. R. 723; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; Wilbur v. Watson, 111 Fed. Rep. 493, 7 Am. B. R. 54; *In re* Tatum, 112 Fed. Rep. 50, 7 Am. B. R. 52; *contra In re* Scholtz, 106 Fed. Rep. 834, 5 Am. B. R. 782.

[90] 190 U. S. 533, 10 Am. B. R. 1.

[91] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36.

[92] R. S. Sec. 3466; Lewis v. United States, 92 U. S. 618; U. S. v. Herron, 20 Wall. 251; *In re* Vetterlein, 20 Fed. Rep. 109; Harrison v. Sterry, 5 Cranch, 289.

See also U. S. v. Murphy, 15 Fed. Rep. 589, and collation of cases in note at the end of the opinion.

[93] *In re* Kirkland, No. 7844, Fed. Cas., s. c. 14 N. B. R. 157.

[94] *In re* McBride, No. 8662, Fed. Cas., s. c. 19 N. B. R. 452.

creditors.[95] A judgment for an internal revenue penalty recovered after the adjudication in bankruptcy is entitled to priority of payment.[96] Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture are allowed only for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.[97] Hence the priority of the United States is limited in respect to what may be allowed.

In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[98]

When the referee has determined what debts are entitled to priority he should pass an order setting forth the names of the creditors and the amount of debts entitled to priority due each, and direct the trustee to pay such debts in full.

Where a secured creditor and a creditor having a priority are entitled to payment out of the same fund, and the fund is insufficient to pay both in full, the question will arise as to which class of creditors has preference over the other, the secured or those having priority? The statute creates preferences in the distribution of the bankrupt's assets, as has been stated, and prescribes the order of payment. This provision does not refer to any part of the estate derived from the sale of property on which creditors may have a specific lien.[99] It will be observed that this priority is only allowed out of the

[95] *In re* Strassburger, No. 13526, Fed. Cas., s. c. 4 Woods, 557.

[96] *In re* Rosey, No. 12066, Fed. Cas., s. c. 6 Ben. 507.

[97] B. A. 1898, Sec. 57*j*.

[98] B. A. 1898, Sec. 64*c*.

[99] *In re* Frick, 1 Am. B. R. 719; *In re* McConnell, No. 8712, Fed. Cas., s. c. 9 N. B. R. 387; see also *in re* Sanderlin, 109 Fed. Rep. 857, 859, 6 Am. B. R. 384, 387; but see *in re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

estate of the bankrupt. The fund derived from the sale of property, which is subject to specific liens becomes a part of the bankrupt's estate to such extent only as the fund exceeds the amount of the debt secured by the lien or mortgage.[100] The priority referred to in Sec. 64 evidently relates to claims otherwise unsecured and gives them priority over other unsecured claims but does not affect a debt or claim secured by mortgage or other lien which the act expressly provides shall not be affected by bankruptcy proceedings in Sec. 67.[99] The claim of the lien creditor must therefore be paid in full before creditors are entitled to a priority under Sec. 64.

§ 268. Dividends are not subject to attachment.

A dividend in the hands of the trustee can not be reached by attachment or on any process from a state court.[101] The same rule holds in cases of money payable under a composition with creditors.[102] The reason for this rule is that while the funds are in the hands of the trustee they are a part of the estate of the bankrupt in the custody of the court. Such money is not the property of the debtor, but is property only which becomes his, when he actually gets it. He can not maintain any suit against the trustee for it, nor obtain it by any legal process other than an application to the court of bankruptcy having control of the funds, as a party to the proceedings in that court. The situation is very similar to that of money in the hands of a public officer due to a private person,

[100] That the trustee takes the title of the bankrupt subject to all equities, liens and encumbrances, consult Yeatman v. Savings Institution, 95 U. S. 766; Jerome v. McCarter, 94 U. S. 734; Donaldson v. Farwell, 93 U. S. 631; Cook v. Tullis, 18 Wall. 332; Gibson v. Warden, 14 Wall. 244; Brown v. Heathcote, 1 Atk. 160; Crane v. Penny, 2 Fed. Rep. 455; Mitchell v. Winslow, No. 6673, Fed. Cas., s. c. 2 Story, 630; Goddard v. Weaver, No. 5495, Fed. Cas., s. c. 1 Woods, 257; *In re* Pusey, No. 11477, Fed. Cas., s. c. 6 N. B. R. 40; Parker v. Muggridge, No. 10743, Fed. Cas., s. c. 2 Story, 334; Fletcher v. Morey, No. 4864, Fed. Cas., s. c. 2 Story, 555; Kelly v. Scott, 49 N. Y. 595; Talcott v. Dudley, 5 Ill. 427.

[101] *In re* Chisholm, 4 Fed. Rep. 526; Gilbert v. Quinby, 1 Fed. Rep. 111; *In re* Cunningham, No. 3478, Fed. Cas., s. c. 10 N. B. R. 276; *In re* Kohlsaat, No. 7918, Fed. Cas., s. c. 18 N. B. R. 570; *In re* Bridgman, No. 1867, Fed. Cas., s. c. 2 N. B. R. 252; Colby v. Coates, 6 Cush. (Mass.) 558.

[102] *In re* Kohlsaat, No. 7918, Fed. Cas., s. c. 18 N. B. R. 570.

and the familiar cases relating to the exemption of such funds from attachment, to prevent them from passing to the person who claims them, may be profitably consulted.[103]

§ 269. **The manner of paying dividends.**

A dividend sheet, showing the dividends declared and payable, is delivered by the referee to the trustee.[104] The trustee should forthwith give notice to the creditors when and where a check or warrant for the dividends may be obtained.[105] The trustee is required to pay dividends within ten days after they are declared by the referee.[106] If the creditor can not personally attend, the warrant may be delivered to a person authorized in writing to receive it.[107] At the time and place named in the notice the creditor should present himself, or a duly authorized agent, to receive and receipt for the dividend warrant.

Each dividend is paid by a check or warrant drawn upon the designated depository in which the fund is deposited.[108] The warrant or check must be signed by the clerk of the court or by the trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the time, and the account for which it is drawn.[109] The warrant is usually drawn by the trustee and countersigned by the referee. Where the checks are given to attorneys they should distinctly show in payment of which claim they are given.[110] An entry of the substance of such check or warrant, with the date thereof, the sum drawn for,

[103] Buchanan v. Alexander, 4 How. 20; McLaughlin v. Swann, 18 How. 217; Providence & Stonington Steamship Co. v. Ins. Co., 11 Fed. Rep. 284; Clarke v. Shaw, 28 Fed. Rep. 356; Van Brocklin v. Tennessee, 117 U. S. 151; Foley v. Shriver, 81 Va. 568; Roeller v. Ames, 33 Minn. 132; Gassett v. Grout, 4 Met. (Mass.) 486.

[104] B. A. 1898, Sec. 39, clause 1; Form No. 40.

[105] Official Form No. 41, see Form No. 99, *post.*

[106] B. A. 1898, Sec. 47, clause 9.

[107] Official Form No. 41, see Form No. 99, *post.*

[108] B. A. 1898, Sec. 47, clause 4.

[109] Gen. Ord. 29; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; see also *in re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319; *In re* Clark, No. 2810, Fed. Cas., s. c. 9 N. B. R. 67.

[110] *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

and the account for which it is drawn, must be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts should be entered in the order of time in which they are drawn, and numbered in the case of each estate.[109] The creditor receiving the check is required by the trustee to sign a voucher to be used in making up his accounts.

§ 270. Unclaimed dividends.

There was a conflict of opinion under the former act as to what disposition should be made of the balance that remained after the payment of all the creditors, who had proved their debts in case there were names of creditors on the schedule who had not proved their debts. Some judges held that it should be distributed among the creditors holding unproved claims.[111] Other judges held that it should be paid to the bankrupt.[112]

This question can not be mooted under the present act, which expressly provides that dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt. Provided, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends.[113]

§ 271. The settlement of the estate.

When the trustee has realized all the property of the bankrupt, or so much thereof as can be realized, or where no tangible assets have come into his hands and he has no informa-

[111] *In re* Haynes, No. 6269, Fed. Cas., s. c. 2 N. B. R. 227; *In re* James, No. 7175, Fed. Cas., s. c. 2 N. B. R. 227.

[112] *In re* Hoyt, No. 6806, Fed. Cas., s. c. 3 N. B. R. 55; Steevens v. Earles, 25 Mich. 40.

In re Blight's Estate, No. 1540, Fed. Cas., s. c. 1 Pa. Law J. 225, it was held that unclaimed dividends would not be awarded to a bankrupt's administrator when opposed by creditors whose claims were not paid in full.

[113] B. A. 1898, Sec. 66.

tion of any property belonging to the bankrupt, and the estate has been distributed or is in shape for a final dividend, the estate is ripe for settlement. The final dividend may be declared before the time limited for proving claims has expired.[114] The trustee thereupon makes a final report and files his final accounts under oath with the referee.[115] This should be done at least fifteen days before the day fixed for the final meeting of the creditors.[116]

The referee should thereupon give at least ten days' notice by mail to the creditors, at their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case, unless they waive notice in writing, of the filing of the final accounts of the trustee and the time when and the place where they will be examined and passed upon.[117] Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.[118] But if no trustee is appointed, the court may order that no meeting of the creditors other than the first meeting shall be called.[119]

Upon the day fixed for the final meeting the creditors assemble pursuant to notice. The trustee is required to lay before this meeting of the creditors detailed statements of the administration of the estate. These statements and accounts are examined at this time, and such other business as may be necessary to the final settlement of the affairs of the bankrupt may be transacted. The creditors may, by vote at the final meeting, dispense with the reading and exhibition of the trustee's accounts and vouchers, where they have been on file for a reasonable time.[120]

If the final accounts are satisfactory and proper the referee passes an order allowing the same and discharging the trustee from his trust.[121] If objections are made to the accounts the

[114] *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[115] Official Forms Nos. 49 and 50, see Forms Nos. 93 and 94, *post.* If there are no assets the trustee makes his return in Official Form No. 48; see Form No. 92, *post.*

[116] B. A. 1898, Sec. 47, clause 8.

[117] B. A. 1898, Sec. 58*a*; *In re* Savage, 12 Fed. Rep. 719.

[118] B. A. 1898, Sec. 55*f*.

[119] Gen. Ord. 15.

[120] *In re* Merchants Ins. Co., No. 9442, Fed. Cas., s. c. 6 Biss. 252.

[121] Official Form No. 51, see Form No. 95, *post.*

referee should hear them and determine the merits as soon as he conveniently can do so. The meeting may be adjourned with leave to the trustee to correct his errors or omissions.[122]

The court may set aside a discharge of a trustee which has inadvertently found its way into the files and order him to proceed.[123] The statute expressly authorizes the court to re-open estates whenever it appears they were closed before being fully administered.[124]

§ 272. The record of the referee to be transmitted to the court.

When the debts have been proved and allowed, the assets collected and distributed, the trustee's accounts audited and the trustee discharged, the case is concluded before the referee. He should then certify to a record of the proceedings before him, together with such papers as are on file before him, and transmit them to the clerk of the court.[125] They are preserved by the clerk as a part of the records of the court.

Certified copies of such proceedings or of such papers, when issued by the clerk or referee, are to be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.[126] The referee can furnish certified copies only when the papers are in his possession, and not after his record has been filed with the clerk.

[122] *In re* Savage, 12 Fed. Rep. 719.
[123] Maybin v. Raymond, No. 9338, Fed. Cas., s. c. 15 N. B. R. 353.
[124] B. A. 1898, Sec. 2, clause 8.
[125] B. A. 1898, Sec. 42*c*.
[126] B. A. 1898, Sec. 21*d*.

CHAPTER XXVI.

DISCHARGE.

§ 273. **Application for a discharge.**

Any person who has been adjudged a bankrupt may file an application for a discharge in the court of bankruptcy in which the proceedings are pending.[1] This includes involuntary as well as voluntary bankrupts.

The application for a discharge should be by a petition in the prescribed form.[2] It should be entitled in the court and cause and addressed to the judge. It must state concisely, in accordance with the provisions of the bankrupt act and the orders of the court, the proceedings in the case and the acts of the bankrupt.[3] Thus it should state the name of the bankrupt, his residence and the date on which he was adjudged a bankrupt; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said acts and of the orders of the court touching his said bankruptcy. It should conclude with a prayer that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge. A person need not pray for a discharge from his firm debts in precise words, if he asks for a discharge from his provable debts; that virtually prays for a discharge from his partnership debts.[4] The petition should be dated and signed by the bankrupt. No verification is required.

As soon as the petition is properly filed the court passes an order of notice.[5] This order should fix the date that a hearing may be had upon the petition, and provide that notice be published in a certain designated newspaper[6] to all known creditors and all other persons in interest to appear at the

[1] B. A. 1898, Sec. 14. Compare R. S. Sec. 5108 to Sec. 5120.

[2] Official Form No. 57; see Form No. 153, *post.*

[3] Gen. Ord. 31.

[4] *In re* Pierson, No. 11153, Fed. Cas., s. c. 10 N. B. R. 107.

[5] Official Form No. 57; see Form No. 153, *post.*

[6] B. A. 1898, Sec. 28.

said time and place to show cause, if any they have, why the prayer of the petitioner should not be granted. The order should also provide that the clerk send by mail to all known creditors copies of the petition and the order. All creditors, whether they have proved their claims or not, are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of the creditors, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of the hearing upon the application for discharge of the bankrupt.[7] If the creditors were not notified by mail it must appear that their addresses could not be obtained after due search, or the discharge will not be granted.[8] This order should be tested by the clerk and issued by him under the seal of the court. The clerk thereupon mails to each creditor and other party in interest a copy of the petition and the order and certifies that he has done so. This certificate of the clerk is sufficient evidence that the notices were duly mailed.[9]

A copy of the petition and order are also published in the newspaper, as directed by the order, and an affidavit to that effect, stating the days upon which they are so published, must be made and filed in the court. A copy of the printed advertisement is usually attached to the affidavit. The affidavit is regularly made by the publisher or some person officially connected with the newspaper. Any person cognizant of the fact may make it.

§ 274. When and where the petition is filed.

Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six

[7] B. A. 1898, Sec. 58*a*.

[8] *In re* Dvorak, 107 Fed. Rep. 76, 6 Am. B. R. 66.

[9] *In re* Townsend, No. 14116, Fed. Cas., s. c. 2 Ben. 62.

months.[10] A petition filed more than twelve months and less than eighteen months after the adjudication will not be heard unless leave to file it has been granted by the court after hearing the reasons for delay, and this leave will not be granted by a *nunc pro tunc* entry more than eighteen months after the adjudication.[11] The petition should be filed in the clerk's office and not with the referee.[12]

It will be observed that the time within which an application may be made is not dependent at all upon the progress made in the administration of the estate. Assets may or may not have come into the hands of the trustee. The estate may have been fully or partly distributed. It is immaterial whether any dividend has been declared or not.

In computing the time within which a petition in bankruptcy must be filed the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[13] The word "holiday" includes Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[14]

A bankrupt is not entitled to file a second application for a discharge when his first petition is denied after an investigation of its merits;[15] but the fact that a bankrupt has been refused a discharge does not prevent his obtaining one on again going through bankruptcy.[16]

§ 275. Who may oppose a discharge.

An application for a discharge may be opposed by any of the "parties in interest."[17] To entitle a party to oppose a

[10] B. A. 1898, Sec. 14*a*; *In re* Fahy, 116 Fed. Rep. 239, 8 Am. B. R. 354.

[11] *In re* Wolff, 100 Fed. Rep. 430, 4 Am. B. R. 74.

[12] Watson v. McDuff, 101 Fed. Rep. 241, 4 Am. B. R. 110.

[13] B. A. 1898, Sec. 31.

[14] B. A. 1898, Sec. 1, clause 14.

[15] *In re* Brockway, 23 Fed. Rep. 583, reviewing 12 Fed. Rep. 69; *In re* Feigenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Royal, 113 Fed. Rep. 140, 7 Am. B. R. 636.

[16] *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128.

[17] B. A. 1898, Sec. 14*b*.

discharge he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown.[18] A person has been held to have an interest sufficient to entitle him to oppose a discharge, where his claim was contingent and unliquidated so as not to be capable of being proved as a debt,[19] or where he held an equitable claim only against the estate,[20] or where his claim was being contested,[21] although his claim has not been proved [22] or is no longer provable.[23] But where a debt is barred by a lapse of time the creditor has no interest, and therefore can not oppose the discharge.[24]

A creditor may be barred from objecting to a discharge by laches,[25] or he may be estopped by his own consent to an act from alleging it against his debtor on the question of his discharge. This question of estoppel arose more frequently under the act of 1867, where fraudulent preferences barred a discharge, than it can under the present act. The question was frequently considered by the court under the former act.[26]

§ 276. How to oppose a discharge.

Although a petition for a discharge is filed and the opposition to it is made in the bankruptcy proceedings, the specification of grounds in opposition to the discharge is in the nature of a new suit. It calls for pleas, proofs and a hearing or trial.[27] If, however, the bankrupt does not plead to the specifications

[18] *In re* Shepard, No. 12753, Fed. Cas., s. c. 1 N. B. R. 439; *In re* Smith, No. 12977, Fed. Cas., s. c. 8 Blatch. 461; *In re* Boutelle, No. 1705, Fed. Cas., s. c. 2 N. B. R. 129; *In re* Murdock, No. 9939, Fed. Cas., s. c. 1 Low. 362; Book's Case, No. 1637, Fed. Cas., s. c. 3 McLean, 317.

[19] *Ex parte* Traphagen, No. 14140, Fed. Cas., s. c. 1 N. Y. Leg. Obs. 98.

[20] *In re* Tebbetts, No. 13817, Fed. Cas., s. c. 5 Law Rep. 259.

[21] *In re* Belden, No. 1238, Fed. Cas., s. c. 4 Ben. 225.

[22] *In re* Frice, 96 Fed. Rep. 611, 2 Am. B. R. 674.

[23] *In re* Bimberg, 121 Fed. Rep. 942, 9 Am. B. R. 601.

[24] *In re* Burk, No. 2156, Fed. Cas., s. c. Deady, 425.

[25] Kentucky National Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822.

[26] *In re* Sawyer, No. 12394, Fed. Cas., s. c. 2 Hask. 337; *In re* Schuyler, No. 12494, Fed. Cas., s. c. 3 Ben. 200; *In re* Kraft, 3 Fed. Rep. 892; Johnson v. Rogers, No. 7408, Fed. Cas., s. c. 15 N. B. R. 1; Judson v. The Courier Co., 8 Fed. Rep. 422.

[27] B. A. 1898, Sec. 14.

the bankrupt will not be denied a discharge without proof by the opposing creditor.[28]

A creditor or other party in interest, who desires to oppose a discharge, is required to enter his appearance in opposition thereto on the day when the creditors are required to show cause, and to file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.[29]

An appearance is not regularly entered until after a petition for discharge is filed,[30] but it has been held that an appearance may be entered to oppose a discharge at any time before the expiration of the time limited by general order 32.[31] The former is the better practice. Manifestly a person should not put in a defense until it is called for, and it is not called for until a petition is filed. Before that time it is not known whether the bankrupt will apply for a discharge or not.

A creditor intending to oppose an application for discharge may enter his appearance in person in his own behalf or by attorney, who must be an attorney or counselor authorized to practice in the circuit or district court.[32] The name of the attorney or counselor, with his place of business, must be entered upon the docket, with the date of the entry.[32] An appearance not duly authorized will be disregarded.[33] Unless an appearance is duly entered, the creditor has no standing in court as to the petition for discharge, and therefore can not be heard in opposition to it.[34] It has been held that creditors may enter their appearance upon an adjourned day of the hearing on the order to show cause;[35] and also that the court

[28] *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; *In re* Logan, 102 Fed. Rep. 876, 4 Am. B. R. 525.

[29] Gen. Ord. 32.

[30] *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257; *In re* Seabury, No. 12573, Fed. Cas., s. c. 10 N. B. R. 90.

[31] *In re* Baum, No. 1116, Fed. Cas., s. c. 1 Ben. 274.

[32] Gen. Ord. 4; Creditors v. Williams, No. 3379, Fed. Cas., s. c. 4 N. B. R. 579; *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257.

[33] *In re* Eidom, No. 4314, Fed. Cas., s. c. 3 N. B. R. 106; Creditors v. Williams, 8379, Fed. Cas., s. c. 4 N. B. R. 579.

[34] *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257; *In re* Sutherland, No. 13640, Fed. Cas., s. c. Deady, 573; *In re* Smith, No. 12985, Fed. Cas., s. c. 5 N. B. R. 20; Creditors v. Williams, No. 3379, Fed. Cas., s. c. 4 N. B. R. 579; *In re* Buxbaum, No. 2259, Fed. Cas., s. c. 2 Hughes, 339.

[35] *In re* Seabury, No. 12573, Fed.

may, in its discretion, enlarge the time for entering appearance and filing specifications in opposition to a discharge as well after as before the expiration of the time allowed by the rule.[36] Speaking of this question, Judge Lowell said: "I have decided in one case that the discretion of the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before; but I do not think it can be laid down as a matter of law that the day when creditors are required to show cause means any day to which the proceedings may have been adjourned for other purposes. But I do think that the rule intends that the court shall have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute right imposing a corresponding duty upon the court, and a discretionary power to be exercised only upon cause shown.[37]

Upon the entry of appearance of a creditor or a party in interest to oppose a discharge all proceedings upon the petition are suspended until the specification of grounds in opposition to the discharge is filed.[38] Where no entry of appearance is made within the time specified, or where it is not duly authorized, it should be disregarded and the cause should proceed as if no opposition had been made.

Where there is no entry of appearance by an opposing party the petition of a bankrupt to be discharged may be continued from time to time to suit the convenience of the bankrupt.[39] When an appearance has been entered by any creditor against the discharge the proceedings upon the petition are no longer under the exclusive control of the bankrupt but the opposing creditor can not move to dismiss the petition or that its

Cas., s. c. 10 N. B. R. 90; *In re* Tallmann, No. 13740, Fed. Cas., s. c. 2 Ben. 404.

But see *in re* Houghton, No. 6730, Fed. Cas., s. c. 2 Low. 328.

[36] *In re* Levin, No. 8291, Fed. Cas., s. c. 7 Biss. 231; *In re* Filley, 2 Cent. L. J. 419. In this last case it appeared that the creditor had not received notice of the application for discharge.

But see Creditors v. Williams, No. 3379, Fed. Cas., s. c. 4 N. B. R. 579; *In re* Houghton, No. 6730, Fed. Cas., s. c. 2 Low. 328.

[37] *In re* Houghton, No. 6730, Fed. Cas., s. c. 2 Low. 328.

[38] *In re* Frizelle, No. 5132, Fed. Cas., s. c. 5 N. B. R. 119.

[39] *In re* Sutherland, No. 13640, Fed. Cas., s. c. Deady, 573.

prayer be denied because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The proper course for the creditor is to move the court to set down the matter for hearing upon the petition and his objections thereto, if any be filed.[39] A hearing on a petition for discharge may be continued for the purpose of examining the bankrupt.[40]

§ 277. The specification of grounds in opposition to a discharge.

Where an opposing creditor or other party in interest has entered his appearance in opposition to a discharge upon the day when creditors are required to show cause, he must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.[41] If the specification is not filed within the prescribed time it can not be considered.[42] Where a creditor has duly entered his appearance, and through inadvertence fails to file a specification within the prescribed time, he may, on showing proper cause, be allowed to file it *nunc pro tunc*.[43] Where the specification is not filed within the time, and the time for filing it is not extended, the cause progresses as though there were no opposition.[44]

The specification must be in writing.[45] It must state the name of the opposing creditor.[46] The specification should then state the grounds of his opposition specifically, except those which appear on the face of the proceedings. The object of the specification of grounds in opposition to a petition for discharge is to give the bankrupt reasonable notice of what is expected to be proved against him. The allega-

[40] *In re* Seckendorf, No. 12600, Fed. Cas., s. c. 2 Ben. 462; *In re* Thompson, No. 13935, Fed. Cas., s. c. 2 Ben. 166; *In re* Jacobs, No. 7160, Fed. Cas., s. c. 5 Saw. 458.

[41] Gen. Ord. 32.

[42] *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257; *In re* Albrecht, 104 Fed. Rep. 974, 5 Am. B. R. 223; *In re* Clothier, 108 Fed. Rep. 199, 6 Am. B. R. 203.

[43] *In re* Grefe, No. 5794, Fed. Cas., s. c. 2 N. B. R. 329.

[44] *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257; Creditors v. Williams, No. 3379, Fed. Cas., s. c. 4 N. B. R. 579.

[45] Gen. Ord. 32.

[46] Official Form No. 58; see Form No. 157, *post; In re* Shoemaker, No. 12799, Fed. Cas., s. c. 4 Biss. 245, it was held that "A. and B., attorneys for opposing creditors," was not sufficient. *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

tions must be allegations of fact, stated distinctly, precisely and specifically;[47] it is not sufficient to simply state the words of the statute [48] and when nothing further was stated leave to amend has been refused.[49] Where the ground of objection was the concealment of realty it was held that the specification must describe the realty, name the persons holding the title, state the time of transfer and other facts necessary to identify the transaction.[50] Where the allegations are so general as really not to advise the bankrupt what facts he must be prepared to meet and resist, the specification is bad, and may be disregarded [51] or stricken out.[52] All objections to specifications for formal defects must be raised before the issue is tried or the defect is waived.[53] If the specifications are defective either in form or in substance they may be amended by leave of the court.[54] Whether or not this leave shall be granted is within the discretion of the court and the question of whether or not this discretion was abused is one on which the circuit court of appeals can exercise its power of revision under section 24*b*.[55] Before the hearing the court should

[47] *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Goodale, 109 Fed. Rep. 783; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Parish, 122 Fed. Rep. 553; *In re* Rathbone, No. 11580, Fed. Cas., s. c. 2 Ben. 138; *In re* Hill, No. 6482, Fed. Cas., s. c. 2 Ben. 136; *In re* Mawson, No. 9318, *Fed. Cas.*, s. c. 2 Ben. 332; *In re* Beardsley, No. 1183, Fed. Cas., s. c. 1 N. B. R. 304; *In re* Butterfield, No. 2247, Fed. Cas., s. c. 5 Biss. 120; *In re* Burk, No. 2156, Fed. Cas., s. c. Deady, 425; *In re* Graves, 24 Fed. Rep. 550; *In re* Eidom, No. 4314; Fed. Cas., s. c. 3 N. B. R. 106.

[48] *In re* Goodale, 109 Fed. Rep. 783; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747.

[49] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; but see *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

[50] *In re* Parish, 122 Fed. Rep. 553.

[51] *In re* Rathbone, No. 11580, Fed. Cas., s. c. 2 Ben. 138; *In re* Hansen, No. 6039, Fed. Cas., s. c. 2 N. B. R. 211; *In re* Dreyer, No. 4082, Fed. Cas., s. c. 2 N. B. R. 212; *In re* Son, No. 13174, Fed. Cas., s. c. 2 Ben. 153; *In re* Tyrrel, No. 14314, Fed. Cas., s. c. 2 N. B. R. 200.

[52] *In re* Waggoner, No. 17037, Fed. Cas., s. c. 1 Ben. 532.

[53] *In re* Baldwin, 119 Fed. Rep. 796, 9 Am. B. R. 591; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Robinson, 123 Fed. Rep. 844. In the northern district of New York this should be done by motion. *In re* Baldwin.

[54] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Parish, 122 Fed. Rep. 553.

[55] *In re* Carley (C. C. A. 3d Cir.),

be very liberal in granting leave to amend specifications,[56] but after issue joined and the case is argued amendment will not be allowed;[57] in one case amendment was allowed after the evidence was in where it would not present any new issue.[58]

As the proceedings in bankruptcy are strictly statutory, a discharge can be refused only upon a ground specifically set forth in the statute, except the want of jurisdiction of the court to entertain the proceedings. The statutory grounds which may be set up in the specification in opposition to a petition for discharge are considered in the next few sections.

The specification must be signed by the parties in interest who are opposing the discharge.[60] As to whether or not a specification must be verified has been a matter of much discussion, but it now seems to be pretty well settled in the affirmative,[61] though the last decision was that it need not be.[62] There is also a conflict as to what verification is sufficient.[63]

§ 278. Grounds for opposing a bankrupt's discharge.

In order to prevent a bankrupt's discharge his case must fall within one of the exceptions named in the statute.[64] Under the act of 1867 the cases in which no discharge could

117 Fed. Rep. 130, 8 Am. B. R. 720.

[56] *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391; *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Frice, 96 Fed. Rep. 611, 2 Am. B. R. 674; *In re* Hirsch, 96 Fed. Rep. 468, 471, 2 Am. B. R. 715, 718; *In re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 610; *In re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600. Amendment was not allowed in *In re* Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747.

[57] *In re* Smith, 16 Fed. Rep. 465, 467; *In re* Graves, 24 Fed. Rep. 550.

[58] *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554.

[60] Official Form No. 58; see Form No. 157 *post; In re* Glass 119 Fed. Rep. 509, 520, 9 Am. B. R. 391, 405.

[61] *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391 (treating the subject exhaustively); *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 7 Am. B. R. 252.

[62] *In re* Jamieson, 120 Fed. Rep. 697, 9 Am. B. R. 681.

[63] *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747.

[64] B. A. 1898, Sec. 14*b; In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* McCarty, 111 Fed. Rep. 151, 7 Am. B. R. 40; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed.

be granted were collated in ten separate paragraphs.[65] The bill, which afterwards became the present bankrupt act, contained nine distinct classes of cases in which no discharge could be granted.[66] These grounds remained in the bill until its final revision by the conference committee. The bill was materially changed by the conference committee in this respect.[67] Many of the grounds were stricken out.

Before the amendment of February 5, 1903, there were two general grounds only for contesting the discharge of a bankrupt in the present statute. They were that the bank-

Rep. 872, 4 Am. B. R. 468; *In re* Peacock, 101 Fed. Rep. 560, 4 Am. B. R. 136.

In re Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727; *In re* Walther, 95 Fed. Rep. 941, 2 Am. B. R. 702; and *In re* Fleishman, 120 Fed. Rep. 960, 9 Am. B. R. 557, seem to deny a discharge where the statute does not authorize it.

[65] R. S. Sec. 5110.

[66] The bill provided that the bankrupt should be discharged "unless he has (1) been convicted of having committed an offense punishable by imprisonment as herein provided; (2) given a preference as herein defined, and within six months prior to the filing of the petition against him, which has not been surrendered to the trustee; (3) obtained property upon credit which has not been paid for or stored at the time the petition is filed against him upon a materially false statement in writing made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person from whom he obtained such property on credit; (4) made a transfer of any of his property which any creditor who has proved his claim in the proceedings might, at the time of the filing of the petition, have impeached as fraudulent if he had then been a judgment creditor, unless such property shall have been surrendered to the trustee; or (5) with fraudulent intent and in contemplation of bankruptcy, destroyed or neglected to keep books of account or records from which his true condition might be ascertained; or (6) made a substantially false valuation, as a bankrupt, of any of the property of his estate in his schedule of property, or intentionally omitted therefrom any of the property of his estate, or from the list of his creditors any person to whom he is indebted in a substantial amount, or included therein any person to whom he is not indebted, or included therein a creditor for an amount substantially more than the true indebtedness, or (7) secreted or conveyed any of his property to avoid its being administered in bankruptcy, or any document relating to his property in contemplation of bankruptcy; or (8) transferred any property otherwise than in the ordinary course of his business, in contemplation of bankruptcy; or (9) in case of any person having, to his knowledge, after he has become a bankrupt, proved a false claim against his estate, failed to disclose that fact, within one month after coming to a knowledge thereof, to his trustee."

[67] 31 Cong. Rec. 7205.

rupt has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.[68]

The statute as it existed prior to Feb. 5, 1903, applies to all cases in which the proceedings were begun before that time. By that amendment the second ground was changed to read " with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained," and the following grounds were added;—[70] obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or,[71] at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or,[72] in voluntary proceedings been granted a discharge in bankruptcy within six years; or [73] in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.[69]

Another ground for contesting a discharge, recognized by the courts, is that the court has never acquired jurisdiction of the proceedings, although it may have made many orders therein. Thus a court will not acquire jurisdiction where at the time of filing the petition the bankrupt had not resided or had a domicile or a place of business within the district for the length of time prescribed by the statute, or where

[68] B. A. 1898, Sec. 14*b*. See Secs. 279 and 280, *post*.

[69] 32 Stat. at L. 797.

[70] *In re* Ives, No. 7115, Fed. Cas., s. c. 5 Dill. 146; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Clisdell, 101 Fed. Rep. 246, 4 Am. B. R. 95; *In re* Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599.

[71] See Chap. XXI

[72] B. A. 1898, Sec. 14*b*.

[73] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 400; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; *contra*, *In re* Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521.

any jurisdictional requirement is wanting. This objection cannot be raised upon an application for a discharge when the record on its face shows jurisdiction.[70] The truth of jurisdictional averments in the petition must be contested at the time of the adjudication or jurisdiction will be conclusively presumed and a discharge granted.[70]

§ 279. First ground for opposing a discharge, that the bankrupt is guilty of an offense.[71]

The court will refuse the application for a discharge when the bankrupt has committed an offense under the statute punishable by imprisonment.[72] It is not necessary that he shall have been convicted of the offense as a foundation for refusing the discharge. If he has been guilty of an offense he can not be discharged, although from difficulties in proof, placed in the way by statute, he can not be convicted of the offense in a criminal prosecution.[73]

Offenses under the act are: When a person has knowingly and fraudulently, *first,* concealed, while a bankrupt, from his trustee any of the property belonging to his estate in bankruptcy; or, *second,* made a false oath or account in, or in relation to, any proceeding in bankruptcy; or, *third,* presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition, personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or, *fourth,* received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act; or, *fifth,* extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[74] Another offense punishable by imprisonment is a contempt committed before a referee[75] or a court of bankruptcy.[76] It would therefore seem that the person who has been guilty of a contempt is not entitled to a discharge.

[74] B. A. 1898, Sec. 29*b*. See also Offenses, Chap. XXI, *ante.*

[75] B. A. 1898, Sec. 41, and Sec. 2, clauses 13 and 16.

[76] B. A. 1898, Sec. 2, clause 13.

§ 280. **Second ground of opposing discharge, that books of account are fraudulently withheld or are not kept.**

The bankrupt can not be discharged when he has, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.[77] In order to prevent a discharge under this provision, three things must concur. *First*, the bankrupt must have destroyed, concealed, or failed to have kept books of account or records from which his true condition might be ascertained. *Second*, he must have done this with fraudulent intent to conceal his true financial condition. *Third*, he must have done this in contemplation of bankruptcy.

First, what constitutes destroying,[78] concealing,[79] or failing[80] to have kept books of account or records is a question of fact to be determined from the circumstances of each particular case.

The object of this provision is to furnish and preserve evidence of the real condition of the bankrupt's affairs, so that all of the bankrupt's proper assets and liabilities may be ascertained and his property distributed among his *bona fide* creditors. If a competent person, upon an examination of the books and records kept by the bankrupt, is able to reach a substantially correct conclusion as to the state of his affairs, it is enough, or if the business of the bankrupt was such that

[77] B. A. 1898, Sec. 14*b*. See amendment of Feb. 5, 1903, 32 Stat. at L. 797.

[78] *In re* McBachron, 116 Fed. Rep. 783, 8 Am. B. R. 732. See *In re* Pierson, No. 11153, Fed. Cas., s. c. 10 N. B. R. 107.

[79] Consult *In re* Jewett, 3 Fed. Rep. 503; *In re* Carrier, 47 Fed. Rep. 438.

To conceal includes to secrete, falsify and mutilate. B. A. 1898, Sec. 1, clause 22. See also *in re* Pierson, No. 11153, Fed. Cas., s. c. 10 N. B. R. 107.

[80] Consult *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160; *In re* Brockway, 12 Fed. Rep. 69; *In re* Vernia, 5 Fed. Rep. 723; *In re* Williams & Leidig, 13 Fed. Rep. 30; *In re* Hammond, No. 5999, Fed. Cas., s. c. 1 Low. 381; *In re* White, No. 17532, Fed. Cas., s. c. 2 N. B. R. 590; *In re* Bellis, No. 1275, Fed. Cas., s. c. 4 Ben. 53; *In re* Gay, No. 5279, Fed. Cas., s. c. 2 N. B. R. 358; *In re* Frey, 9 Fed. Rep. 376; *In re* Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95.

ordinarily books would not be kept, he need not have kept them.[81]

The destruction of partnership books is ground for the refusal of a discharge to a bankrupt individually.[82] The offense can not be imputed, so a failure to keep books by a husband who manages the business for his wife will not prevent a discharge being granted the wife if she is innocent,[83] and a failure to keep books by a partner, if it prevents the discharge of an innocent partner at all, does so only when the transactions not recorded had reference to partnership transactions so as to fall within the scope of the partner's authority.[84]

Two principal objections are liable to be raised in respect to books of account and records.

First, that proper books were not kept by the bankrupt, or, if kept, have been destroyed or concealed so that it is impossible to determine his financial condition. Thus it was held under the former statute in some cases that it was necessary to keep a cash book,[85] and a stock or invoice book,[86] and a shipping book,[87] and other accounts than mere sales made on credit.[88]

Second, that the books have been so negligently kept that it is impossible to determine the bankrupt's true financial condition from them. Congress has not attempted to prescribe any particular system or principle of bookkeeping. The system may be double entry or single entry. The form and manner in which the books are kept is unimportant so long as the financial condition of the bankrupt may be ascertained from them. The degree of accuracy and particularity re-

[81] *In re* Corn, 106 Fed. Rep. 143, 5 Am. B. R. 478.

[82] *In re* Conley, 120 Fed. Rep. 42, 9 Am. B. R. 496.

[83] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4; *In re* Hyman, 97 Fed. Rep. 195, 3 Am. B. R. 169.

[84] *In re* Schultz, 109 Fed. Rep. 264, 6 Am. B. R. 91.

[85] *In re* Bellis, No. 1275, Fed. Cas., s. c. 4 Ben. 53; *In re* Gay, No. 5279 Fed. Cas., s. c. 2 N. B. R. 358.

See also *in re* Smith, 16 Fed. Rep. 468.

[86] *In re* White, No. 17532, Fed. Cas., s. c. 2 N. B. R. 590; *In re* Brockway, 12 Fed. Rep. 69.

[87] *In re* Hammond, No. 5999, Fed. Cas., s. c. 1 Low. 381.

[88] *In re* Vernia, 5 Fed. Rep. 723.

quired depends in a great degree upon the circumstances of each case.[89]

Second. In order to defeat a discharge, in proceedings begun before Feb. 5, 1903, the destroying, concealing, or failing to keep books of account or records must be with fraudulent intent to conceal his true financial condition.[90] Where the bankrupt acts honestly, without intent to deceive or defraud, he is entitled to a discharge, although he may have destroyed or neglected to keep books through inadvertence, ignorance or mistake. In this respect the present statute differs from the law of 1867. Under the provision of that statute no intent to deceive or defraud was essential to bar a discharge. A simple failure to keep books of account was all that was necessary to defeat a discharge under the act of 1867.[91] Since the amendment of the present act,[92] the intent need no longer be fraudulent, there must merely be an intent to conceal his financial condition. The amendment also leaves out the word "true" as qualifying the bankrupt's financial condition.

A fraudulent intent on the part of the bankrupt is not ordinarily capable of direct proof. It must usually be determined from the acts of the bankrupt and the circumstances on each particular case.

Third. In order to defeat a discharge, in proceedings begun before Feb. 5, 1903, the destroying, concealing, or failing to keep books of account or records must be in contemplation of bankruptcy.[93] What is meant by the words "in contemplation of bankruptcy" has been the subject of a good deal

[89] *In re* Feldstein, 115 Fed. Rep. 259, 8 Am. B. R. 160; *In re* Greenburg, 114 Fed. Rep. 773, 8 Am. B. R. 94; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; *In re* Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; *In re* Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402; *In re* Ablowich, 99 Fed. Rep. 81, 3 Am. B. R. 586; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re* Studebaker, 124 Fed. Rep. 945.

[90] B. A. 1898, Sec. 14*b*; *In re* Idzall, 96 Fed. Rep. 314, 2 Am. B. R. 741; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Spear, 103 Fed. Rep. 779, 4 Am. B. R. 617; *In re* Brice, 102 Fed. Rep. 114, 4 Am. B. R. 355.

[91] *In re* Hunt, 26 Fed. Rep. 739; *In re* Jorey, No. 7530, Fed. Cas., s. c. 2 Bond, 336; *In re* White, No. 17532, Fed. Cas., s. c. 2 N. B. R. 590.

[92] 32 Stat. at L. 797.

[93] B. A. 1898, Sec. 14*b*.

of discussion and difference of judicial opinion in this country and in England.[94] In some cases it has been held to mean in contemplation of insolvency, or a simple inability to pay as debts should become payable. In other cases it has been held that the debtor must contemplate an act of bankruptcy or a voluntary application for the benefit of the bankrupt law. The most authoritative definition of these words in this country is contained in the opinion in Buckingham v. McLean.[95] In that case the supreme court decided that the words "in contemplation of bankruptcy," did not mean "in contemplation of insolvency"— or a simple inability to pay as debts should become due and payable — but meant that the debtor must contemplate the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be declared a bankrupt. This has been followed under the present act.[96]

It may be conceived that if any of the acts mentioned above were done or omitted to be done after an act of bankruptcy had been committed, or after a petition in bankruptcy

[94] As used in the act of 1841, see Buckingham v. McLean, 13 How. 151; Arnold v. Maynard, No. 561, Fed. Cas., s. c. 2 Story, 349; Hutchins v. Taylor, No. 6953, Fed. Cas., s. c. 5 Law Rep. 289; Wakeman v. Hoyt, No. 17051, Fed. Cas., s. c. 5 Law Rep. 309; Ashby v. Steere, No. 576, Fed. Cas., s. c. 2 W. & M. 347; Everett v. Stone, No. 4577, Fed. Cas., s. c. 3 Story, 446; Collins v. Hood, No. 3015, Fed. Cas., s. c. 4 McLean, 186; Atkinson v. Farmers' Bank, No. 609, Fed. Cas., s. c. Crabbe, 529; Jones v. Sleeper, No. 7496, Fed. Cas., s. c. 2 N. Y. Leg. Obs. 131; Dennett v. Mitchell, No. 3789, Fed. Cas., s. c. 6 Law. Rep. 16; Morse v. Godfrey, No. 9856, Fed. Cas., s. c. 3 Story, 346; Carr v. Hilton, No. 2436, Fed. Cas., s. c. 1 Curtis, 230.

Under the act of 1867, see *In re* Goldschmidt, No. 5520, Fed. Cas., s. c. 3 Ben. 379; *In re* Freeman, No. 5082, Fed. Cas., s. c. 4 Ben. 245; *In re* Black, No. 1457, Fed. Cas., s. c. 2 Ben. 196; *In re* Craft, No. 3316, Fed. Cas., s. c. 2 Ben. 214, affirmed, No. 3317, Fed. Cas., s. c. 6 Blatch. 177; Rison v. Knapp, No. 11861, Fed. Cas., s. c. 1 Dill. 186; *In re* Wolfskill, No. 17930, Fed. Cas., s. c. 5 Saw. 385; *In re* Wright, No. 18071, Fed. Cas., s. c. 2 N. B. R. 490.

Under the English acts, see Morgan v. Brundrett, 5 B. & Ad. 296; Atkinson v. Brindall, 2 Bing. N. C. 225; Abbott v. Burbage, 2 Scott, 656; Strachan v. Barton, 11 Exch. 647; Gibson v. Boutts, 3 Scott, 229, cited at 4 M. & G. 169; Poland v. Glyn, 4 Bing. 22, n., s. c. 12 J. B. Moore, 109, n.; *Ex parte* Simpson, De Gex, 9.

[95] 13 How. 168.

[96] *In re* Marx, 102 Fed. Rep. 676; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527.

had been filed, the bankrupt would come within the meaning of the words "in contemplation of bankruptcy." This question has never been directly presented for decision under the former bankrupt acts.

This third requirement is done away with by the amendment.[97]

§ 281. Pleading to a specification.

As has been stated, the filing of a specification of grounds of opposition to a bankrupt's discharge in the bankruptcy proceedings is in the nature of a new suit. It calls for pleading by the bankrupt.[98]

Where the allegations of the specification are vague and general he may move to have them stricken out,[99] or he may rely upon this defense at the time of the hearing, for the court will disregard vague and general allegations.[100] If the allegations are insufficient in law he may file exceptions to them analogous to those allowed in equity,[101] or he may demur.[102] Where the bankrupt desires to make a general defense, as by confession and avoidance, or otherwise, he may do so by answer.

When a bankrupt has been allowed to file his petition for discharge more than a year after adjudication insufficient grounds for the delay should be seasonably set up by motion to vacate.[103]

§ 282. The hearing of objections to a discharge.

The statute provides that "the judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be

[97] 32 Stat. at L. 797.

[98] See *ante*, sec. 276.

[99] *In re* Waggoner, No. 17037, Fed. Cas., s. c. 1 Ben. 532.

[100] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Parish, 122 Fed. Rep. 553.

[101] *In re* Rosenfield, No. 12057, Fed. Cas., s. c. 2 N. B. R. 116; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Robinson, 123 Fed. Rep. 844.

[102] *In re* Burk, No. 2156, Fed. Cas. s. c. Deady, 425; *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257.

[103] *In re* Haynes & Sons, 122 Fed. Rep. 560.

heard, and investigate the merits of the application."[104] It would seem from this provision that congress intended the application to be heard and determined by the judge,[105] although he can refer it to a referee to report the facts.[105] The act of 1867 provided that "the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court."[106] This was construed to mean a trial by jury.[107]

It is regularly the duty of the bankrupt to move the court to set the case down for hearing. If the bankrupt is dilatory in bringing the matter on for hearing, the creditor may move the court to set down the matter for hearing upon the petition and his objections.[108]

Upon the hearing, proofs are introduced in support of and against the specification of grounds of opposition to the discharge. The burden of proof is upon the persons objecting to the discharge.[109] The proofs in support of the specification should be confined to proving the allegations contained in it. The opposing party is bound by them and can not go beyond them and produce evidence outside of them.[110] A creditor may be estopped by his own consent to an act from proving it against his debtor on the question of his discharge,[111] or may be barred from objecting to his discharge by laches.[112] The court may allow an amendment of the specification at the

[104] B. A. 1898, Sec. 14*b*. See also Sec. 19, B. A. 1898.

[105] Watson v. McDuff, 101 Fed. Rep. 241, 4 Am. B. R. 110.

[106] R. S. Sec. 5111. See also Sec. 19c, B. A. 1898.

[107] Morgan v. Thornhill, 11 Wall. 65, 77; *In re* Holst, 11 Fed. Rep. 856; *In re* Lawson, No. 8151, Fed. Cas., s. c. 2 N. B. R. 396.

[108] *In re* Sutherland, No. 13640, Fed. Cas., s. c. Deady, 573.

[109] *In re* Boasberg, 1 Nat. Bank News, 133, s. c. —Fed. Rep. —; *In re* Herdic, 1 Fed. Rep. 242; *In re* Nooman, No. 10291, Fed. Cas., s. c. 3 N. B. R. 267; *In re* Frey, 9 Fed. Rep. 376; *In re* Jewett, 3 Fed. Rep. 503; *In re* Okell, No. 10475, Fed. Cas., s. c. 2 N. B. R. 105; *In re* George, No. 5325, Fed. Cas., s. c. 1 Low. 409; *In re* Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95.

[110] *In re* Rosenfield, No. 12057, Fed. Cas., s. c. 2 N. B. R. 116.

[111] *In re* Sawyer, No. 12394, Fed. Cas., s. c. 2 Hask. 337; *In re* Schuyler, No. 12494, Fed. Cas., s. c. 3 Ben. 200; *In re* Kraft, 3 Fed. Rep. 892; Johnson v. Rogers, No. 7408, Fed. Cas., s. c. 15 N. B. R. 1; Judson v. The Courier Co., 8 Fed. Rep. 422.

[112] Kentucky National Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822.

time of the hearing if justice requires it.[113] Where the creditors, filing the specification, withdraw their opposition to the discharge, under the former act in some districts, other creditors were permitted to take up the opposition and prosecute the matter as if they had originally filed the specification.[114] This is true under the present act at least where the withdrawal was without notice to the other creditors.[115]

Counsel may be heard in support of and in opposition to the specification. The court thereupon considers the merits of the application for a discharge in view of the grounds upon which it is opposed, and passes an order in accordance with justice, either granting or refusing to grant the bankrupt a discharge.

§ 283. The order granting a discharge.

It is the duty of the court to discharge the applicant unless he has committed one of the acts specifically set out as a reason for refusing the discharge.[116]

These are the only grounds on which the court can refuse a discharge, except that the judge may refuse it when the court is without jurisdiction of the proceedings.[117] An honest bankrupt is regularly entitled to a discharge, which releases him from all his provable debts, except such as are expressly excepted by the statute.[118] The court will not seek for grounds for refusing a discharge unless they are properly presented by the parties.[119] If the parties do not raise objections, the court will consider them to consent to the discharge, or that no reason exists for not granting it. The confirmation of the composition with creditors operates as a discharge of the bankrupt.[120]

[113] *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Bellis, No. 1275, Fed. Cas., s. c. 4 Ben. 53.

[114] See *In re* Houghton, No. 6730, Fed. Cas., s. c. 10 N. B. R. 337. Compare B. A. 1898, Sec. 59*f*.

[115] *In re* Dietz, 97 Fed. Rep. 563, 3 Am. B. R. 316.

[116] B. A. 1898, Sec. 14*b*, and amendment of Feb. 5, 1903, 32 Stat. at L. 797; Official Form No. 59; see Form No. 164 *post*.

[117] See *ante*, Sec. 278.

[118] B. A. 1898, Sec. 17, and Sec. 1, clause 12.

[119] *In re* Schuyler, No. 12494, Fed. Cas., s. c. 3 Ben. 200; *In re* Rosenfield, No. 12057, Fed. Cas., s. c. 2 N. B. R. 116; *In re* Frey, 9 Fed. Rep. 376.

[120] B. A. 1898, Sec. 14*c*; Sec. 250, *ante*.

An order denying a discharge to a bankrupt is a bar to a second application in the same bankruptcy proceedings.[121]

§ 284. The general nature and effect of a discharge.

A discharge in bankruptcy is in the nature of a personal privilege granted to a debtor in consideration of his yielding up all of his property for distribution among his creditors. It does not extinguish the bankrupt's liability. It is a release from the unpaid balance of debts existing at the time the petition was filed, which may be pleaded in bar of any action upon a debt so released.[122] Where no discharge is granted there is no release, and the unpaid balance of a debt may be recovered.[123] Bankruptcy proceedings alone do not operate to bar suits.

§ 285. The effect of a discharge upon liens.

The effect of a discharge is to release the personal liability only. It does not effect liens upon his property. If they are valid, under the laws of the state and the bankrupt act, they may be enforced after a discharge is granted.

Thus a judgment which has become a lien on property will continue to be so,[124] but if the judgment is merely a personal liability it is released by a discharge. In an action to enforce a mechanic's lien or mortgage the discharge will not bar the proceedings except as to a personal judgment for a deficiency.[125] A vendor's lien for the purchase price of prop-

[121] *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Royal, 113 Fed. Rep. 140, 7 Am. B. R. 636.

[122] See Pleading a discharge, Sec. 298, *post.*

[123] Dingee v. Becker, No. 3919, Fed. Cas., s. c. 9 N. B. R. 508; Greenwald v. Appell, 17 Fed. Rep. 140; Whitney v. Crafts, 10 Mass. 23. See also *In re* Sweet, 36 Fed. Rep. 761.

[124] Blum v. Ellis, 73 N. C. 293; Peck v. Jenness, 7 How. 612; Crosby v. Wentworth, 48 Mass. 10; McCullough v. Caldwell, 5 Ark. 237; McCance v. Taylor, 10 Grat. (Va.) 580; Bates v. Tappan, 99 Mass. 376; Bowman v. Harding, 56 Me. 559; Leighton v. Kelsey, 57 Me. 85; Ingraham v. Phillips, 1 Day (Conn.) 117; Jones v. Lellyett, 39 Ga. 64.

[125] Second Nat'l Bank v. State Nat'l Bank, 10 Bush. (Ky.) 367; Reed v. Bullington, 49 Miss. 223; Scott v. Ellery, 142 U. S. 381; Pierce v. Wilcox, 40 Ind. 70; Roberts v. Wood, 38 Wis. 60; Stewart v. Anderson, 10 Ala. 504; Truitt v. Truitt, 38 Ind. 16; City Bank v. Walton, 5 Rob. (La.) 158.

erty sold may be enforced after a discharge, provided such lien is recognized by the state laws.[126] Nor can a discharge be pleaded when the question in issue is one of title to property.[127]

Where property of the bankrupt has been attached by legal proceedings prior to the period of four months next preceding the commencement of proceedings in bankruptcy, a judgment may be entered in the court in which such judgment is pending, to be enforced against the property attached, even though the discharge is pleaded in bar of the further maintenance of the judgment suit.[128] In such cases the judgment can not be enforced against the person of the bankrupt. It was held under the former act that where a suit has been begun before a petition in bankruptcy had been filed, a person might prosecute a suit to enforce a lien upon property fraudulently conveyed by the bankrupt, even though a discharge is pleaded in bar of the suit.[129]

The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt is not altered by the discharge of the bankrupt.[130]

§ 286. The effect of a discharge on foreign creditors.

A discharge under the national bankruptcy act of the United States operates to release a bankrupt from all his provable debts, except certain debts enumerated in the statute.[131] A discharge operates as a release from any such debt or liability, wherever it has been contracted or arisen,[131*] throughout the several states and territories of the United

[126] Lewis v. Hawkins, 23 Wall. 119.

[127] Berry v. Jackson (Ga.), 8 Am. B. R. 485.

[128] Doe v. Childress, 21 Wall. 642; Bates v. Tappan, 99 Mass. 376; Ingraham v. Phillips, 1 Day (Conn.) 117; Bowman v. Harding, 56 Me. 559; Leighton v. Kelsey, 57 Me. 85. See also *In re* Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Remington Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533.

[129] Fetter v. Cirode, 4 B. Mon. (Ky.) 482; Payne v. Able, 7 Bush. (Ky.) 344; Lowry v. Morrison, 11 Paige (N. Y.) 327.

[130] B. A. 1898, Sec. 16. See sec. 296, *post*.

[131] B. A. 1898, Sec. 17, and amendment of 1903, 32 Stat. at L. 798; Sec. 292, *post*.

[131*] Zarega's Case, No. 18204, Fed. Cas., s. c. 4 L. R. 480; Ruiz v. Eickerman, 5 Fed. Rep. 790; Pattison v. Wilbur, 10 R. I. 448.

States.[132] It may be set up as a defense in bar of any action, upon a debt thereby released, in any court, either state or federal, within the United States.[133] The reason for this is that the territorial effect of a discharge is coextensive with power of the legislature enacting the law. It may be possible that a foreigner can not enforce a claim in the courts of this country, although he may be able to enforce it in a foreign court.

The rule of comity of nations is that a discharge from any debt or liability under the bankrupt law of the country where the debt or liability has been contracted or has arisen, or possibly where it is to be paid or satisfied, will be recognized as a discharge or satisfaction everywhere.[134] "The rule was laid down by Lord Mansfield in Ballantine vs. Golding, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere."[135] Hence a discharge obtained in a court of bankruptcy in the United States, releasing a debt or obligation contracted or incurred in the United States, will be recognized as a discharge of that debt or liability in any country. Thus where a debtor and creditor both resided in the United States where the debt was created and where the discharge was granted, and afterwards both parties became residents of England, and a suit was there commenced against the debtor on the original indebtedness, the discharge was held a bar to re-

But see Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

[132] Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225.

[133] See Pleading a discharge, Sec. 298, *post*.

[134] Story on Conflict of Laws, Sec. 340; Dicey on Conflict of Laws, 449.

[135] Lord Ellenborough in Potter v. Brown (1804), 5 East, 130.

In Ellis v. McHenry, 6 L. R. C. P. 234, Bovill, C. J. (1871), applying this principle to the British Colonies, said: "In the first place there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in Burrows v. Jemino, 2 Stra. 733; by Lord Mansfield, in Ballantine v. Golding, Cook's Bk. Law, 419; by

covery.[136] The same rule with reference to a discharge in the states has been applied in Canada.[137] The authorities seem to recognize no distinction with reference to the residence of the parties to the contract, whether between citizens or between citizens and a foreigner, or between foreigners.[138]

A discharge from any debt or liability under the national bankrupt act of this country will not be recognized as a release of a debt or liability which has not been contracted or arisen, and is not to be paid or satisfied in this country.[139] It has been held in England that a contract made in England is not discharged under an insolvent act of one of the United States so as to bar a suit upon contract in the English courts.[140]

Where a foreigner comes into a court of bankruptcy for the purpose of proving a debt, he thereby submits himself to the jurisdiction of the court. A discharge in such case will probably bar the foreigner's claim asserted in either a domestic or foreign court.[141] But where a foreigner does not prove his debt in a court of bankruptcy, and has not knowledge of the proceedings, his debt is not barred in any court by the discharge.[142]

Where a discharge does not release a debt or claim under the national bankruptcy act, such debt or claim is not released in any other country.

§ 287. The effect of a foreign discharge on American debts.

The same principles which have been stated in the last section as governing the effect of an American discharge in a

Lord Ellenborough, in Potter v. Brown, 5 East, 124; by the Privy Council, in Odwin v. Forbes, Buck. 57; in Quelin v. Moisson, 1 Knapp, 265, 6, n.; by the court of Queen's Bench, in Gardner v. Houghton, 2 B. & S. 743; and by the Court of Exchequer Chamber, in Phillips v. Eyre, L. R. 6 Q. B. 1.

[136] Potter v. Brown, 5 East, 124.

[137] Ohlemacher v. Broek, 44 Upper Canada Rep. 366.

[138] Story on Conflict of Laws, Sec. 340.

[139] Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435; Ellis v. McHenry, L. R. 6 C. P. 228.

See also Bartley v. Hodges, 1. B. & S. 375; Story on Conflict of Laws, Sec. 342; Dicey on Conflict of Laws, 451.

[140] Smith v. Buchanan, 1 East, 6, 11. See also Lewis v. Owen, 4 B. & Ald. 654; Phillips v. Allan, 8 B. & Ald. 477.

[141] Consult Peck v. Hibbard, 26 Vt. 698; Phelps v. Borland, 103 N. Y. 406.

[142] B. A. 1898, Sec. 17, clause 3;

foreign country are true with reference to the effect of a foreign discharge in the United States. Thus it has been held that a discharge under a foreign law was no bar to an action on a contract made in this country.[143] Where a person voluntarily submits himself to the jurisdiction of the court granting the discharge, to prove his claim and participates in the proceedings, he is bound thereby, and the courts of this country will recognize the discharge as a bar to an action upon a debt released thereby.[144] The courts of this country will also recognize the binding force of a discharge under a foreign law, releasing a debt or liability which had been contracted or had arisen in that country.

There are many cases decided in the federal and state courts which apply to discharges granted by the courts of one state when sought to be asserted against the citizens of another.[145] These cases can not be considered authority in determining the effect of a discharge between sovereign states unrestricted by constitutional limitations. All of these cases turned upon the peculiar structure of the constitution of the United States prohibiting the states from passing laws impairing the obligation of contracts. This limitation upon state legislatures has been discussed in another place.[146]

§ 288. In what court the effect of a discharge is determined. A discharge in bankruptcy discharges the bankrupt from all debts and claims, which are made provable against his estate, and which existed on the day the petition was filed,

Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

[143] McMillan v. McNeill, 4 Wheat. 209; Green v. Sarmiento, No. 5760, Fed. Cas., s. c. 3 Wash. C. C. 17.

[144] Peck v. Hibbard, 26 Vt. 698; Phelps v. Borland, 103 N. Y. 406.

[145] Gilman v. Lockwood, 4 Wall. 409; Baldwin v. Hale, 1 Wall. 223; Baldwin v. Bank, 1 Wall. 234; Ogden v. Saunders, 12 Wheat. 358-369; Boyle v. Zacharie, 6 Pet. 348; Felch v. Bugbee, 48 Me. 9; Anderson v. Wheeler, 25 Conn. 603; Whitney v. Whiting, 35 N. H. 457; Murphy v. Manning, 134 Mass. 488; Hicks v. Hotchkiss, 7 John. Chan. (N. Y.) 297; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; Savoye v. Marsh, 10 Met. (Mass.) 594; Producers Bank v. Farnum, 5 Allen (Mass.) 10; Dunlap v. Rogers, 47 N. H. 281; Pierce v. O'Brien, 129 Mass. 314; Towne v. Smith, No. 14115, Fed. Cas., s. c. 1 Wood. & M. 115.

[146] Sec. 11, *ante*.

excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.[147]

The court of bankruptcy decides whether or not a discharge shall be granted, and if granted, it has the sole power to entertain a proceeding to vacate the same. It does not construe the extent of the discharge with reference to particular debts of the bankrupt.[148] That inquiry is properly to be made only by the court in which a direct suit on the debt is pending, and when the discharge is properly pleaded in bar of the particular debt.[149] The court in which such a direct suit is pending and the discharge pleaded does not modify the order of the court of bankruptcy. Its inquiry should be, is the debt sued on a debt which is released by the discharge pleaded? If it is released under the bankrupt act, the plea should be sustained and the action dismissed. If such court determines that it is a debt not released by the discharge, the plea is bad and should be overruled.

§ 289. What debts are released by a discharge.

A discharge in bankruptcy releases a bankrupt from all of his provable debts,[150] whether allowable or not,[151] except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as

[147] Official Form No. 59; see Form No. 164, *post.*

[148] *In re* Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592.

[149] *In re* Rosenberg, No. 12054, Fed. Cas., s. c. 3 Ben. 14.

In re Wright, No. 18065, Fed. Cas., s. c. 2 Ben. 509, Judge Blatchford said: "There is nothing in the proof of debt in this case which can in any manner conclude or prejudice any party in any tribunal so far as regards the issue of fraud in contracting the debt."

[150] B. A. 1898, Sec. 17.

[151] Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am.

an officer or in any fiduciary capacity. By the amendment of Feb. 5, 1903, the second exception was changed to read, "are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation." [152] This exception does not apply when the proceedings were commenced before the above date.

Debts only which are provable are in any case released by a discharge.[153] In order, therefore, to be discharged it must come within one of the classes enumerated in the statute as being provable against the estate of the bankrupt.[154] Such are debts which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liqui-

B. R. 225. See also *In re* Horstein, 122 Fed. Rep. 266.

[152] 32 Stat. at L. 798.

[153] Consult Murray v. De Rottenham, 6 John. Chan. (N. Y.) 52; Monroe v. Upton, 50 N. Y. 593; Glenn v. Howard, 65 Md. 40; Bush v. Cooper, 18 How. 82; Riggin v. Magwire, 15 Wall. 551; Porter v. Lazear, 109 U. S. 84.

[154] B. A. 1898, Sec. 63.

See also Provable debts, Chap. XIII.

dated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

The inquiry of the court, to which is presented the question of whether a debt is barred or not, should be, *first,* is the debt one which was provable in bankruptcy? and *second,* is such debt included in the exceptions specified in section 17? If the debt is a provable one and is not one included in these exceptions it is in all cases released by a discharge. This applies even to debts the discharge from which was denied under former bankruptcy or insolvency proceedings.[155] What are provable debts is the subject of a separate chapter.[156] An unliquidated claim which might have been liquidated and proved under Sec. 63*b* is discharged.[157] The liability of a sheriff for an escape of the bankrupt is not a debt owed by the bankrupt and therefore is not released by the bankrupt's discharge.[158] What is included in the exceptions is considered in the next few sections following.

§ 290. The effect of a discharge on debts due the United States.

The act expressly excepts from the effect of a discharge debts due as taxes levied by the United States, the state, county, district or municipality in which the bankrupt resides.[159]

Whether a debt due the United States, or one of the states, other than taxes, is released by a discharge under the present act, is not free from difficulty. It was held that a debt due the United States was not barred by a bankrupt's certificate of discharge under the act of 1800,[160] or under the act of 1867,[161] where it was extended to a surety on the bond of a

[155] *In re* Bybee, 124 Fed. Rep. 1011; Dean v. Justices, 173 Mass. 453. There is a *dictum contra* in *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128, and it seems to have been held the other way under the Act of 1867 (*In re* Drisco, Fed. Cas. No. 4090, 2 Low. 430), but it is hard to see how, under the plain wording of Sec. 17 of the present act the debt can be otherwise than discharged.

[156] Chap. XIII.

[157] *In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.

[158] Baer v. Grell, 6 Am. B. R. (N. Y.) 428.

[159] B. A. 1898, Sec. 17, clause 1.

[160] U. S. v. King, No. 15536, Fed. Cas., s. c. Wall. Sen. 13.

[161] U. S. v. Herron, 20 Wall. 251;

public officer.[162] The ground of this rule was that a discharge will not release the debtor from a debt due the sovereign, unless the sovereign is expressly named in the clauses relating to discharge of debts. This rule is recognized in England.[163]

The leading case in this country upon this subject is U. S. v. Herron.[164] The reasoning of the court in that case would appear to apply with equal force to the act of 1898. There are, however, two points of distinction to be noted between the act of 1867 and the act of 1898 with reference to this opinion. In the act of 1867 there was no provision in the clause relating to discharges with reference to the United States, but the fifth class of claims entitled to priority[165] provided that "nothing contained in this title shall interfere wih the assessment and collection of taxes by the authority of the United States or any state." It is clear that that provision is the same in import as clause 1 of section 17 of the present act. The only difference noticeable is the position the clauses occupy in the two acts. In the act of 1898 it is in the section relating to discharges. Does this rule *expressio unius, exclusio alterius* apply to exclude all debts due the United States except for taxes?

In section 57*j* the act provides that debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. This provision is a limitation upon the rights of the sovereign.

U. S. v. Rob Roy, No. 16179, Fed. Cas., s. c. 1 Woods, 42; Smith v. Hodson, 50 Wis. 279; Hamilton v. Reynolds, 88 Ind. 191.

[162] U. S. v. Herron, 20 Wall. 251, overruling U. S. v. Throckmorton, No. 16516, Fed. Cas., s. c. 8 N. B. R. 309; U. S. v. Davis, No. 14929, Fed. Cas., s. c. 3 McLean, 483.

[163] Anon., 1 Atk. 262; Rex v. Pixley, Bunbury, 202; Craufurd v. Attorney General, 7 Price, 5; 1 Deacon's Bankruptcy, 784.

Sec. 150 of the English bankruptcy act of 1883, 46 and 47 Vic., Chap. 52, provides that "save as herein provided the provisions of this act relating to . . . a discharge shall bind the Crown."

[164] 20 Wall. 251.

[165] R. S. Sec. 5101, which embraces a part of Sec. 28 of the original act.

Were it not for this provision the debtor would be liable for the whole amount of the penalty. It can not be contended but what the United States may or may not prove its debts in the bankruptcy proceedings.[166]

It would seem therefore that these two points of difference can hardly be urged as sufficient to take the present act out of the general rule announced and followed in U. S. v. Herron. It would seem that if congress had intended a departure from the general rule relating to the sovereign not being bound by the provisions of a bankrupt statute, which has long been recognized in England and in this country, it would have expressed its intention more clearly in this respect.

By a similar course of reasoning many of the state courts reached the same conclusion with reference to debts due a state. Such debts were held not barred by a discharge in bankruptcy either under the act of 1841 or the act of 1867.[167]

§ 291. The effect of a discharge upon judgments against the bankrupt.

A discharge releases all judgments, provable in bankruptcy, except such as are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.[168] Subject to these exceptions, judgments entered prior to the filing of the petition, granted in actions founded in contract, are discharged.[169] Since the amendment of 1903 it is immaterial whether or not the claim is in the form of a judgment, as the word "judgments" has been omitted and "liabilities" substituted. If it is a liability for obtaining property by false pretenses or false representations, or for

[166] Lewis v. The United States, 92 U. S. 618; Bayne v. United States, 93 U. S. 642; Harrison v. Sterry, 5 Cranch, 289.

[167] Commonwealth v. Hutchinson, 10 Pa. St 466; Saunders v. The Commonwealth, 10 Grat. (Va.) 494; Connecticut v. Shelton, 47 Conn. 400; Johnson v. The Auditor, 78 Ky. 282. But see Jones v. The State, 28 Ark. 119.

[168] B. A. 1898, Sec. 17, clause 2. As to what judgments are provable, see Sec. 115, *ante*.

[169] B. A. 1898, Sec. 63, clause 1; Sec. 115, *ante;* Blake v. Bigelow, 5 Ga. 437; Comstock v. Grout, 17 Vt. 512; *In re* Comstock, 22 Vt. 642; *In re* Sidle, No. 12844, Fed. Cas., s. c. 2 N. B. R. 220; Duncan v. Hargrove, 22 Ala. 150.

wiilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female or for criminal conversation, it is not discharged.[170] The discharge of debts created by fraud is now covered only by clause 4.

Judgments and decrees are not released, where they are in the nature of penalties or fines, imposed for wrongful or criminal acts, or to enforce a moral or natural duty. Such are judgments imposing a fine for contempt,[171] or directing the payment of certain sums periodically, for the support of a bastard or other child,[172] or in actions for seduction,[173] or directing the payment of alimony.[174] These judgments are not deemed debts within the meaning of that word as used in bankruptcy.[175] The amendment to 1903 expressly excludes such liabilities from those to which a discharge will be a release. A verdict is not a judgment,[176] and the report of a referee or master is equivalent to the verdict of a jury.[177]

[170] 32 Stat. at L. 798.

[171] People v. Spalding, 10 Paige (N. Y.) 284, s. c. 4 How. 21; Macey v. Jordan, 2 Dem. (N. Y.) 570. See also *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590; but see *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

[172] Dunbar v. Dunbar, 190 U. S. 340; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101; *In re* Cotton, No. 3269, Fed. Cas., s. c. 2 N. Y. Leg. Obs. 370; Comm. v. Erisman, 21 Pitts. L. Jour. 69.

[173] *In re* Cotton, No. 3269, Fed. Cas., s. c. 2 N. Y. Leg. Obs. 370; Nassau v. Parker, 2 Penn. L. Jour. 298. Such cases are put on the ground of not being judgments for willful and malicious injury. *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; Distler v. McCauley, 35 Misc. (N. Y.) 411, 6 Am. B. R. 491; so also of a judgment for criminal conversation, Colwell v. Tinker, 35 Misc. (N. Y.) 330, 6 Am. B. R. 434.

[174] Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829; Barkley v. Barkley, 184 Ill. 375; Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289, *In re* Shephard, 97 Fed. Rep. 187; *In re* Houston, 94 Fed. Rep. 119, 2 Am. B. R. 107, is *contra* in regard to alimony due but no longer represents the law; *In re* Garrett, No. 5252, Fed. Cas., s. c. 2 Hughes, 235.

As to a judgment for breach of promise, see *In re* Sidle, No. 12844, Fed. Cas., s. c. 2 N. B. R. 220; Alling v. Egan, 11 Rob. (La.) 244.

[175] See Sec. 110, *ante*.

[176] Kellogg v. Schuyler, 2 Denio (N. Y.) 73; Nassau v. Parker, 2 Penn. L. Jour. 298; Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829; Barkley v. Barkley, 184 Ill. 375.

[177] Crooch v. Gridley, 6 Hill (N. Y.) 250.

Judgments founded upon provable debts, which have been entered after the filing of the petition and before the consideration of the bankrupt's application for a discharge, are released to the same extent as judgments entered prior to the commencement of the bankruptcy proceedings. Such judgments are made provable debts under the present act,[178] and therefore discharged under section 17. Under the act of 1867 there was a conflict of opinion among the judges as to whether a judgment entered after the commencement of bankruptcy proceedings and before the discharge was granted was a provable debt or not. Some judges held that the original debt was merged in the judgment and the original debt extinguished; and some judges held to the contrary. The supreme court finally held that, notwithstanding the change in its form from that of a simple contract debt or unliquidated claim, or whatever its character may have been, by merger, into a judgment of a court of record, it still remained the same debt on which the action was brought and the existence of which was provable in bankruptcy and therefore discharged.[179] This is the rule in cases arising under the present act.

Where a judgment is entered upon a debt, whether provable or not, after a discharge has been granted, it is not released by the discharge. The reason for this is that the discharge does not extinguish the debt and can only be used as a defense to the action. Where it is not set up as a defense it is waived.[180] If the discharge is pleaded and the judgment rendered against the bankrupt the adjudication is in effect that the discharge is not a sufficient defense.

Judgments Expressly Excepted by the Statute.—The statute expressly excepts from the effect of a discharge judgments in three classes of cases,[181] namely: Judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.

[178] B. A. 1898, Sec. 63, clause 5.

[179] Boynton v. Ball, 121 U. S. 457, 466.

[180] Dimock v. Revere Copper Co., 117 U. S. 559; McDonald v. Davis, 105 N. Y. 508; Park v. Casey, 35 Tex. 536; Mechanics Bank v. Hazard, 9 Johns. (N. Y.) 392; Desobry v. Morange, 18 Johns. (N. Y.) 336. See also Pleading a discharge, Sec. 298, *post*.

[181] B. A. 1898, Sec. 17, clause 2.

These judgments may be proved in bankruptcy and a dividend paid out of the bankrupt's estate on such claims. The effect of this provision is merely to deprive the bankrupt of the privilege of pleading his discharge in an action for any balance of such judgments remaining unpaid. Such balance may be collected out of his after-acquired property.

First, a discharge does not release judgments in actions for frauds. The act of 1867 did not contain a similar exemption in terms. It was, however, held under that act that a judgment upon a debt fraudulently created did not merge the debt in the judgment so as to take it out of the provision in that act that "no debt created by fraud or embezzlement of the bankrupt shall be discharged."[182] It was held under that act that, where a judgment for a fraudulent debt created by two persons, one of whom afterwards received a discharge, and the other purchased the judgment, that he might enforce the judgment against the discharged bankrupt, as there could be no contribution between wrong-doers.[183] A debt created by fraud which has not gone to judgment is not released because of clause 4 of section 17.[184]

Whether a discharge is obtained in an action for fraud or not is a question for the court to determine, upon the inspection of the record, including the pleadings, and not one to be submitted to a jury.[185] Fraud must be the ground of the recovery of the judgment.[186]

The clause in regard to judgments for frauds was omitted from the amendment of 1903.[188]

Second, a discharge in bankruptcy does not release a judgment in an action for obtaining property under false pretenses or false representations.[187] The rules governing this class of judgments are the same generally as those relating to judgments in actions for frauds. The action must be founded

[182] R. S. Sec. 5117; *In re* Pitts, No. 11190, Fed. Cas., s. c. 19 N. B. R. 63; Warner v. Cronkhite, No. 17180, Fed. Cas., s. c. 6 Biss. 453. But see Palmer v. Preston, 45 Vt. 154.

[183] Balliett v. Seeley, 34 Fed. Rep. 300, reversing 27 Fed. Rep. 507.

[184] *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685 and cases cited.

[185] Flanagan v. Pearson, 42 Tex. 1.

[186] *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633.

[187] B. A. 1898, Sec. 17, clause 2; *In re* Pitts, No. 11190, Fed. Cas., s. c. 19 N. B. R. 63.

[188] 32 Stat. at L. 798.

upon the false pretenses or false representations. Incidental or immaterial false representations in connection with the transaction are not sufficient. They must have been essential to maintaining the action to avail to take the judgment out of the rule that judgments, provable in bankruptcy, are released by a discharge.

By the amendment of 1903 the word "judgments" was changed to read "liabilities."[188]

Third, a discharge in bankruptcy does not release judgments in actions for willful and malicious injuries to persons or property of another.[189]

The effect of this provision is not to except all judgments for torts from the effect of the discharge. In order that a judgment shall not be released, the injury to the person or property must have been willful and malicious. Seduction has been held to be a willful and malicious injury both to the female,[190] and to the father;[191] alienation of affections may also be a willful and malicious injury.[192] A judgment founded upon negligence without malice is not such a judgment. Such judgments undoubtedly are released by the discharge. Whether the act was willful and malicious must be determined by the record of the court in which the judgment was recovered. It is a question of law for the court, and should not be submitted to a jury.[193]

"Judgment" is here also changed to "liability" by the amendment of 1903.[194]

§ 292. **The effect of a discharge upon debts not scheduled.**

A discharge will not release a bankrupt from debts, which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.[195] Where the court has jurisdic-

[189] B. A. 1898, Sec. 17, clause 2.

[190] *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

[191] *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479.

[192] Leicester v. Hoadley, 9 Am. B. R. (Kas.) 318.

[193] See Flanagan v. Pearson, 42 Tex. 1.

[194] 32 Stat. at L. 798.

[195] B. A. 1898, Sec. 17, clause 3; *In re* Monroe, 114 Fed. Rep. 398, 7 Am. B. R. 706, Tyrrel v. Hammerstein, 6 Am. B. R. (N. Y.) 430; see also 1 C. C. New Series, Ohio, 469.

tion and the claims have been placed upon the schedule, or if omitted from it and the creditors have had notice or actual knowledge of the proceedings, the debt, if provable, is released by the discharge.

The rule established by the present act is quite different in many respects from that under the act of 1867. Under that act, if the notice required by the statute had been duly published, the discharge was held to bar the debt, although the name of the creditor was not placed on the schedule nor notice given to him.[196]

§ 293. Debts created by fraud or embezzlement.

A discharge in bankruptcy does not release a bankrupt from debts which were created by his fraud or embezzlement.[197] This is substantially a reenactment of the provision of the act of 1867 in this regard.[198] The effect to be given to this phrase was considered and fully settled by the supreme court in cases arising under the former act. The word "fraud" means "positive fraud, or fraud in fact — involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law." [199]

This phrase was held not to apply to a debt created by purchasing in good faith from an executor bonds belonging to his decedent's estate, at a discount, although such an act was held to be constructive fraud.[200] Nor does it include

[196] Hill v. Robbins, 1 Mich. (N. P.) 305; Thurmond v. Andrews, 10 Bush. 400; Payne v. Able, 7 Bush. 344; Blum v. Ricks, 39 Tex. 112; Symonds v. Barnes, 59 Me. 191; Hood v. Spencer, No. 6665, Fed. Cas., s. c. 4 McLean, 168; Knabe v. Hayes, 71 N. C. 109; Burnside v. Brigham, 49 Mass. 75; Fox v. Paine, 10 Ala. 523; Strong v. Clawson, 10 Ill. 346; Stern v. Nussbaum, 47 How. Pr. (N. Y.) 489; Campbell v. Perkins, 8 N. Y. 430; Morse v. Presby, 25 N. H. 299; Magoon v. Warfield, 3 Greene (Ia.) 293; Hubbell v. Cramp, 11 Paige, 310; Thomas v. Jones, 39 Wis. 124; Downer v. Dana, 22 Vt. 337; Russell v. Cheatham, 16 Miss. 703; Mitchell v. Singletary, 19 Ohio, 291; Pattison & Co. v. Oliver, 10 R. I. 448.

[197] B. A. 1898, Sec. 17, clause 4.

[198] R. S. Sec. 5117.

[199] *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633; Western Union Cold Storage Co. v. Hurd, 116 Fed. Rep. 442, 8 Am. B. R. 633; Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23; Burnham v. Pidcock (N. Y.), 5 Am. B. A. 590; *In re* Benedict (N. Y.), 8 Am. B. R. 463; Neal v. Clark, 95 U. S. 704; Strang v. Bradner, 114 U. S. 555; Palmer v. Hussey, 119 U. S. 96; Noble v. Hammond, 129 U. S. 65; Wolf v. Stix, 99 U. S. 1; Ames v. Moir, 138 U. S. 311; Upshur v. Briscoe, 138 U. S. 365.

[200] Neal v. Clark, 95 U. S. 704.

such fraud as the law implies from the purchase of property from a debtor with intent thereby to hinder and delay the creditors in the collection of their debts.[201] Nor does it apply to a debt created by a person asked to collect money for another without compensation, and to keep it until called for, and the money is collected, and, without actual fraud, is deposited to the credit of the collector with his own money, and he is afterwards forced into bankruptcy and effects a composition with his creditors.[202] Nor where a factor or commission merchant converts money received,[203] nor is a debt arising by an overpayment which the bankrupt refused to return on learning of the overpayment one arising in fraud.[204]

Where the claim is for damages on account of actual fraud or deceit, practiced by the debtor, the claim is not barred by a discharge.[205] Thus a private banker who accepts deposits with full knowledge of his own insolvency, concealing the fact from the depositor, is guilty of fraud and the debt is not released.[206] A debt is not barred by a discharge where goods are purchased with the intention of never paying for them, or by fraudulent representations at the time.[207] A discharge was held not to bar an action for a debt created by fraud, even where the creditor has proved his claim in the bankruptcy

[201] Wolf v. Stix, 99 U. S. 1.

[202] Noble v. Hammond, 129 U. S. 65; Zeperink v. Card, 11 Fed. Rep. 295.

[203] *In re* Benedict (N. Y.), 8 Am. B. R. 463; *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; Knott v. Putnam, 6 Am. B. R. 80, 107 Fed. Rep. 907; Bracken v. Milner, 104 Rep. 522, 5 Am. B. R. 23.

[204] Western Union Cold Storage Co. v. Hurd, 116 Fed. Rep. 442, 8 Am. B. R. 633.

[205] The court in Hargadine-McKittrick Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, seems to say that unless there is a judgment a claim for fraud is released, but see *contra In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685, and cases cited; *In re* Cole, 106 Fed. Rep. 837; *In re* Butts, 120 Fed. Rep. 966; Frey v. Torrey (N. Y.), 8 Am. B. R. 196, 75 N. Y. 40; Forsyth v. Vehmeyer, 177 U. S. 177, 3 Am. B. R. 807; Strang v. Bradner, 114 U. S. 555; Ames v. Moir, 138 U. S. 306; Hughes v. Oliver, 8 Pa. St. 426; Morse v. Hutchins, 102 Mass. 439; Stokes v. Mason, 10 R. I. 261. That the intent to deceive at the time the debt was contracted is essential, see Broadnax v. Bradford, 50 Ala. 270; Brown v. Broach, 52 Miss. 536.

[206] Frey v. Torrey (N. Y.), 8 Am. B. R. 196, 75 N. Y. S. 40.

[207] Forsyth v. Vehmeyer, 177 U. S. 177, 3 Am. B. R. 807; Stewart v. Emerson, 52 N. H. 301; *In re* Devoe, No. 3843, Fed. Cas., s. c. 1 Low. 251.

proceedings and received a dividend on it.[208] The act of 1867 provided that "the debt may be proved, and the dividend thereon shall be a payment on account of such debt." [209] The rule must be the same under the present act because the exemptions from the effect of a discharge relate to provable claims. It can not be contended that by proving a claim the creditor waives a right expressly given him by the statute.

It has been held that where a plaintiff sues on a contract he may reply to the plea of discharge that the debt was created by fraud.[210] The reason for this rule is that the plaintiff does not, by his replication, attempt to rescind, or invalidate, or renounce the contract, but he affirms it, and claims that the debt is a valid subsisting debt. In his petition he asserts a debt. In his reply he asserts the same debt. He avers the fraud, not to avoid the contract, but to show that the defendant can not avoid it; not to show that, by reason of the fraud, the debt declared upon was never created, but to show, being created, it was not discharged under the bankrupt act — not to show that there was any such debt but to show such a debt notwithstanding the discharge.

§ 294. Fiduciary debts.

A discharge does not release a bankrupt from debts which were created by him "while acting in any fiduciary capacity." [211]

This phrase is substantially a reenactment of the provision of the act of 1867 in this regard.[212] The effect to be given to the phrase "while acting in any fiduciary capacity" has been considered and fully settled by the supreme court in cases arising under the former acts. This phrase relates to special trusts, and does not include those trusts which the law implies from the contract, and which form an element in every agency and in nearly all the commercial transactions in the country. It is confined to technical trusts,[213] and the fiduciary character is not that which the debt gives rise to, but must exist inde-

[208] Frey v. Torrey (N. Y.), 8 Am. B. R. 196, 75 N. Y. S. 40; Stokes v. Mason, 10 R. I. 261.

[209] R. S. Sec. 5117.

[210] Stewart v. Emerson, 52 N. H. 301; Broadnax v. Bradford, 50 Ala. 270; Hamilton v. Reynolds, 88 Ind. 191.

[211] B. A. 1898, Sec. 17, clause 4.

[212] R. S. Sec. 5117.

[213] *In re* Benedict (N. Y.), 8 Am. B. R. 463; Bracken v. Milner, 104

pendently of it.[214] Thus a factor, commission merchant, or agent, who has sold property of his principal and has failed to pay over to him the proceeds is held not to owe to him a debt created in a fiduciary capacity.[215]

Under the act of 1867 a series of diverse rules by different courts arose on this subject. Some judges conceived that act to be broader in scope than the act of 1841,[216] and hence treated agents, factors, commission merchants, etc., as acting in a fiduciary capacity.[217] Other judges took the view that the act of 1867 used the phrase "acting in a fiduciary character" in the sense which it had received by construction in Chapman v. Forsyth under the act of 1841.[218] The effect of the decisions of the supreme court established the latter as the correct construction.[219] Thus, where a person, to secure a debt from himself, hypothecates securities which had been pledged to him to secure the obligation of another, and failed to return them when such obligation was discharged, was held not thereby to create a debt in a fiduciary capacity.[220]

Fed. Rep. 522, 5 Am. B. R. 23; Chapman v. Forsyth, 2 How. 202; Hennequin v. Clewes, 111 U. S. 676; Palmer v. Hussey, 119 U. S. 96, affirming 87 N. Y. 303.

[214] Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23.

[215] *In re* Benedict (N. Y.), 8 Am. B. R. 463; Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; Chapman v. Forsyth, 2 How. 202.

[216] In Sec. 1 of the act of 1841 (5 Stat. at L. 441), debts are not provable "which have been created in consequence of defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity," and hence were not released by a discharge because only provable debts were affected by the discharge (see Sec. 4 of the act of 1841).

R. S. Sec. 5117 provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

[217] *In re* Seymour, No. 12684, Fed. Cas., s. c. 1 Ben. 348; *In re* Kimball, No. 7769, Fed. Cas., s. c. 6 Blatch. 292; Whitaker v. Chapman, 3 Lans. (N. Y.) 155; Lemcke v. Booth, 47 Mo. 385; Gay v. Farran, 2 Cinn. Sup. Ct. 426; Meader v. Sharpe, 54 Ga. 125; Banning v. Bleakley, 27 La. Ann. 257.

[218] Woolsey v. Cade, 15 N. B. R. 238; Owsley v. Cobin, No. 10636, Fed. Cas., s. c. 15 N. B. R. 489; Cronan v. Cotting, 104 Mass. 245.

[219] Neal v. Clark, 95 U. S. 704; Hennequin v. Clewes, 111 U. S. 676. For a review of the authorities, see Upshur v. Briscoe, 138 U. S. 365.

[220] Hennequin v. Clewes, 111

A balance due on the subscription to capital stock of a corporation has been held not to be a fiduciary debt.[221] A sum of money to which a wife was entitled on the sale of certain real estate in partition proceedings was decreed to be paid to her husband to have the use of the interest and give bond for the payment of the principal at his death or when ordered to do so by the court. In an action to recover such a principal sum it was held that the liability incurred by the husband was incurred while acting in a fiduciary capacity, and was not discharged by proceedings in bankruptcy.[222]

EXECUTORS, TRUSTEES, GUARDIANS, ETC.— A discharge does not release a debt due by a testamentary trustee, executor, administrator, or guardian, as such. These are the special or technical trusts, which have been uniformly held to create obligations not released by a discharge. Thus it has been held to be a fiduciary debt where a sum of money is due from an executor, as such, to the residuary legatee,[223] or where a guardian fails to account for money belonging to his wards. In such cases a surety of the bankrupt, having paid his liability on a bond, may recover such amount from the bankrupt out of property acquired after the discharge.[224]

It should, however, be observed that the debt must be due from the trustee, executor, administrator, or guardian in his official capacity. An individual indebtedness, even though connected with the trust estate, is not a fiduciary debt. Thus, where a guardian gave his note under seal to the ward's husband in settlement of his account and received a release from them he was held not liable in a fiduciary capacity.[225] Where a note is given as new evidence of an old debt, without a release, no release of the debt is effected by the discharge.[226] Where an executor gave his personal guarantee of a claim of a creditor against the testate's estate the guarantee was held

S. 676; Palmer v. Hussey, 119 U. S. 96, affirming 87 N. Y. 303.

[221] Morrison v. Savage, 56 Md. 142.

[222] Mock v. Howell, 101 N. C. 443.

[223] Crisfield v. State, 55 Md. 192.

[224] Carlin v. Carlin, 8 Bush. (Ky.) 141; Halliburton v. Carter, 55 Mo. 435.

[225] Coleman v. Davies, 45 Ga. 489. See also Elliot v. Higgins, 83 N. C. 459.

[226] Madison v. Dunkle, 114 Ind. 262.

an ordinary debt and not one created while acting in a fiduciary capacity.[227]

Attorneys.— An attorney, who collects debts for a client, has been held to act in a fiduciary capacity, and will not be released by a discharge from his obligation to pay the money to his client.[228] Where an attorney acts as a gratuitous bailee, and his liability is merely for negligence in failing to return a note, he is released by a discharge.[229]

Officers.— A discharge in bankruptcy does not release a bankrupt from a debt which was created by his defalcation while acting as an officer.[230] Precisely who are included in the term "officer" can not be stated. It manifestly includes all public officers. A collector of city taxes is such an officer, and a debt due from him to the municipal corporation for taxes received and not accounted for is not discharged.[231] So where a retiring township trustee gave his note to his successor in satisfaction of a debt due the township for funds wrongfully appropriated to his own use, it was held that the debt was not so changed thereby as to be released by a discharge.[232] The mere negligence of a public officer in collecting moneys, which it is his duty to collect, has been held not to be a defalcation.[233]

Sureties on bonds of public officers are not within the exemption. It has been held that a discharge granted to a surety will release him from any liability actually incurred upon his bond, even though his principal is guilty of a defalcation.[234]

The phrase "while acting as an officer or in any fiduciary capacity," has been held to apply only to "defalcation," so

[227] Amoskeag Manufacturing Co. v. Barnes, 49 N. H. 312.

[228] Heffren v. Leroy, 39 Ind. 471; Heffren v. Jayne, 39 Ind. 463; Flanagan v. Pearson, 42 Tex. 1; White v. Platt, 5 Den. (N. Y.) 274. But see Wolcott v. Hodge, 81 Mass. 547; Williamson v. Dickens, 5 Ired. Law (N. C.) 259.

[229] McAdoo v. Lummis, 43 Tex. 227.

[230] B. A. 1898, Sec. 17, clause 4.

[231] Morse v. Lowell, 48 Mass. 152; Richmond v. Brown, 66 Me. 373.

[232] Madison v. Dunkle, 114 Ind. 262.

[233] Courtney v. Beale, 84 Va. 692.

[234] McMinn v. Allen, 67 N. C. 131; Steele v. Graves, 68 Ala. 21; Fowler v. Kendall, 44 Me. 448; Reitz v. The People, 72 Ill. 435; Jones v. Knox, 46 Ala. 53; Saunders v. Commonwealth, 10 Grat. (Va.) 494. But see U. S. v. Herron, 20 Wall. 251.

debts created by "fraud, embezzlement or misappropriation" are not released, although the bankrupt was not acting as an officer or in any fiduciary capacity.[235]

§ 295. **Debts created by misappropriation.**

It will be observed that clause 4 of section 17 is substantially a reenactment of the provision of the act of 1867,[236] with the addition of the word "misappropriation." It is a new word in bankrupt laws. It is not contained in the English statutes nor in the former United States statutes on the subject of bankruptcy.

It was manifestly inserted for some purpose. In view of the judicial construction of R. S. section 5117, it may be for the purpose of excluding from the effect of a discharge debts created by implied fraud. It was settled by the supreme court that "debts created by fraud" meant actual fraud.[237] It was also settled that fiduciary debts were thus created only in the discharge of a technical trust.[238] It follows from these two propositions, and the facts in the cases cited to support them, as well as in many other cases decided by the inferior courts, that a factor, agent, commission merchant, collecting agent, bailee or auctioneer was not acting in a fiduciary capacity with reference to their principals, and that the mere conversion of property in their hands without actual fraud was not a debt included within the statutory exemption from the effect of a discharge. Such debts were held to be discharged. It would therefore seem reasonable to conclude that the insertion of the word "misappropriation" was intended to bring debts of this character within the exemption from the effect of a discharge to the same extent as debts created by actual fraud or by a person acting in a fiduciary capacity. This view was taken by Laughlin, J., in Frey v. Torrey,[239] where he said: "We regard the addition of the word 'misappro-

[235] *In re* Butts, 120 Fed. Rep. 966; Frey v. Torrey (N. Y.), 8 Am. B. R. 196, 75 N. Y. S. 40.

[236] R. S. Sec. 5117.

[237] Neal v. Clark, 95 U. S. 704; Wolf v. Stix, 99 U. S. 1; Strang v. Bradner, 114 U. S. 555; Noble v. Hammond, 129 U. S. 65; Ames v. Moir, 138 U. S. 311; Upshur v. Briscoe, 138 U. S. 365.

[238] Chapman v. Forsyth, 2 How. 202; Hennequin v. Clews, 111 U. S. 676; Palmer v. Hussey, 119 U. S. 96.

[239] 8 Am. B. R. 196, 199, 75 N. Y. S. 40, 42.

priation' inserted in subdivision 4 of section 17 of the act of 1898, which was not in the former act, as quite significant and as designed to except from the discharge the classes of debts last referred to which were discharged under the former bankruptcy law." The opposite view, however, was taken by Brown, J., in *In re* Basch.[240] Other cases, without noticing in particular the word "misappropriation," also hold that debts of this class are not discharged.[241]

§ 296. Codebtors not discharged.

The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt, is not altered by the discharge of such bankrupt.[242]

This section applies to the discharge in bankruptcy, and does not refer to nor have in view any act of the parties effecting a release of liability in law or in equity.[243] The fact that one of the codebtors has received a discharge will not prevent the creditor from suing anyone else liable on the same debt; and proceedings pending against others, and unsatisfied judgments already obtained against others for the same debt, are not affected by a discharge or surrendered by proving the debt.[244] Thus the discharge of the maker in no way affects the endorser.[245] There is no obligation resting on the creditor to prove his claim in bankruptcy.[246] The bankrupt statute protects the surety in such cases.[247] The provision quoted above undoubtedly includes partners jointly liable, although they are not expressly mentioned in the section.[248] Where two general partners are discharged, a special partner

[240] 97 Fed. Rep. 761, 3 Am. B. R. 236.

[241] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Benedict (N. Y.), 8 Am. B. R. 463; Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23; *In re* Butts, 120 Fed. Rep. 966.

[242] B. A. 1898, Sec. 16. Compare R. S. Sec. 5118.

[243] *In re* McDonald, No. 8753, Fed. Cas., s. c. 24 Pitts. L. J. 42.

[244] *In re* Levy, No. 8297, Fed. Cas., s. c. 2 Ben. 169; Payne v. Abel, 7 Bush. (Ky.) 344; Moore v. Waller, 1 A. K. Marsh. (Ky.) 488; Bowery Savings Bank v. Clinton, 2 Sandf. (N. Y.) 113; Seldner v. Smith, 40 Md. 602; Phillips v. Solomon, 42 Ga. 192.

[245] King v. Central Bank, 6 Ga. 257; Clopton v. Spratt, 52 Miss. 251.

[246] Clopton v. Spratt, 52 Miss. 251.

[247] B. A. 1898, Sec. 57*i*.

[248] As to the effect of a discharge upon partners, see Sec. 102, *ante*. See also *in re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

can not avail himself of their discharge to bar an action against him on a firm obligation.[249]

The question of the effect of a discharge on the liability of sureties on bonds given by the bankrupt, to release property of his which had been attached, where the suit was pending at the time of the commencement of bankruptcy proceedings, was variously answered by the courts under the act of 1867. Some held when a discharge had been granted to a bankrupt, pending a suit in which a judgment on his property had previously been dissolved by the giving of a bond, no judgment could be subsequently entered against him or his sureties. Others held otherwise. The question came before the supreme court ten years after the bankrupt act had been repealed, in the case of Hill v. Harding.[250] It was held in that case that where the attachment of property in an action in the state court was dissolved by the defendant entering into a bond with sureties to pay any final judgment, and the defendant after a verdict against him obtained his discharge in bankruptcy, the bankrupt act did not prevent the state court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties. In that case the court said: "If the sureties should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal the amount so paid (which is a point not now in issue), it would be because his liability to them upon such a claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy nor barred by the discharge, and consequently would not be affected by any provision of the bankrupt act."

The statutory liability of officers and stockholders of a corporation, being in the nature of surety, is not released by the discharge of the corporation. The amendment of February 5, 1903, expressly provides that the bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any such liability.[251] A suit to enforce such statu-

[249] Abendroth v. Van Dolsen, 131 U. S. 66.

[250] 130 U. S. 699.

[251] B. A. 1898, Sec. 4 as amended, 32 Stat. at L. 974.

tory liability may be maintained against such officers or stockholders notwithstanding the fact that the corporation has obtained a discharge.[252] A court of bankruptcy may refuse to stay a suit against the corporation but may permit a judgment to be entered with stay of execution for the purpose of fixing the liability of the stockholders and officers, when such judgment is required as a condition precedent to maintaining suit to enforce the statutory liability of officers and stockholders.[253] A judgment against a corporation obtained after a discharge granted and pleaded in the suit is not such a judgment as is required by the Massachusetts statute as a condition precedent to maintain a suit to enforce the statutory liability of its officers and stockholders.[254] It is error for a state court to enter such a judgment.[254] But where the judgment is entered before the discharge is granted or when it is not pleaded it would seem to be a sufficient compliance with such statute.

A discharge does not have the effect of releasing a liability of a surety on an appeal bond while the appeal is pending,[255] or upon replevin bonds;[256] or upon an administrator's bond;[257] or upon an auctioneer's bond;[258] or upon jail bonds,[259] except where the bankrupt leaves the prison limits after he receives his discharge.[260] Where one of several cosureties is discharged, so that he is released from his liability as such, he is also released from the duty of contribution to his cosureties.[261]

One of several joint debtors discharged in bankruptcy may be made a party to a suit upon a debt from which he is discharged.[262] The reason for this is that the discharge is a personal privilege which he may or may not plead as a defense. If he does not plead his discharge a judgment may be entered against him.[263]

[252] Wood v. Vanderveer, 55 N. Y. App. Div. 549.

[253] *In re* Marshall Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533.

[254] Train v. Marshall Paper Co., 180 Mass. 513.

[255] Knapp v. Anderson, 71 N. Y. 466, affirming 7 Hun (N. Y.) 295; Hall v. Fowler, 6 Hill (N. Y.) 630.

[256] Flagg v. Tyler, 6 Mass. 33.

[257] Moore v. Waller, 1 A. K. Marsh. (Ky.) 488; Miller v. Gillespie, 59 Mo. 220.

[258] Jones v. Russell, 44 Ga. 460.

[259] Dyer v. Cleaveland, 18 Vt. 241; Claflin v. Cogan, 48 N. H. 411; Goodwin v. Stark, 15 N. H. 218.

[260] Kirby v. Garrison, 21 N. J. L. 179.

[261] Tobias v. Rogers, 13 N. Y. 59. But see Miller v. Gillespie, 59 Mo. 220.

[262] Jenks v. Opp, 43 Ind. 108; Camp v. Gifford, 7 Hill (N. Y.) 169.

[263] See Pleading a discharge, Sec. 298, *post.*

§ 297. The effect of a new promise upon a discharged debt.

As has been pointed out, the effect of a discharge is to release a bankrupt from his liability for provable debts.[1] He is not bound in law to pay any debt released by his discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience although discharged in law, and this moral obligation, together with a subsequent promise by the bankrupt to pay the debt, gives a right of action.[2]

There is considerable conflict in the decisions under the former bankrupt acts, as to whether the action should be founded on the original debt or on the new promise. Some judges were of the opinion that the discharge extinguished the debt, and the only cause of action was, therefore, on the new promise.[3] The better authority, however, is to the effect that the new promise revives a debt barred by the discharge, and that the creditor should declare on the original debt and not on the new promise.[4] If the debt were wholly extinguished by the discharge it is hard to see what consideration would support a new promise. Upon principle, therefore, it would seem that the new promise should be considered a waiver of the discharge as a defense.

Where there is no state law requiring the promise to pay a debt discharged in bankruptcy to be made in writing, the promise may be proved by parole, and when proved is binding.[5] An oral promise made before a statute requiring it to

[1] See General nature and effect of a discharge, Sec. 284, *ante*.

[2] Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Morse, 8 Mass. 127; Fletcher v. Neally, 20 N. H. 464; Herdon v. Givens, 16 Ala. 261; Blanc v. Banks, 10 Rob. (La.) 115; Williams v. Robbins, 32 Me. 181; Spooner v. Russell, 30 Me. 454.

[3] Eckler v. Galbraith, 12 Bush. (Ky.) 71; Carson v. Osborn, 10 B Mon. (Ky.) 155; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Hobough v. Murphy, 114 Pa. St. 358; Murphy v. Crawford, 114 Pa. St. 496; Fleming v. Lullman, 11 Mo. App. 104; Ross v. Jordan, 62 Ga. 298; Horner v. Speed, 2 Patt. & H. (Va.) 616.

[4] Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Morse, 8 Mass. 127; Marshall v. Tray, 74 Ill. 379; Badger v. Gilmore, 33 N. H. 361; Apperson v. Stewart, 27 Ark. 619; Riggs v. Roberts, 85 N. C. 151; Fraley v. Kelly, 67 N. C. 78.

[5] Hill v. Robins, 22 Mich. 474; Barron v. Benedict, 44 Vt. 518; Apperson v. Stewart, 27 Ark. 619.

be in writing is binding, and will defeat a defense of bankruptcy in actions subsequently brought.[1]

It is immaterial at what date a new promise is made. It is a sufficient consideration if the new promise is made before the discharge as well as after it.[2] It may, however, be doubted if a new promise would entitle a judgment creditor to sue execution on a judgment released by a discharge.[3] An original debt is revived only as of the date of the new promise.[4]

All the authorities agree that the promise by which a discharged debt is revived must be clear, distinct and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred, in case the promise be conditional. The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In any case acts or declarations recognizing the present existence of the debt have often been held to take the case out of the statute, but not so in the class of cases relating to new promises reviving debts discharged in bankruptcy. In order to revive a discharged debt the jury must be authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt.[5]

Thus it has been held to be a sufficient promise to support an action where a debtor promises "to settle" a liquidated demand concerning which there was no dispute between the parties,[6] or where a debtor declared that he was "able and willing to pay the debt,"[7] or the statement "I intend to pay," upon the happening of a particular event,[8] or any

[1] Williams v. Robbins, 32 Me. 181; Spooner v. Russell, 30 Me. 454. But see Kingley v. Cousins, 47 Me. 91.

[2] Jersey City Ins. Co. v. Archer, 122 N. Y. 376; Griel v. Solomon, 82 Ala. 85; Otis v. Gazlin, 31 Me. 567; Wheeler v. Wheeler, 28 Ill. App. 385.

[3] Shuman v. Strauss, 52 N. Y. 404. This case was dismissed on another ground.

[4] Willis v. Cushman, 115 Ind. 100.

[5] Allen v. Ferguson, 18 Wall. 1; Stewart v. Reckless, 24 N. J. L. 427; Fraley v. Kelly, 67 N. C. 78; Pratt v. Russell, 61 Mass. 462; Church v. Winkley, 73 Mass. 460.

[6] Stillwell v. Cope, 4 Denio (N. Y.) 225.

[7] Evans v. Carey, 29 Ala. 99.

[8] Dearing v. Moffitt, 6 Ala. 776.

agreement to pay or any word signifying an intention to pay or giving assurance that the debtor would pay (although he did not use the word promise),[1] or a promise "to pay the old debts as well as the new,"[2] or a promise to pay the debt he owed "when he shall be able."[3] It is not necessary that the new promise be made by the bankrupt to the creditor or his authorized agent.[4] It may be made to a third person. The refusal to give a new note is not inconsistent with a promise to pay an existing note.[5] A debt revived by a new promise may be enforced although it was proved in the bankruptcy proceedings.[6]

If the promise is not clear, distinct and unequivocal it does not revive a debt. It is necessary that there be an express promise or an expression by the debtor of a clear intention to bind himself to the payment of the debt.[7] It has been held not sufficient to constitute a new promise where the debtor merely expressed an intention to pay the debt,[8] or declared that he "expects" or "hopes" to pay as fast as he could,[9] or mere admissions of the debt or acknowledgment of the obligation,[10] or where he promised to give his note and did not execute it,[11] or where he has made partial payments,[12] or the mere payment of interest.[13] It has been held that the benefit of the new promise will not pass to the endorsee of a note to

[1] Harris v. Peck, 1 R. I. 262.

[2] Hornthal v. McRae, 67 N. C. 21.

[3] Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[4] Bennett v. Everett, 3 R. I. 152; Comfort v. Eisenbeis, 11 Pa. 13; Evans v. Carey, 29 Ala. 99; Haines v. Stauffer, 13 Pa. 541.

[5] Pratt v. Russell, 61 Mass. 462; Underwood v. Eastman, 18 N. H. 582. See also Horner v. Speed, 2 Patt. & H. 616.

[6] Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[7] Allen v. Ferguson, 18 Wall. 1; Fraley v. Kelly, 67 N. C. 78; Samuel v. Cravens, 10 Ark. 380; Sherman v. Hobart, 26 Vt. 60; Taylor v. Nixon, 4 Sneed (Tenn.) 352.

[8] Allen v. Ferguson, 18 Wall. 1; Stewart v. Reckless, 24 N. J. L. 427; Yoxtheimer v. Keyser, 11 Pa. 364; Dearing v. Moffitt, 6 Ala. 776; Church v. Winkley, 73 Mass. 460.

[9] Bartlett v. Peck, 5 La. Ann. 669.

[10] Prewett v. Caruthers, 20 Miss. 491; Bennett v. Everett, 3 R. I. 152.

[11] Porter v. Porter, 31 Me. 169.

[12] Stark v. Stinson, 23 N. H. 259; Viele v. Ogilvie, 2 Greene (Ia.) 326.

[13] Cambridge Inst. v. Littlefield, 60 Mass. 210.

whom it is susbequently endorsed, for the new promise is not negotiable.[1]

Where the debtor has promised to pay the debt after his discharge the creditor may bring his action upon the original demand and reply the new promise in avoidance of a plea of discharge.[2] A conditional promise and an unconditional promise may be joined in the same petition.[3] Where the words are capable of being construed as a promise it is for the jury to determine whether the bankrupt intended to promise to pay the debt,[4] or whether the promise was absolute or conditional in case the evidence is conflicting.[5]

§ 298. **Pleading a discharge.**

A discharge in bankruptcy may be pleaded in bar of an action founded upon a debt released by it. A state court does not lose jurisdiction of the person of a defendant by his being adjudged a bankrupt. A judgment may be rendered against him if he does not plead his discharge. Unless a defendant pleads his discharge he is deemed to have waived it as a defense.[6] No proceeding in bankruptcy can be pleaded in bar of an action upon ante-bankruptcy debts except the discharge.[7]

[1] Warwell v. Foster, 31 Me. 558; White v. Cushing, 30 Me. 267; Walbridge v. Harroon, 18 Vt. 448.

But see Way v. Sperry, 60 Mass. 238; Underwood v. Eastman, 18 N. H. 582.

[2] Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Norse, 8 Mass. 127.

In those states which held that the action must be brought upon the new promise and not upon the original debt a different rule exists. See Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Carson v. Osborn, 9 B. Mon. (Ky.) 155.

[3] Horner v. Speed, 2 Patt. & H. 616.

[4] Pratt v. Russell, 61 Mass. 462; Bennett v. Everett, 3 R. I. 152.

[5] La Tourrette v. Price, 28 Miss. 702.

[6] Dimock v. Revere, 117 U. S. 559, affirming 90 N. Y. 33; Horner v. Spelman, 78 Ill. 206; Seymour v. Browning, 17 Ohio, 362; Manwarring v. Kouns, 35 Tex. 171; Park v. Casey, 35 Tex. 536; Jenks v. Opp, 43 Ind. 108.

[7] Whitney v. Crafts, 10 Mass. 23; Atkinson v. Fortinberry, 15 Miss. 302; Hayes v. Flowers, 25 Miss. 169; Dick v. Powell, 2 Swan (Tenn.) 632; Ingalls v. Savage, 4 Pa. 224.

In Nat. Bank v. Taylor, 120 Mass. 124, the defendant was allowed a continuance of the suit upon filing a copy of an adjudication until his right to a discharge should be determined by the court of bankruptcy.

A discharge may be pleaded by the bankrupt,[1] or by a person who has derived title from the bankrupt subsequent to his bankruptcy,[2] but not by other persons.[3] A discharge of two general partners can not be set up in favor of a special partner in an action against the three as general partners on the ground that the special partner has made himself liable as a general partner.[4] Where a bankrupt joins his sureties in pleading his discharge, if the plea is insufficient for them all, it is bad for all.[5]

In what pleading, answer or plea, the defense of a discharge may be set up depends upon the practice relating to particular action and court in which it is pleaded. A plea of discharge is sufficient if it sets out a discharge duly authenticated.[6] A certified copy of an order confirming a composition or granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[7]

Where a discharge has been granted before the suit on the debt is commenced the plea of discharge should be set up in the first instance. The court will not permit it to be set up by amendment, unless a good excuse for omitting it is shown. Where a discharge is granted pending the suit the defense of discharge in bankruptcy is regularly permitted to be set up by amendment or supplemental answer or other proper plead-

[1] Boynton v. Ball, 121 U. S. 457; Banque Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Ruiz v. Eickerman, 5 Fed. Rep. 790.

[2] Upshur v. Briscoe, 138 U. S. 365; Fleitas v. Mellen, 39 Fed. Rep. 129; Fleitas v. Richardson, 147 U. S. 550.

As to the effect of a discharge granted a *feme sole* who marries, see Chadwick v. Starrett, 27 Me. 138.

[3] Moyer v. Dewey, 103 U. S. 301, as explained in Upshur v. Briscoe, 138 U. S. 378; Frazier v. Banks, 11 La. Ann. 31.

[4] Abendroth v. Van Dolson, 131 U. S. 66.

[5] Dyer v. Cleaveland, 18 Vt. 241; Hall v. Fowler, 6 Hill (N. Y.) 630.

[6] McNeil v. Knott, 11 Ga. 142; Rowan v. Holcombe, 16 Ohio, 463; Downer v. Chamberlin, 21 Vt. 414; Morrison v. Woolson, 23 N. H. 11; Preston v. Simons, 1 Rich. (S. Car.) 262; Lathrop v. Stuart, No. 8113, Fed. Cas., s. c. 5 McLean, 167; White v. How, No. 17549, Fed. Cas., s. c. 3 McLean, 291.

[7] B. A. 1898 Sec. 21*f*; Boas v. Hetzel, 3 Pa. 298; Morse v. Cloyes, 11 Barb. (N. Y.) 100; Pennell v. Percival, 13 Pa. 197.

ing.[1] It will not be allowed, however, where application to amend is not seasonably made.[2] Where a discharge is granted after a judgment has been entered it is usually unavailing as a defense.[3] But judgments by default have frequently been set aside to allow a plea of discharge.[4] An execution should not issue upon a judgment after the debtor has obtained a discharge.[5] If an execution is isued it may be perpetually stayed.[6]

Where a discharge is not granted until the case is in an appellate court it will not avail the defendant ordinarily as a defense,[7] because there is no way in which it can be brought before the court. It has been held, however, that the appellate court might enter a judgment *pro forma* where a discharge was suggested.[8]

§ 299. Revoking discharges.

The statute provides that "the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge

[1] Richards v. Nixon, 20 Pa. 19; Lyon v. Isett, 34 N. Y. Supr. 41; Holyoke v. Adams, 59 N. Y. 233; Fellows v. Hall, No. 4722, Fed. Cas., s. c. 3 McLean, 281; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; Keene v. Mould, 16 Ohio, 12.

In Nat. Bank v. Taylor, 120 Mass. 124, the defendant filed an order of adjudication in the state court and was permitted to have a continuance to await the determination of the question of whether he received a discharge.

[2] Medbury v. Swan, 46 N. Y. 200; Barstow v. Hansen, 2 Hun (N. Y. Supr.) 333.

[3] Dimock v. Revere, 117 U. S. 559.

[4] Savings Bank v. Webster, 48 N. H. 21; Lee v. Phillips, 6 Hill (N. Y.) 246; Carter v. Goodrich, 1 How. Prac. (N. Y.) 239; Shurtleff v. Thompson, 63 Me. 118; Park v. Casey, 35 Tex. 536; Manwarring v. Kouns, 35 Tex. 171.

[5] Francis v. Ogden, 22 N. J. L. 210; Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Hill v. Harding, 130 U. S. 699; Wolf v. Stix, 99 U. S. 1.

[6] Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Thomas v. Shaw, 2 Cin. Sup.Ct. 97; Chambers v. Neal, 13 B. Mon. (Ky.) 256; McDougald v. Reid, 5 Ala. 810; Curtis v. Slosson, 6 Pa. 265; Graham v. Pierson, 6 Hill (N. Y.) 247; Stewart v. Hargrove, 23 Ala. 429; Bank v. Franciscus, 10 Mo. 27.

[7] Wolf v. Stix, 99 U. S. 1; Wolf v. Stix 96 U. S. 541; Cornell v. Dakin, 38 N. Y. 253; Riggs v. White, 4 Heisk. (Tenn.) 503; Longley v. Swayne, 4 Heisk. (Tenn.) 506.

[8] Bank v. Onion, 16 Vt. 470; Haggerty v. Morrison, 59 Mo. 324.

shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge." [1]

This provision prescribes the forum, the time within which and the grounds upon which direct proceedings to impeach a discharge may be had. The remedy thus given is exclusive. The application must be made to the court which granted the discharge. The order of discharge can not be questioned or attacked collaterally in any other court, either state or federal.[2] A certified copy of the order granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceeding, and of the fact that the order was made.[3]

The application must be made by a party in interest. A creditor, whose name has been omitted from the schedule, and who has had no notice or knowledge of bankruptcy proceedings, has not such an interest as will enable him to institute proceedings to vacate a discharge. The reason for this is that his debts are not affected by the discharge.[4] The fact that a creditor is barred from proving his claim by Sec. 57*n* does not prevent him from being a party in interest.[5]

The application must be filed within one year after the discharge has been granted, and by one who has not been guilty

[1] B. A. 1898, Sec. 15 and Sec. 2, clause 12.

Compare R. S. Sec. 5120. The act of 1841 provided that a discharge might be impeached in all courts of justice for certain causes and in the manner in the act stated. (Act of 1841, Sec. 4, 5 Stat. at L. 440.) Under the act of 1800 discharge might be impeached when pleaded as a defense. (Act of 1800, Sec. 34, 2 Stat. at L. 19.)

[2] Corey v. Ripley, 57 Me. 69; Oates v. Parish, 47 Ala. 157; Ocean National Bank v. Olcott, 46 N. Y. 12; Dusenbury v. Hoyt, 53 N. Y. 521; Reed v. Bullington, 49 Miss. 223; Way v. Howe, 108 Mass. 502; Alston v. Robinett, 37 Tex. 56; Beardsley v. Hall, 36 Conn. 270; Smith v. Ramsey, 27 O. S. 339; Seymour v. Street, 5 Neb. 85; Commercial Bank v. Buckner, 20 How. 108; Black v. Blazo, 117 Mass. 17; Parker v. Atwood, 52 N. H. 181.

But see Batchelder v. Low, 43 Vt. 662; Poillon v. Lawrence, 77 N. Y. 208.

[3] B. A. 1898, Sec. 21*f*; Allen v. Thompson, 10 Fed. Rep. 116; *In re* Adams, 29 Fed. Rep. 843.

[4] B. A. 1898, Sec. 17, clause 3; *In re* Monroe, 114 Fed. Rep. 398, 7 Am. B. R. 706.

[5] *In re* Bimberg, 121 Fed. Rep. 942, 9 Am. B. R. 601.

of undue laches.[6] Where the petition is not filed within one year from the date of the discharge it is absolutely barred by the statute.[7] The limitation is not in any way controlled by the discovery of the fraud.[8] A person will not be permitted to amend his application after the expiration of one year from the date of the discharge by adding new grounds or acts.[9]

What causes such laches on the part of the applicant as to prevent his making an application within a year from the granting of a discharge depends upon the circumstances of each case.[10] Mere averments by the creditor that he has not been guilty of laches are not sufficient.[11]

The application is made by petition, addressed to the judge and filed in the clerk's office, and not with the referee. It should state the names and residences of the creditors and their interest in the matter; the date upon which the order of discharge was made; the particular acts complained of as fraudulent on the part of the bankrupt; that the knowledge of the fraud has come to the petitioners since the granting of the discharge; that the actual facts did not warrant a discharge; and pray that the discharge be annulled and set side. The petition should be signed and verified[12] by the creditors or their authorized agent or attorney.

[6] B. A. 1898, Sec. 15.

[7] Mall v. Ullrich, 37 Fed. Rep. 653.

[8] Pickett v. McGavick, No. 11126, Fed. Cas., s. c. 14 N. B. R. 236; *In re* Brown, No. 1983, Fed. Cas., s. c. 19 N. B. R. 312.

[9] *In re* Sims, 9 Fed. Rep. 440.

[10] *In re* Upson, 124 Fed. Rep. 980; *In re* Murray, No. 9953, Fed. Cas., s. c. 14 Blatch. 43, five months was held an unreasonable delay under the circumstances of that case. See also *in re* Beck, 31 Fed. Rep. 554; *In re* Hunter, No. 6902, Fed. Cas., s. c. 3 McLean, 297.

In *in re* Dupee, No. 4183, Fed. Cas., s. c. 2 Low. 18, Judge Lowell reopened a decree of discharge where the date had been set for hearing an application for discharge upon specification of objections, and a discharge granted in the absence of the creditors, upon a showing that their counsel was unavoidably prevented from being present and from informing them in order that they might obtain a postponement.

In re McIntire, No. 8823, Fed. Cas., s. c. 2 Ben. 345, a specification of objections to a discharge had been filed, which was, however, too vague to be triable, and a discharge had been granted. An application one month afterward to have the case reopened, with leave to amend the specification, was denied on the ground of laches.

[11] *In re* Oleson, 110 Fed. Rep. 796, 7 Am. B. R. 22.

[12] B. A. 1898, Sec. 18*c*.

The procedure on such a petition is not prescribed by act or the general orders. The bankrupt should have reasonable notice of the filing of such petition in order to give him an opportunity to make a defense, if any he has. This he may do by demurrer if the petition is not sufficient in law. He should set up his defense on the merits in an answer or a plea. The time within which such pleading should be filed may be fixed by the judge. When an issue is made, the case is ripe for a hearing or trial. This may be had before the judge or a jury.[13] Evidence may be introduced by the petitioning creditors and by the bankrupt, and counsel heard for both parties.

The fact that a creditor can adduce new facts happening since the discharge, which would be competent evidence for a new trial, does not authorize a rehearing or a new trial upon specifications filed in opposition to the discharge of a bankrupt, heard and determined before the discharge.[14]

There is only one ground specified in the statute upon which a discharge can be revoked; and that is, that the discharge "was obtained through the fraud of the bankrupt."[15] The creditor has the right to have the discharge set aside when such fraud was used in obtaining it as would have prevented the granting of the discharge if it were known at the time.[16] It may be doubted if constructive fraud is sufficient to maintain an application to revoke a discharge. It should

[13] B. A. 1898, Sec. 19*c*.

[14] *In re* Corwin, 1 Fed. Rep. 847; *In re* McIntire, No. 8823, Fed. Cas., s. c. 2 Ben. 345.

But see *in re* Dupee, No. 4183, Fed. Cas., s. c. 2 Low. 18, where a case was reopened after discharge granted.

[15] B. A. 1898, Sec. 15.

[16] *In re* Roosa, 119 Fed. Rep. 542, 9 Am. B. R. 531; *Ex parte* Briggs, No. 1868, Fed. Cas., s. c. 2 Low. 389; *In re* Rainsford, No. 11537, Fed. Cas., s. c. 5 N. B. R. 381; *In re* Fowler, No. 4999, Fed. Cas., s. c. 2 Low. 122; *In re* Douglass, 11 Fed. Rep. 403.

In re Augenstein, 2 MacArthur (D. C.) 322, the court said: "The fraud of the bankrupt in relation to his property is too clear for doubt or discussion. He is shown to have possessed considerable property, of which he gives no rational account, no assets came to the hands of the assignee, and his wife, when interrogated as to how she came to have a large sum of money, refused to give any explanation. The traces of fraud are apparent upon the slightest examination of the evidence, and little or nothing need be said upon the subject."

be actual fraud as distinguished from fraud in law. The courts have set aside decrees of discharge, which were entered either through mistake or by default.[17]

A discharge will not be vacated unless the court is satisfied that the creditor or his representatives had no knowledge of the objections at the time the discharge was granted.[18] Where an attorney has knowledge of objections it will be presumed that the client knows the same facts.[19]

If the court finds that the fraudulent acts alleged are not proved, or that they were known to the creditors before the granting of the discharge, the judgment should be rendered in favor of the bankrupt.[20] In such case the validity of his discharge is not affected by the proceedings. If the court finds that the fraudulent acts, or any of them, alleged by the creditor in his petition are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, and that the actual facts would not warrant the discharge, the judgment should be given in favor of the creditor and the discharge of the bankrupt should be annulled.

Costs may be awarded to the prevailing party in such a proceeding.[21]

§ 300. The effect of revoking a discharge.

The effect of annulling an order granting a discharge renders the discharge invalid as a defense to actions upon debts of the bankrupt. Where it is pleaded, the order revoking it is a good answer to the plea. If the judgment of the court is in favor of the bankrupt the validity of his discharge is not affected by the proceedings to revoke it.

The granting of a discharge is in no way dependent upon the settlement of the bankrupt's estate.[22] It may therefore

[17] *In re* Amory & Leeds, No. 336*a*, Fed. Cas., s. c. Betts Scr. Bk. 97; *In re* Dupee, No. 4183, Fed. Cas., s. c. 2 Low. 18.

[18] B. A. 1898, Sec. 15; *In re* Bates, 27 Fed. Rep. 604; Marionneaux's Case, No. 9088, Fed. Cas., s. c. 1 Woods, 37; *In re* Douglass, 11 Fed. Rep. 403.

[19] *In re* Douglass, 11 Fed. Rep. 403.

[20] *In re* Hoover, 105 Fed. Rep. 354, 5 Am. B. R. 247.

[21] *In re* Holgate, No. 6601, Fed. Cas., s. c. 8 Ben. 355.

[22] B. A. 1898, Sec. 14.

be granted and revoked before the estate is settled and the original trustee discharged. Where this is the case a new trustee is not necessary. Otherwise the creditors of the bankrupt estate may, at their first meeting after a discharge has been revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court should do so.[23] Whenever a discharge is revoked, the trustee, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt as of the date of the final decree revoking the discharge.[24]

In the event of a discharge being revoked, the property acquired by the bankrupt, in addition to his estate at the time the adjudication was made, shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[25]

[23] B. A. 1898, Sec. 44.

[24] B. A. 1898, Sec. 70*d*; McAlpine v. Tourtelotte, 24 Fed. Rep. 69.

[25] B. A. 1898, Sec. 64*c*.

CHAPTER XXVII.

APPELLATE PROCEEDINGS.

§ 301. The appellate courts.

The statute confers appellate jurisdiction in bankruptcy upon three classes of existing courts as follows:[1] "The supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia." No other court, federal or state, has any appellate jurisdiction to review proceedings in a court of bankruptcy. The circuit courts have no such power under the present statute as they had under the act of 1867.[2]

§ 302. Appellate jurisdiction at law and in equity to revise the action of federal courts.

The bankrupt statute does not affect the appellate jurisdiction or procedure at law or in equity. Decrees in equity and judgments at law, although in controversies relating to bankruptcy, are revised by the appellate courts as before the passage of the act.[3]

The statute regulating the jurisdiction in cases from federal courts provides:[4]

[1] B. A. 1898, Sec. 24*a* and Sec. 1, clause 3. Compare R. S. Secs. 4980 to 4989.

[2] Compare R. S. Secs. 4980 to 4986.

[3] Bardes v. Hawarden Bank, 175 U. S. 526; s. c. 178 U. S. 524, 4 Am. B. R. 163; Scott v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 8 Am. B. R. 349; Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 8 Am. B. R. 521; Booneville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165; Burleigh v. Foreman (C. C. A. 1st Cir.), 11 Am. B. R. 74.

[4] Act of March 3, 1891, 26 Stat. at L. 826.

"SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[5]

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital [or otherwise infamous][6] crime.

"In any case that involves the construction or application of the constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

"Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.

"SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final[7] in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United

[5] In such cases there must be a certificate of the judge that only the question of jurisdiction was in issue and an appeal will not lie where other questions were also considered. Denver First Nat. Bank v. Klug, 186 U. S. 203; or where no final judgment has been entered. Bardes v. Bank, 175 U. S. 526; s. c. 178 U. S. 524, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 4 Am. B. R. 177.

For form of certificate and practice generally, see Loveland's Forms of Fed. Practice, Nos. 1334 to 1336.

[6] The words in brackets were stricken out by the act of January 20, 1897; 29 Stat. at L. 492.

[7] Spencer v. Duplan, 191 U. S. 526. Spreckles v. McClaim, 192 U. S. —.

States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.[8] And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The manner of proceeding to obtain a review of a decree or a judgment of a federal court, and the practice in respect thereto, is not changed or affected by the bankrupt statute. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall

[8] As was done in Hicks v. Knost, 178 U. S. 541; White v. Schloeb, 178 U. S. 542; Wall v. Cox, 181 U. S. 244; Wilson v. Nelson, 183 U. S. 191; Metcalf v. Barker, 187 U. S. 165; Elliott v. Toeppner, 187 U. S. 327; Randolph v. Scruggs, 190 U. S. 533.

be followed as nearly as may be.[9] In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be.[9]

§ 303. Appellate jurisdiction at law and in equity to revise the action of a state court.

The only federal court which can review the action of a state court in a suit at law or in equity is the supreme court of the United States. The cases in which the decision of a state court may be reviewed by the supreme court are pointed out in the Revised Statutes, section 709. It is immaterial whether the judgment or decree was rendered in a case arising in bankruptcy or not. The state courts have jurisdiction only of suits at law or in equity which may concern bankruptcy matters, and not cases in bankruptcy strictly. The courts of bankruptcy have exclusive jurisdiction in such cases.

The Revised Statutes provide for a review in three classes of cases, namely: Section 709 provides that:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined

[9] Gen Ord. 36.

As to the practice in obtaining a review of a proceeding at law and in equity in the appellate courts of the United States, see Beach's Mod. Eq. Prac., Secs. 954, *et seq.*; Foster's Fed. Prac., Chap. 33; rules of the circuit courts of appeals and of the supreme court; Desty's Fed. Prac.; Loveland's Forms Fed. Prac., Nos. 1308 to 1512, and notes thereto.

Cases in bankruptcy strictly. The courts of bankruptcy have exclusive jurisdiction in such cases.

and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; (*and the proceeding upon the reversal shall be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed*). [See R. S. Sec. 1017.]

"The supreme court may (*reaffirm*), reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

Unless a particular case relating to matters in bankruptcy falls within one of these classes it can not be revised in the supreme court.[10] Where a federal question is drawn in question and the decision of the highest court of a state to which the case may be taken is adverse to the federal authority or statute, that decision may be reviewed by the supreme court of the United States.

The supreme court has entertained cases in which the validity and effect of a discharge in bankruptcy was called in question, and the decision was against the debtor holding the discharge;[11] where the judgment of a state court was against the trustee in bankruptcy, in an action between him and the bankrupt, where the question at issue was whether the matter in controversy passed to the trustee or not;[12] where a sheriff was sued for moneys obtained by a sale, directed by the court of bankruptcy to be made in the state court, and the decision of the state court was adverse to that authority;[13] where the suit was for the foreclosure of a mortgage on real estate, when the only controversy in the case was as to the effect to

[10] McKenna v. Simpson, 129 U. S. 506; Boatman's Savings Bank v. State Savings Association, 114 U. S. 265; Wolf v. Stix, 96 U. S. 541; Scott v. Kelly, 22 Wall. 57; Linton v. Stanton, 12 How. 423.

[11] Dunbar v. Dunbar, 190 U. S. 340; Hennequin v. Clews, 111 U. S. 677; Strang v. Bradner, 114 U. S. 555; Neal v. Clark, 95 U. S. 704; Dimock v. Revere Copper Co., 117 U. S. 559; Long v. Bullard, 117 U. S. 617; Palmer v. Hussey, 119 U. S. 96; Jenkins v. International Bank, 127 U. S. 484.

[12] Williams v. Heard, 140 U. S. 529.

[13] O'Brien v. Weld, 92 U. S. 81.

be given to a sale of the property under an order of the court of bankruptcy to sell the bankrupt's mortgaged property free from encumbrances;[14] where a state court denied an application to stay a suit and rendered final judgment against the bankrupt;[15] and where an immunity was claimed by the appellant (under the Revised Statutes, section 711) from the operation of the decree of a state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases.[16]

The writs of error and appeals are taken from the decision of a state court in the same manner in a case, in which the federal question is one relating to bankruptcy matters, as in any other cases. The same rules govern the law and practice in such cases.[17]

§ 304. Jurisdiction of the U. S. supreme court of appeals in bankruptcy.

The supreme court of the United States has no original jurisdiction in bankruptcy. Nor does the statute provide for taking a case to that court on writ of error.

Power to reverse on appeal the action of other courts of the United States in bankruptcy is conferred upon the supreme court in the following cases:

First: From the Supreme Court of the District of Columbia.— The supreme court is invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.[18]

The manner of taking and prosecuting an appeal from such courts to the supreme court is prescribed by the general orders[19] as follows:

Appeals to the supreme court from the supreme court of the District of Columbia, or from any court of bankruptcy

[14] Factors, etc., Ins. Co. v. Murphy, 111 U. S. 738.

[15] Hill v. Harding, 107 U. S. 631.

[16] Winchester v. Heiskell, 119 U. S. 450.

[17] For practice, see Foster's Fed. Prac., Sec. 477. See Forms Nos. 166 to 175, *post*.

[18] B. A. 1898, Sec. 24, as in Audubon v. Shufeldt, 181 U. S. 575.

[19] Consult Sec. 313, *post*.

whatever, must be taken within thirty days after the judgment or decree, and must be allowed by a judge of the court appealed from, or by a justice of the supreme court;[20] and in every case, in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon stated separately,[20] and the record transmitted to the supreme court on such an appeal consists only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.[20]

When the case is in the supreme court it is governed by the general rules of practice of that court.[21]

SECOND: FROM THE CIRCUIT COURTS OF APPEAL.— The statute provides[22] that "from any final decision of a court of appeals, allowing or rejecting a claim under the act, an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States in the following cases and no other: *First,* where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States;[23] or, *second,* where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The supreme court has prescribed by rule 36 that appeals under the act to the supreme court from a circuit court of appeals, or from the supreme court of a territory, or from

[20] Gen. Ord. 36.

[21] Consult rules of the supreme court.

[22] B. A. 1898, Sec. 25*b*. This provision is considered at length by the Circuit Court of Appeals for the First Circuit in Hutchinson v. Otis, 10 Am. B. R. 275, 123 Fed. Rep. 14; s. c. on appeal, 190 U. S. 552, 10 Am. B. R. 135.

See also Holden v. Stratton, 191 U. S. 115; Spencer v. Duplan Silk Co., 191 U. S. 526.

[23] As was done in Jaquith v. Alden, 189 U. S. 78, 9 Am. B. R. 773; Hutchinson v. Otis, 190 U. S. 552; Page v. Edmunds, 187 U. S. 596; Pirie v. Trust Co., 182 U. S. 438.

any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the supreme court of the United States.

In every case in which either party is entitled by the act to take an appeal to the supreme court, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

When the case is in the supreme court it is governed by the general rules of practice of that court.[24]

§ 305. Writs of certiorari from the supreme court.

The bankrupt statute authorizes the supreme court of the United States "to issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." [25] This provision manifestly applies to controversies in bankruptcy cases. It clearly confers upon the supreme court the same power with reference to writs of *certiorari* in bankruptcy cases as that court has in other cases.

Under the laws of the United States now in force the supreme court is authorized to issue writs of *certiorari* for two purposes, namely: *First*, for the purpose of completing a record in a case pending in the supreme court; and, *second*, for the purpose of removing a case from a circuit court of appeals to be reviewed by the supreme court.

§ 306. Certiorari to complete records.

The Revised Statutes authorize the supreme court to "issue writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.[26]

[24] Consult the rules of the supreme court.

[25] B. A. 1898, Sec. 25*d*.

[26] R. S. Sec. 716.

Under this provision the writ of *certiorari* has not been used as freely by the supreme court as by the court of queen's bench in England.[27] It has been used as an auxiliary process only, to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court.[28] It has never been used to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court.[29]

The Evarts acts of March 3, 1891,[30] did not affect this power, and the supreme court may still issue writs of *certiorari* in proper cases.[31]

The circuit courts of appeals are vested, by the act creating them,[32] with the power to grant writs of *certiorari* for the purpose of supplying omissions or curing defects in a record in a case pending in one of these courts. Under this provision the circuit courts of appeals have frequently issued writs of *certiorari* for such purposes, although the cases are rarely, if ever, reported.

The application for a writ of *certiorari* to supply an omission or cure a defect in a record should be made to the court in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of *certiorari* to issue. The petition should be signed and verified. If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court be-

[27] *Ex parte* Vallandigham, 1 Wall. 243, 249.

[28] Luxton v. North River Bridge, 147 U. S. 337; U. S. v. Young, 94 U. S. 258; *Ex parte* Gordon, 1 Black, 503; Barton v. Pettit, 7 Cranch, 288; Beach's Mod. Eq. Prac., Sec. 963.

[29] *Ex parte* Hitz, 111 U. S. 766; Patterson v. U. S., 2 Wheat. 221; Fowler v. Lindsey, 3 Dall. 411; *In re* Tampa Suburban R. R. Co., 168 U. S. 583.

[30] 26 Stat. at L. 826

[31] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380. Sup. Ct., Rule 14.

In re Chetwood, 165 U. S. 443, a writ of *certiorari* was allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out writs of error and directing them, or either of them, to refrain from prosecuting the same, might be revised and annulled. This case is explained in Tampa Southern R. R. Co., 168 U. S. 587.

[32] Act of March 3, 1891, 26 Stat.

low, commanding it to return a true and complete record, including the omitted or defective parts, if any there be. The order also regularly contains a direction to the clerk of the appellate court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The appellate court will not undertake to make a record in the inferior court.

The writ of *certiorari* is regularly issued under the hand and seal of the clerk of the appellate court, and is transmitted to the clerk of the court below, together with the transcript and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is returned under the seal of the court. It is not necessary to have the return made by the judge.[33] It is regularly made by the clerk.

§ 307. Certiorari to remove a case for review.

The provision of the bankrupt statute, with reference to writs of *certiorari*,[34] clearly adopts the same rule, with reference to removing a bankrupt case for review by writs of *certiorari*, that applies to other cases. The authority for the supreme court to issue such writs is found in the act of March 3, 1891.[35] This being the case the rules announced in other cases, with reference to when such writs may properly issue, will be useful in determining under what circum-

at L. 826, Sec. 12, provides "that the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States." Rule 18, C. C. A., 90 Fed. Rep. clx. See also Loveland's Forms Fed. Prac., Nos. 1477 and 1478.

[33] Stewart v. Ingle, 9 Wheat. 526.

[34] B. A. 1898, Sec. 25*d*.

[35] 26 Stat. at L. 826, Sec. 6, which is quoted in full at page 791, Den-

stances the writ may issue in bankruptcy, for the purpose of removing a case from a circuit court of appeals to the supreme court to be there reviewed.

There is no authority for issuing a writ of *certiorari* to remove a case to the supreme court, except such as is found in the act of March 3, 1891.[36] The language of that act is very general. All that is essential is that the case be pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality. When these two elements exist, the supreme court may reach out of its writ of *certiorari* and transfer the case there for review and determination.[37]

The question at what stage of the proceedings, and under what circumstances the case should be required to be sent up for review, is left to the discretion of the supreme court, as the exigencies of each case may require.[38] The supreme court has declined to issue writs of *certiorari* in cases where, there being only a matter of private interest, there has been no final judgment in the circuit court of appeals,[39] and where there was a remedy by appeal or otherwise.[40] Although a writ of *certiorari* is not usually issued until after a circuit court of appeals has pronounced its judgment, the supreme court has issued a writ in one case,[41] appealed to a circuit court of appeals, before any action has been taken by that court. But this was a case involving questions affecting the relation of this country to foreign nations, the decision of which, by the highest court was important, not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he

ver National Bank v. Klug, 186 U. S. 202.

[36] 26 Stat. at L. 826; Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380.

[37] Forsyth v. Hammond, 166 U. S. 513.

[38] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380.

See also Harris v. Barber, 129 U. S. 368.

[39] Chicago & Northwestern Ry. Co. v. Osborne, 146 U. S. 354.

[40] *In re* Tampa Suburban Ry. Co., 168 U. S. 583, an application was made for a writ of *certiorari* to a circuit court, where there was a right of appeal to a circuit court of appeals.

See also Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, where there was a writ of *certiorari* and also an appeal.

[41] The Three Friends, 166 U. S. 1, as explained in Forsyth v. Hammond, 166 U. S. 513.

might not go in interfering in the affairs of another nation without violating the laws of this. The writ may be granted after the mandate of the circuit court of appeals has issued.[42]

§ 308. The application for writ of certiorari to remove a case to the supreme court.

The application for a writ of *certiorari* to remove a case from the circuit court of appeals to the supreme court must be made to the supreme court. The time within which the application must be made is not prescribed by the statute. It should, however, be made within a reasonable time after the final decision of the circuit court of appeals. One year is probably a reasonable time.[43]

The application is made by petition.[44] The style of the case in that court is A. B., petitioner, vs. C. D., respondent. The petition is filed in the office of the clerk of the supreme court, together with a deposit of twenty-five dollars on account of costs and an entry of appearance for the petitioning party, signed by a member of the bar of the supreme court. The case is then docketed. The petitioner must also file a certified copy of the entire record, including all the proceedings in the circuit court of appeals.[45] A sufficient number of the printed copies of this record (not less than ten) must also be furnished to supply the court. These printed copies may usually be obtained from the clerk of the circuit court of appeals. In case they can not be so obtained the record must be reprinted under the supervision of the clerk of the supreme court. In such cases it is usually desirable to print at least fifty copies, in order that there may be a sufficient number for use on the final hearing, should the petition be granted.

[42] The Conqueror, 166 U. S. 110.

[43] In The Conqueror, 166 U. S. 114, the supreme court said: "While we think such application should be made with reasonable promptness, as it was made during the term and within a year after the original decree, we think it was within the time. We do not think the party complaining is limited to the six months allowed by Sec. 11 of the court of appeals act for suing out a writ of error from the court of appeals to review the judgment of the district or circuit court; and it would seem that he is, by analogy, entitled to the year within which, by Sec. 6, an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review."

[44] See Form No. 109, *post*.

[45] Supreme Court Rule 37.

Some Monday should be fixed for the submission of the petition, that being motion day. Sufficient notice must be given counsel for the respondent of the day selected to enable them to file briefs in opposition, if they desire to do so. Proof of service of such notice must be filed in the clerk's office. The petition must be called up and submitted in open court by counsel. The application is submitted on briefs. Oral arguments are not permitted.

Although invested with a power so broad and comprehensive it has been sparingly exercised. The supreme court has said that writs of *certiorari* will be allowed "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." [46]

These rules were rigidly adhered to by the supreme court for several years. In the words of Mr. Justice Brewer, the supreme court, "while not doubting its power, has been chary of action in respect to *certioraries*." [47] Of the many applications which have been more recently made to the supreme court, comparatively few have been granted, yet that court appears to be much more liberal of late in granting such writs than formerly.[48] A writ of *certiorari* will be granted to bring up a case in which one member of the circuit court of appeals sat on the trial or hearing of the same case or question in the district court.[49]

[46] Mr. Justice Brewer, in Forsyth v. Hammond, 166 U. S. 514. Consult also Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 383; Lau Ow Bew v. U. S., 144 U. S. 58; *In re* Woods, 143 U. S. 202; Lau Ow Bew, petitioner, 141 U. S. 583; The Three Friends, 166 U. S. 1.

[47] Forsyth v. Hammond, 166 U. S. 513. Consult also cases reported in 163 U. S., pp. 675 to 712. Lau Ow Beu, 141 U. S. 583; *In re* Woods, 143 U. S. 202; Chicago & Northwestern Ry. Co. v. Osborne, 146 U. S. 354; Hendry v. Ocean Steamship Co., 164 U. S. 707.

[48] Writs of *certiorari* have been granted to remove bankruptcy cases from the circuit court of appeals in Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421; Lockwood v. Exchange Bank, 190 U. S. 294; Clarke v. Larremore, 188 U. S. 486.

[49] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 386.

When a writ of *certiorari* is granted it is issued by the clerk of the supreme court and sent to the clerk of the circuit court of appeals from which the case is to be removed. A return to such writ is ordinarily made pursuant to a stipulation of counsel filed in the office of the clerk of the circuit court of appeals. The stipulation is in effect an agreement that the transcript of record filed with the application for the writ may be taken as a return to the writ and no new transcript made. The clerk returns the writ by endorsing thereon a copy of the stipulation. This writ is returned to the office of the clerk of the supreme court, and the case is then pending in the supreme court, upon the writ of *certiorari*. The questions arising upon the record are determined according to fixed rules of law.[50] A case so removed to the supreme court is pending there as if on the appeal of the petitioner, and only his assignments of error will be considered by that court,[51] unless the respondent also applies for *certiorari*. The burden is upon the petitioner, and he is allowed to open and close the argument, as in the case of an appeal.

Whenever a case has been reviewed and determined by the supreme court on a writ of *certiorari* to a circuit court of appeals the mandate issues directly to and the cause is remanded to the proper district or circuit court for further proceedings in pursuance of such determination.[52]

§ 309. Certifying questions to the supreme court.

The provisions of the bankrupt statute, with reference to certifying questions to the supreme court from other courts of the United States and giving the supreme court power to exercise jurisdiction of such matters, manifestly adopt the same rule, with reference to certifying questions in bankruptcy cases, that applies to certificates in other cases.[53]

It therefore becomes necessary to examine the United States laws now in force with reference to such certificates. The

[50] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372.

[51] Hubbard v. Tod, 171 U. S. 474.

[52] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 10.

[53] B. A. 1898, Sec. 25*d*. See Loveland's Forms Fed. Prac., Nos. 1431 to 1435, and notes thereto.

supreme court is the only court to which questions may be certified. The Revised Statutes of the United States provided for certifying questions to the supreme court in certain cases where there was a division of opinion between the judges holding the inferior court.[54] These sections, however, were repealed by the circuit court of appeals act.[55] The only provisions now in force for certifying questions to the supreme court for its action are found in the act creating the circuit courts of appeals.[56] This act provides for a certificate in two classes of cases. *First*, a certificate from a district or circuit court with reference to the jurisdiction of that court; and, *second*, a certificate from a circuit court of appeals of any question or proposition of law concerning which that court desires the instruction of the supreme court.

First: Certifying Jurisdictional Questions.— Section 5 of the court of appeals act[57] provides that in any case in which the jurisdiction of a district or circuit court is in issue the question of jurisdiction alone may be certified from the court below to the supreme court for decision.

This provision applies to the jurisdiction of district courts, and will therefore include the jurisdiction of that court with reference to bankruptcy cases. When and how such certificate should be made has been considered by the supreme court in a number of cases with reference to the jurisdiction of the circuit courts.[58] The principles announced in these cases will be useful in certifying questions of the jurisdiction of the district courts in bankruptcy.

The application for a certificate of the question of jurisdiction is made to the district court. It is a matter of right and not of judicial discretion.

Second: Certifying Questions of Law from Circuit Courts of Appeals.— Section 6 of the circuit court of

[54] R. S. Secs. 650–651–652–693–697.

[55] March 3, 1891, 26 Stat. at L. 826, Sec. 12; U. S. v. Rider, 163 U. S. 132; U. S. v. Hewecker, 164 U. S. 46.

[56] Act of March 3, 1891, 26 Stat. at L. 826.

[57] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 5. This section is printed in full at page 791–2.

[58] McLish v. Roff, 141 U. S. 661; U. S. v. Jahn, 155 U. S. 109; Shields v. Coleman, 157 U. S. 168; Davis, etc., Co. v. Barber, 157 U.

appeals act [59] provides "that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." [59]

It should be observed that the questions to be certified under this provision rest within the discretion of the circuit court of appeals. It is not a discretion the exercise of which may be invoked by a party as of right. The certification is for the instruction of the court upon doubtful questions. In cases of magnitude and upon indirect and doubtful questions of law the court, upon the argument, may properly indulge the suggestion of counsel as to the desirability of the advice and instruction of the supreme court. It is not, however, good practice to file a motion for a certificate, nor will the court usually grant such a motion.[60] Unless the circuit court of appeals is in doubt with reference to some question of law, and asks for information, the supreme court will not entertain the certificate.[61] The circuit court of appeals will not ordinarily certify a question in advance of the argument,[62] nor after it has decided the case.[63] The circuit court of appeals may certify certain questions in a case and file an opinion on

S. 673; Colvin v. Jacksonville, 158 U. S. 457; Davis v. Geissler, 162 U. S. 290; Maynard v. Hecht, 151 U. S. 324; Chappell v. U. S., 160 U. S. 499; Van Wagenen v. Sewall, 160 U. S. 369.

[59] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 6.

[60] Louisville, etc., Ry. Co. v. Pope, 74 Fed. Rep. 1; Andrews v. National Foundry & Pipe Works, 77 Fed. Rep. 774; Pullman Palace Car Co. v. Central Transportation Co., 83 Fed. Rep. 1.

But see Farmers & Merchants State Bank v. Armstrong, 49 Fed. Rep. 600.

[61] Columbus Watch Co. v. Robbins, 148 U. S. 266.

[62] Louisville, etc., Ry. Co., v. Pope, 74 Fed. Rep. 1.

[63] The Majestic, 69 Fed. Rep. 844.

other points in the same case.[64] In such cases the final decree or judgment will await the decision of the supreme court.

In certifying a question or proposition of law to the supreme court the certificate should be entitled in the circuit court of appeals, and should contain such a statement of the facts as may be necessary to the determination of the questions of law certified. It should not contain the whole record.

A certificate should not in effect certify the whole case to the supreme court, but only certain questions or propositions of law, unmixed with questions of fact or of mixed law and fact.[65] The certificate should show that the instructions of the supreme court is desired in the particular case upon a particular question as to the proper decision.[66] The questions propounded should present distinct points or propositions clearly stated so that each can be distinctly answered without reference to other issues of law involved in the case.[67]

The certificate should be signed by the judges constituting the circuit court of appeals sitting in the particular case. The clerk of the circuit court of appeals attaches to this certificate a certificate to the effect that the certificate was duly filed and entered of record in the clerk's office by order of the court, and, as directed by the court, the certificate is forwarded to the supreme court for its action thereon.

The certificate, including a statement of facts, is transmitted to the clerk of the supreme court and filed and docketed by him. The case is set down for argument upon the certificate like a case upon an appeal or writ of error. Counsel are permitted to file briefs and make oral arguments.

Upon the determination of the supreme court a certificate of its answers to the propositions of law, under the hand and seal of the clerk of the supreme court, is sent to the circuit court of appeals. In case the circuit court of appeals has decided the other questions at issue in the case, a decree may be usually entered upon the certificate without further argu-

[64] Sigafus v. Porter, 84 Fed. Rep. 430; McCormick Harvesting Machine Co. v. Aultman, 69 Fed. Rep. 371; Compton v. Jesup, 68 Fed. Rep. 263, s. c. on Certificate, 167 U. S. 1.

[65] Cross v. Evans, 167 U. S. 60; Graver v. Faurot, 162 U. S. 435; U. S. v. Union Pac. Ry. Co., 168 U. S. 505; Warner v. New Orleans, 167 U. S. 467.

[66] Columbus Watch Co. v. Robbins, 148 U. S. 266.

[67] U. S. v. Union Pac. Ry. Co.,

ment. In case the circuit court of appeals desires further argument, it may order the whole case reargued in view of the certificate of the supreme court. In any case the final decree is entered in the circuit court of appeals from which the question was certified.

§ 310. Appeals to the supreme courts of the territories.

The supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.[1]

Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the supreme court of the territories in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.[1] *

Such appeal must be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.[1*] The appeal is allowed by a judge of the court appealed from or of the court appealed to, and is regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.[2]

§ 311. The twofold jurisdiction of the circuit court of appeals.

The bankrupt statute confers upon the circuit courts of appeals power to revise the orders and decrees of a court of bankruptcy by two different proceedings and for two different purposes. *First*, it invests these courts with jurisdiction in equity, "either interlocutory or final, to superintend and revise any matter of law in the proceedings of the several inferior courts of bankruptcy within their jurisdiction;" [2*] and, *second*,

168 U. S. 505; McHenry v. Alford, 168 U. S. 651; Warner v. New Orleans, 167 U. S. 467.

[1] B. A. 1898, Sec. 24*a*.

[1*] B. A. 1898, Sec. 25*a*.

[2] Gen. Ord. 36. Consult also Secs. 315 *et seq.*, *post*.

[2*] B. A. 1898, Sec. 24*b*. See Sec. 312, *post*.

it invests these courts with appellate jurisdiction, as in equity, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.[3]

In the first case the appellate court acts not upon appeal, but by a petition of a complaining party, and is given authority to review and revise a matter of law only in the proceedings of the bankrupt court that is complained of. In the second case the review is as in equity, which may rest upon a question of fact or a question of law, or both.

In some cases the moving party being uncertain as to the nature of his remedy, has both appealed and filed a petition for review and allowed the court to select the proper proceeding and dismiss the other.[4] It has been held that an appeal may be treated as a petition for review when only a question of law is presented,[5] but not where questions of fact and law are both involved in the appeal.[6] Which is the proper method of review in particular cases is considered in the following sections.

§ 312. The supervisory powers of the circuit courts of appeals.

The several circuit courts of appeal have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.[7] A similar power was conferred upon circuit courts by the act of 1867[8] and by the act of 1841.[9]

[3] B. A. 1898, Sec. 25*a*. See Sec. 314, *post*.

[4] *In re* County of Worcester, 102 Rep. 808, 4 Am. B. R. 496; *In re* Fisher, 103 Fed. Rep. 860, 4 Am. B. R. 646; *In re* Dickson, 111 Fed. Rep. 726, 7 Am. B. R. 186; Hutchinson v. Le Roy, 113 Fed. Rep. 202, 8 Am. B. R. 20.

[5] Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466.

[6] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[7] B. A. 1898, Sec. 24*b*. The Circuit Court of Appeals for the Eighth Circuit has no revisory jurisdiction over courts of bankruptcy in the Indian Territory. *In re* Blair, 106 Fed. Rep. 662.

[8] R. S. Sec. 4986.

[9] 5 Stat. at L. 440, Sec. 6.

The provision of the present statute confers a complete supervision in matters of law over all the proceedings of the court of bankruptcy within the limits specified. It extends not only to all cases, but to all questions arising under the statute; in other words, the circuit courts of appeals may review the whole case after a final decree and decide upon it, or it may assume jurisdiction of any particular proceeding or order arising in the progress of the case. The power is expressly extended to "interlocutory or final" orders or decrees.

The supervisory power of the circuit courts of appeals is confined to orders made in a bankruptcy proceeding as distinguished from suits at law or in equity.[10] Questions of law arising in the process of a jury trial in bankruptcy can not be reviewed under this provision.[11] The revisory jurisdiction does not include orders or judgments of the court of bankruptcy or of the district judge which can be reviewed on appeal under the bankrupt act.[12] Thus where the proceedings in the district court result in a judgment adjudging or refusing to adjudge the defendant a bankrupt, or a judgment granting or denying a discharge, or a judgment allowing or rejecting a debt or claim of five hundred dollars or over, they can only be reviewed and revised by an appeal duly taken.[12]

The revisory jurisdiction does not include a review of orders made by a referee. To review an order of a referee a certificate must be taken from the referee to the district judge and the matter passed upon by him. This order may then be reviewed by a circuit court of appeals.[13]

This power is not to be exercised by the appellate court until after the action of the court of bankruptcy. The power

[10] *In re* Jacobs, 99 Fed. Rep. 539, 3 Am. B. R. 671; Scott v. Wilson, 115 Fed. Rep. 284, 8 Am. B. R. 349; *In re* Rusch (C. C. A. 7th Cir.), 116 Fed. Rep. 270, 8 Am. B. R. 518.

[11] Elliott v. Toeppner, 187 U. S. 329, 9 Am. B. R. 50.

[12] B. A. 1898, Sec. 25. See also Sec. 314, *post*. *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605; *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; Mueller v. Nugent, 184 U. S. 1; *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692; *In re* Seebold (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 5 Am. B. R. 358; *In re* Eggert (C. C. A., 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449.

[13] As was done in Mueller v. Nugent, 184 U. S. 1; Louisville Trust Co. v. Comingor, 184 U. S. 18.

to superintend and revise extends only to questions and matters which have been fairly presented to and passed upon by the court of bankruptcy. The exercise of such revisory power does not operate to transfer the entire proceedings into the circuit court of appeals, to be there continued as in a court of the first instance. Its jurisdiction is appellate and not original. Where the decree or order is affirmed, it stands as the decree or order of the court of bankruptcy, and is to be carried into due execution by that court.

It should be observed, also, that the supervisory power of the appellate courts extends only to matters of law.[14] They can not superintend or revise matters of fact or mixed matters of fact and law.[15] In this respect the present statute differs from the act of 1867. Although the former act provided for revising matters of fact as well as points of law, it is noticeable that under the act the questions presented were generally mere points of law. There were a few cases in which evidence was admitted in the circuit courts.[16] It is clear that such proceedings can not be had under the present act.

In the exercise of the revisory jurisdiction under Sec. 24*b* the circuit courts of appeals have reviewed an order of a court of bankruptcy giving or refusing priority of claims irrespective of the value,[17] or with reference to a homestead exemption,[18] or refusing to stay proceedings in a state court,[19] or to vacate

[14] Mueller v. Nugent, 184 U. S. 1; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Courier-Journal Job Printing Co. v. Brewing Co., 101 Fed. Rep. 699, 4 Am. B. R. 183.

[15] *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937.

[16] Langley v. Perry, No. 8067, Fed. Cas., s. c. 2 N. B. R. 596; Farrin v. Crawford, No. 4686, Fed. Cas., s. c. 2 N. B. R. 602; *In re* Alexander, No. 160, Fed. Cas., s. c. Chase, 295. But see *In re* Great Western Tel. Co., No. 5739, Fed. Cas., s. c. 5 Biss. 359; Bank v. Cooper, 20 Wall. 171.

[17] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234.

[18] Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513; *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; *In re* Holden (C. C. A. 9th Cir.), 7 Am. B. R. 615.

[19] *In re* Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 9 Am. B. R. 372; *In re* Seebold (C. C. A. 5th Cir.), 105 Fed. Rep. 910,

and set aside an order setting aside a discharge and to reinstate the discharge,[20] or refusing to enjoin the bankrupt from prosecuting a second application for his discharge,[21] or refusing to reconsider a decision allowing claims and for the recovery of dividends,[22] or to sell the property of an adverse claimant,[23] or refusing to allow a creditor to amend his specification in opposition to a bankrupt's discharge,[24] or that a party to a bankruptcy proceeding is guilty of contempt in refusing to obey an order of the court,[25] or directing the trustee to return certain property to persons claiming it, which property was claimed by the trustee to be a part of the bankrupt's estate,[26] or directing a payment to the trustee in bankruptcy of a sum of money,[27] or allowing an amendment to an involuntary petition,[28] or directing an officer of the court to take possession of the bankrupt's property including that which was found in the custody of a third party and was claimed adversely,[29] or determining whether a preference must be surrendered or not before proving claim,[30] or determining conflicting claims to property in the possession of a court of bankruptcy,[31] or ascertaining and liquidating liens,[32] or to

5 Am. B. R. 358; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868; *In re* San Gabriel Sanitorium Co. (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 7 Am. B. R. 206.

[20] *In re* Hawk (C. C. A. 8th Cir.), 114 Fed. Rep. 916, 8 Am. B. R. 71.

[21] *In re* Feigenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595.

[22] *In re* Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 538, 9 Am. B. R. 368.

[23] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 8 Am. B. R. 751.

[24] *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822.

[25] Carling v. Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 8 Am. B. R. 29; Mueller v. Nugent, 184 U. S. 1; Louisville Trust Co. v. Comingor, 184 U. S. 18.

[26] *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149.

[27] Hutchinson v. LeRoy (C. C. A. 1st Cir.), 113 Fed. Rep. 202, 8 Am. B. R. 20.

[28] *In re* Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 8 Am. B. R. 713.

[29] *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14.

[30] *In re* Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Abraham Steers Lumber Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332.

[31] *In re* Lemmon & Gale Co. (C. C. A. 6th Cir.), 112 Fed. Rep. 296, 7 Am. B. R. 201.

[32] *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Pekin Plow Co. (C.

enjoin execution in a state court against a trustee,[33] or to set aside an order of dismissal and to reinstate an involuntary petition,[34] or sustaining demurrer to petition filed for the purpose of vacating an adjudication in bankruptcy,[35] or to sell property of the bankrupt free from liens,[36] or requiring the bankrupt or other person to surrender to the trustee property alleged to be in his possession belonging to the estate in bankruptcy,[37] or as to the vacating of an adjudication upon a judgment lien under Sec 67*f*,[38] or requiring the surrender of property by an assignee for the benefit of creditors,[39] or requiring a bankrupt to endorse a liquor license for sale,[40] or to remove a trustee,[41] or with reference to the extradition of bankrupt,[42] or appointing trustee when creditors fail to elect one.[43]

§ 313. Application to superintend and revise matters of law.

The supervisory power of the circuit courts of appeals is exercised on due notice and petition by a party aggrieved.[44]

The exercise of this general jurisdiction is not placed by the act under specified regulations and restrictions, like the proceeding by appeal or writ of error.[45] Congress has left these regulations to the discretion of the circuit courts of appeals, and to the rules to be prescribed by the supreme court. As yet the supreme court has prescribed no rules concerning

C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542.

[33] *In re* Neely (C. C. A. 2d Cir.), 113 Fed. Rep. 210, 7 Am. B. R. 312.

[34] *In re* Jemison Mercantile Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 7 Am. B. R. 588.

[35] *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692.

[36] *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383.

[37] Mueler v. Nugent, 184 U. S. 1; Louisville Trust Co. v. Comingor, 184 U. S. 18; *In re* Purvine, 96 U. S. 192, 2 Am. B. R. 787.

[38] *In re* Richards, 96 Fed. Rep. 935, 3 Am. B. R. 145; *In re* Beaver Coal Co., 113 Fed. Rep. 889, 7 Am. B. R. 542.

[39] *In re* Gutwillig, 92 Fed. Rep. 337; Davis v. Bohle, 92 Fed. Rep. 325; *In re* Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

[40] *In re* Fisher, 103 Fed. Rep. 860, 4 Am. B. R. 646.

[41] *In re* Perkins, No. 10982, Fed Cas., s. c., 5 Biss. 254.

[42] *In re* Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35.

[43] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57.

[44] B. A. 1898, Sec. 24*b*.

[45] Mr. Justice Chase, in construing the act of 1867, *In re* Alexander, No. 160, Fed. Cas., s. c. Chase, 295.

it. Until it does, the circuit courts of appeals may prescribe rules and regulations, so far as they do not conflict with the statute.

The act prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days.[46] Not so with a petition for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the act nor any rule of the supreme court determines what that time is. It must, therefore, be left to depend upon the circumstances of each case. It should generally be fixed in analogy in the period designated within which appeals must be taken.[47]

The application for a review and revision of the action of a court of bankruptcy can be made only by a person aggrieved by such action.[48]

A second petition to review the same matter as a previous petition will not be permitted.[49]

The Petition.— The application for the exercise of supervisory power is made by petition.[50] The petition should be filed in the circuit court of appeals for the circuit in which the court of bankruptcy, whose action is to be reviewed, is held.[51] It should be entitled in the appellate court with the style of the case, and should state the proceedings in the court of bankruptcy sufficient to show the jurisdiction of that court, and clearly and specifically point out the question of law decided by the district court, charging that the petitioner is aggrieved thereby, and praying the circuit court of appeals to review and revise the decision of the court below.[52] An allegation by

[46] B. A. 1898, Sec. 25*a*.

[47] Bank v. Cooper, 20 Wall. 171; *In re* Economical Printing Co. (C. C. A. 2d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 697; *In re* Good (C. C. A. 8th Cir.), 3 Am. B. R. 605, 99 Fed. Rep. 389.

[48] B. A. 1898, Sec. 24*b*; Ala. & C. R. Co. v. Jones, No. 127, Fed. Cas., s. c. 7 N. B. R. 145; *In re* Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 4 Am. B. R. 778.

[49] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736.

[50] B. A. 1898, Sec. 24*b*.

[51] *In re* Williams, 105 Fed. Rep. 906, 5 Am. B. R. 108, note.

[52] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; *In re* Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 4 Am. B. R. 778; *In re* Seebold (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 5 Am. B. R. 358.

the petitioner that he is aggrieved is not sufficient, unless it is also alleged in what the error consists.[53] The nature of the error should be distinctly stated for the information of the appellate court and as a matter of notice to the opposing party.[53]

It is not necessary for the petition to allege any value in relation to the question or matters concerning which a review is sought.[54]

The petition should be signed and verified by the petitioner. The order of the court of bankruptcy is usually attached as an exhibit to the petition. Other papers necessary to establish the facts alleged in the petition may also be attached.[55] No record, however, is made as upon an appeal. The papers should show that the questions of law, sought to be reviewed, were passed upon by the court below and the opinion of that court is not sufficient for this purpose.[56]

All persons interested in the controversy should e made parties to the petition and have notice of the filing of it. Where the trustee represented the creditors in the bankruptcy court he only need be made party respondent in the circuit court of appeals.[57]

Petitions for review may be amended in the discretion of the court.[58]

Proceedings on a Petition to Review and Revise Matters of Law.— Upon filing a petition for review in a circuit court of appeals due notice must be given adverse parties.[59] The notice required may be given by the petitioner or his at-

[53] Littlefield v. Del. & Hud. Canal Co., No. 8400, Fed. Cas., s. c. 3 Cliff. 371; *In re* Sutherland, No. 13636, Fed. Cas., s. c. 2 Biss. 405; *In re* Casey, No. 2495, Fed. Cas., s. c. 10 Blatch. 376; *In re* Clark, No. 2802, Fed. Cas., s. c. 9 Blatch. 379.

[54] *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96; *In re* Clark, No. 2802, Fed. Cas., s. c. 9 Blatch. 379.

[55] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145.

[56] *In re* Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 226.

[57] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383.

[58] Gen. Ord. 11; Knight v. Cheney, No. 7883, Fed. Cas., s. c. 5 N. B. R. 305; Littlefield v. Del. & Hud. Canal Co., No. 8400, Fed. Cas., s. c. 3 Cliff. 371.

[59] B. A. 1898, Sec. 24*b*; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

torney or other person delivering a copy of the petition to the respondent and proof of service made either in the form of an affidavit or acceptance of service. The proof of service should be filed in the appellate court. The clerk of the appellate court may be requested to serve a copy of the printed petition upon the respondent or his attorneys after the petition has been docketed and printed. This is sufficient notice, but the better practice is to serve a formal notice.[60] The service of a petition upon a person who acted as counsel for the respondent in the original proceedings is sufficient.[61]

The proceedings in review are a part of the original case, and for the purpose of review the parties are still in court. The proceeding in review is intended to be speedy and summary, and a reasonable notice to counsel accomplishes the ends of justice. A defective service is cured by appearance in the court of appeals.[62]

Upon filing the petition the case is docketed, and the petition and exhibits printed as in other cases. The case is regularly heard upon the petition and exhibits filed therewith. The circuit court of appeals may direct certain original papers to be sent up, if necessary, to ascertain the facts. No answer is required to the petition, unless called for by a rule or order of court for the reason that the petition and exhibits must show the question of law to be reviewed.[63] No new evidence is introduced in the appellate court. The court of appeals acts to review the question of law upon the statement of facts presented by the petition and papers before it. It is not proper to permit an issue of fact to be made. The appellate court revises only questions of law. The practice under the act of 1867 was somewhat different in this respect, for the reason that the circuit courts were authorized to examine both law and facts.

Counsel are permitted to file briefs and make arguments. The attorney for the petitioner opens and closes the argument.

[60] For form of notice see Form No. 176, *post*.

[61] Ala. & C. R. Co. v. Jones, No. 126, Fed. Cas., s. c. 5 N. B. R. 97.

[62] Ala. & C. R. Co. v. Jones, No. 124, Fed. Cas., s. c. 5 N. B. R. 97.

[63] By rule of court the time to plead to a petition is limited in the circuit court of appeals for the 1st circuit. *In re* Baker, 104 Fed. Rep. 287, 4 Am. B. R. 778.

The order of the circuit court of appeals in such cases is regularly an affirmance, reversal or modification of the order of the court below, with such directions as justice may require. The appellate court does not execute the order, but by its mandate it directs the court of bankruptcy with reference to what should be done, as in the case of an appeal or writ of error.

No appeal lies to the supreme court from the decision of the circuit court of appeals upon a bill for review.[64] The only method of obtaining a revision of such decision by the supreme court is by writ of *certiorari*.[65]

§ 314. Appellate jurisdiction in bankruptcy of the circuit courts of appeals.

As has been observed, the present statute does not affect the appellate jurisdiction of the circuit courts of appeals, either in equity or law cases.[66]

The appellate powers of the circuit courts of appeals, in bankruptcy, are contained in section 25 of the act. They are "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit, (1) from a judgment adjudging, or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

Unless a case falls within one of these three classes it can not be reviewed on appeal.[67] Thus no appeal lies from an interlocutory order made during the examination of a bank-

[64] Conro v. Crane, 94 U. S. 441. Consult Morgan v. Thornhill, 11 Wall. 65; Hill v. Thompson, 94 U. S. 322.

[65] See Writs of *certiorari*, Sec. 307, *ante*.

[66] Sec. 302, *ante*.

[67] Goodman v. Brenner (C. C. A. 5th Cir.), 109 Fed. Rep. 481, 6 Am. B. R. 470; *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 4 Am. B. R. 646; Hutchinson v. Le Roy (C. C. A. 1st Cir.), 113 Fed. Rep. 202, 8 Am. B. R. 20.

rupt requiring him to produce books,[68] or a decree in a suit to recover property from the trustee as property that belonged to the plaintiff and not to the bankrupt's estate.[69] Where a case falls within one of these provisions the review should be by appeal and not by invoking the supervisory powers of the circuit courts of appeals.[70]

First. From a Judgment Adjudging or Refusing to Adjudge the Defendant a Bankrupt.— It seems that an appeal under this clause lies only in involuntary proceedings because the word "defendant" implies that the proceeding is instituted against the debtor by his creditors. A creditor is not permitted to contest an adjudication in voluntary bankruptcy[71] and could not therefore be aggrieved by a decision either refusing or making an adjudication. Whether the bankrupt would be permitted to review on appeal a judgment refusing an adjudication on his petition is very doubtful.

It is clear that an appeal in an ordinary involuntary proceeding may be taken by either the petitioning creditors or the bankrupt to review a judgment either refusing or making an adjudication.[72] It has been held that an appeal will not lie from an order dismissing a petition for intervention by a creditor for the purpose of a rehearing to oppose the adjudication.[73] An assignee for the benefit of creditors, who has intervened to contest the petition has a right to appeal from the decree adjudging the defendant to be bankrupt.[74]

[68] Goodman v. Brenner (C. C. A. 5th Cir.), 109 Fed. Rep. 481, 6 Am. B. R. 470.

[69] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[70] *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605; *In re* Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186.

Consult *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96, in which the court held that the case presented was not within the appellate, but properly in the supervisory, jurisdiction, and that if it had been a proceeding in which an appeal would lie, it said: "We should be wholly without jurisdiction." See Sec. 312, *ante*.

[71] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498.

[72] Simonson v. Sinsheimer (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 3 Am. B. R. 824; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; West Co. v. Lea, 174 U. S. 590.

See also Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50.

[73] *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441.

[74] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

SECOND. FROM A JUDGMENT GRANTING OR DENYING A DISCHARGE.— It is clear that under this clause a creditor or the bankrupt may appeal from the judgment of the court of bankruptcy either granting or refusing a discharge to the bankrupt in voluntary or involuntary proceedings.[75] A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect. It has been held that an appeal lies from an order refusing to confirm a composition of creditors on the ground that this is in effect refusing a discharge.[76]

THIRD. FROM JUDGMENTS ALLOWING OR REJECTING CLAIMS.— A judgment allowing or rejecting a debt or claim of a creditor against the estate of the bankrupt may be reviewed on appeal provided the sum in controversy amounts to five hundred dollars or over.[77] This applies to voluntary and involuntary proceedings. "A debt or claim of five hundred dollars or over" refers to a debt or claim attempted to be proved in the bankruptcy proceedings against the bankrupt's estate for the purpose of receiving a dividend and does not include all debts or claims arising in the administration of the bankrupt's estate.[78] It includes an attorney's fee[79] and also a claim proved as a secured debt.[80] Where an appeal is founded upon a claim or debt, the circuit court of appeals may determine as incident thereto the question of the validity

[75] *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160; *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1.

[76] U. S. v. Hammond (C. C. A. 6th Cir.), 104 Fed. Rep. 862, 4 Am. B. R. 736, overruling *In re* Adler, 103 Fed. Rep. 444, 4 Am. B. R. 583; Marshall, Field & Co. v. Wolf & Bro. (C. C. A. 8th Cir.), 120 Fed. Rep. 815. But see Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[77] B. A. 1898, Sec. 25.

[78] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[79] *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; Randolph v. Scruggs, 190 U. S. 533.

[80] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; Randolph v. Scruggs, 190 U. S. 533.

and priority of such claim in connection with a lien or other security of the same.[81]

Where a claim is disallowed the creditor owning the claim may prosecute an appeal. Where a claim is allowed the trustee representing all of the creditors is the proper person to prosecute the appeal.[82] It has been held that a creditor may appeal from the allowance of a claim of another creditor in case the trustee refuses to appeal.[83] A better practice is for the dissatisfied creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee.[84]

Cross-Appeals.— It is sometimes necessary for an appellee to prosecute an appeal in order to obtain relief in the appellate court.[85] This is called a cross-appeal. An appellee is entitled to urge any ground in the appellate court to support the decree below, but if he feels aggrieved by any portion of the decree, it is necessary for him to prosecute an independent appeal, with assignment of errors, citation and bond, in the same manner as the appellant, for the purpose of correcting the decree in this respect. One record will be sufficient ordinarily for both appeals.

Writs of Error.— It will be observed that there is no provision in the act for reviewing a proceeding in bankruptcy on a writ of error. The act provides for jury trials in certain cases,[86] which may result in a judgment adjudging or refusing to adjudge the defendant a bankrupt. There may be also a jury trial with reference to the facts in connection with the application for a discharge, and possibly with reference to

[81] Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 4 Am. B. R. 192; Hutchinson v. Otis, 190 U. S. 552, 10 Am. B. R. 135; *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496.

[82] Foreman v. Burleigh (C. C. A. 1st Cir.), 109 Fed. Rep. 313, 6 Am. B. R. 230; Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313.

[83] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

[84] Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

[85] McGahan v. Anderson (C. C. A. 4th Cir.), 7 Am. B. R. 641, 113 Fed. Rep. 115.

[86] B. A. 1898, Sec. 19.

allowing or rejecting a debt. The question therefore arises, when such jury trial is had, as to the manner of reviewing the judgment in such cases. Two methods only were known to the common law to reexamine a jury trial, namely, to grant a new trial by the court where the issue was tried, or to which the record was returnable; or, *second*, to award a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.[87] It has been held that a circuit court of appeals has power to review a jury trial upon a writ of error.[88]

§ 315. Time within which an appeal must be taken.

An appeal must be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.[89] The ten days' limitation for appeal applies only to bankruptcy proceedings and does not limit the time for taking appeals in independent suits relating to bankruptcy matters.[90] In computing this time the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[91] The word "holiday" includes Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[92] In computing this time Sundays and holidays are counted, except when the last day would fall on Sunday or a holiday.[93] The time begins to run

[87] Ins. Co. v. Comstock, 16 Wall. 258. See also Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50.

[88] Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649. See also Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50.

[89] B. A. 1898, Sec. 25*a*; Norcross v. Mercantile Co. (C. C. A. 8th Cir.), 101 Fed. Rep. 796, 4 Am. B. R. 317; Peterson v. Nash Bros. (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 7 Am. B. R. 181; *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[90] Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165; Booneville Nat. Bank v. Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13.

[91] B. A. 1898, Sec. 31.

[92] B. A. 1898, Sec. 1, clause 14.

[93] York's Case, No. 18139, Fed. Cas., s. c. 1 Abb. (U. S.) 503.

only from the time that the judgment is actually entered or filed.[94] When a judgment is amended the time may begin to run from the date of the amendment.[95] When a rehearing is had and a judgment entered thereon, the time begins to run from the date of the entry of the last judgment.[96]

The limit of time is statutory and can not be extended by either a court of bankruptcy or an appellate court.[97] It is not necessary, however, to give the appeal bond,[98] or file the transcript of record in the appellate court,[99] or issue a citation [100] within the ten days. These are necessary to the due prosecution of an appeal, but are not jurisdictional.

§ 316. How to take an appeal in bankruptcy.

Whenever a party feels himself aggrieved by a judgment of a court of bankruptcy in one of the cases specified in section 25 he may prosecute an appeal to the circuit court of appeals "as in equity." Appeals in equity are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error.[101]

An appeal is regularly "taken" by presenting to the judge of the court of bankruptcy or one of the judges of the circuit

[94] Rubber Co. v. Goodyear, 6 Wall. 153; Radford v. Folsom, 123 U. S. 725; Polleys v. River Ins. Co. 113 U. S. 81; Del Valle v. Harrison, 93 U. S. 233; Peterson v. Nash Bros. (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 7 Am. B. R. 181; Rush v. Lake (C. C. A. 9th Cir.), 10 Am. B. R. 455, 122 Fed. Rep. 561.

[95] U. S. v. Gomez, 1 Wall. 690.

[96] *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496.

[97] Credit Co. v. Ark. Cent. R. Co., 128 U. S. 258; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[98] Dos Hermanos, 10 Wheat. 306; Peugh v. Davis, 110 U. S. 227; Dodge v. Knowles, 114 U. S. 430.

As to what is necessary to be done within the ten days, see Sec. 315, *ante*. As to the bond, see Sec. 320, *post*.

[99] Green v. Elbert, 137 U. S. 615, and cases cited in opinion. See also Sec. 325, *post*.

[100] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 126 Fed. Rep. —, 11 Am. B. R. —; Green v. Elbert, 137 U. S. 615; Richardson v. Green, 130 U. S. 104; Hewitt v. Filbert, 116 U. S. 142; Evans v. State Bank, 134 U. S. 330; Altenberg v. Grant, 54 U. S. App. 312, s. c. 83 Fed. Rep. 980.

[101] Gen. Ord. 36; R. S. Sec. 1012. As to procedure on writ of error, see R. S. Secs. 997, *et seq.*; rules of the supreme court; and the rules of the circuit courts of appeals, which are compiled in 90 Fed. Rep. p. li.

court of appeals [102] a petition for appeal, assignments of error and an appeal bond. If the papers are regular, the judge to whom they are presented allows the appeal and approves the bond. The signing of a citation,[103] or the approving of a bond [104] within time is a sufficient allowance of an appeal. An appeal will not be allowed unless an assignment of errors is presented with the petition.[105] The giving of a bond is not essential to the taking, although it is to the due prosecution of the appeal.[106] A mandamus will lie to compel a judge to allow an appeal.[107] A simpler proceeding, however, is to apply to one of the judges of the appellate court, if the trial judge refuses to allow the appeal.

An appeal may be allowed in open court.[108] In such case no citation is necessary.[109] Such an allowance of an appeal to be regular should be entered upon the minutes.[109]

Whichever mode is adopted, the allowance of the appeal constitutes the taking of an appeal contemplated by the statute.[110] The appeal must, in some way, be presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers in the clerk's office within the time limited by

[102] Gen. Ord. 36; Norcross v. Mercantile Co. (C. C. A. 8th Cir.), 101 Fed. Rep. 796, 4 Am. B. R. 317.

As to the necessity of filing an assignment of errors before the allowance of an appeal, see *In re* Dunning (C. C. A. 9th Cir.), 94 Fed. Rep. 709; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599.

[103] Brown v. McConnell, 124 U. S. 489.

[104] R. R. Co. v. Bradleys, 7 Wall. 575; Brandies v. Cochrane, 105 U. S. 262; Sage v. R. R. Co., 96 U. S. 712.

[105] Rule 11, C. C. A., 90 Fed. Rep. clxvi.

[106] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 126 Fed. Rep. —, 11 Am. B. R. —. The Dos Hermanos, 10 Wheat. 306; Peugh v. Davis, 110 U. S. 227; Dodge v. Knowles, 114 U. S. 438.

[107] U. S. v. Adams, 6 Wall. 101; U. S. v. Gomez, 3 Wall. 752; Sage v. R. R. Co., 96 U. S. 712.

[108] Brockett v. Brockett, 2 How. 238; Reiley v. Lamar, 2 Cranch, 344.

[109] Vansant v. Gas Light Co., 99 U. S. 213.

[110] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 126 Fed. Rep. —, 11 Am. B. R. —; The Dos Hermanos, 10 Wheat. 306; Peugh v. Davis, 110 U. S. 227; Dodge v. Knowles, 114 U. S. 438; Noonan v. Chester Park Athletic Co., 93 Fed. Rep. 576; Wickelman v. Dick Co., 85 Fed. Rep. 851, s. c. 29 C. C. A. 436.

statute.[111] This must be done within ten days after the judgment appealed from has been rendered.[112]

A judge of a court of bankruptcy is not required to make findings of fact for the purpose of an appeal from his decision.[113]

§ 317. Parties to an appeal.

An appeal can only be prosecuted by a party to the proceedings upon which the judgment was entered, and who has been aggrieved thereby. The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved; and that must be determined by considering not upon what grounds the judge has proceeded, but what effect his action has upon the claims of the appellant.[114] The party appealing must have an interest in the proceedings. Where he has parted with all his interest in the subject of litigation *pendente lite* he can not appeal from a judgment which injuriously affects such interest.[115]

Where a claim is disallowed the creditor may prosecute an appeal. Where a claim is allowed the trustee, representing all of the creditors, is the proper person to prosecute the appeal.[116] It has been held that a creditor may appeal from the allowance of a claim of another creditor in case the trustee refuses to appeal.[117] A better practice is for the dissatisfied

[111] Credit Co. v. Ark. Cent. R. Co., 128 U. S. 258; Farrar v. Churchill, 135 U. S. 609.

In Balance v. Forsyth, 21 How. 389, no appeal was taken in court below, and the appellant was permitted to withdraw the transcript for purpose of taking an appeal.

In Credit Co. v. Ark. Cent. R. Co., *supra*, the appeal was allowed by a justice of the supreme court in Washington, D. C., on the last day within which an appeal could be taken, but was not presented to the circuit court until five days thereafter. The appeal was not taken in time.

[112] B. A. 1898, Sec. 25*a*; Sec. 315, *ante*.

[113] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

[114] See Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265.

[115] See Meyer v. Pritchard, 23 Law. Coop., S. C. R. 961; Lord v. Veazie, 8 How. 251; Cleveland v. Chamberlain, 1 Black, 419.

[116] Foreman v. Burleigh (C. C. A. 1st Cir.), 109 Fed. Rep. 313, 6 Am. B. R. 230; Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313.

[117] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee.[118]

On an appeal by a creditor from an order approving a composition all the assenting creditors who have received money due them under the composition must be made parties to the appeal.[119]

A creditor or the bankrupt are the proper parties to take an appeal from a judgment granting or refusing a discharge. A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect.

Where an appeal is prosecuted from a judgment adjudging or refusing to adjudge the defendant a bankrupt it should be prosecuted by the bankrupt or by the petitioning creditors or a creditor intervening for the purpose of contesting the adjudication,[120] but not by one who intervenes after the judgment for the purpose of rehearing the order of adjudication.[121]

It is well settled that all the parties against whom a joint judgment is rendered must, except where they have distinct and separate interests and the decree is several and does not jointly affect them all, unite in the appeal.[122] Thus it would seem that where an appeal is taken from a judgment adjudging a partnership bankrupts, that all the partners should unite in the appeal. Where an appeal is taken from a judgment rejecting a joint debt or claim, the owners of such claim should unite in the appeal. Where an appeal is taken from a judgment refusing to adjudge a defendant a bankrupt, that all the petitioning creditors at least, and probably also such creditors as may have appeared to join in the petition under section 59*f*, should unite in the appeal.

[118] Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

[119] Marshall, Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815.

[120] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

[121] *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441.

[122] Hardee v. Wilson, 146 U. S. 179.

Where one of several persons having a joint interest desires to appeal and the others interested with him do not, he may appeal alone without joining the others as appellants by showing a valid excuse for not joining them. This can be done only by a summons and severance or some equivalent proceeding, such as a request to the others and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so.[123] This must be evident upon the record of the court appealed from in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.[124] Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he can not ask its reversal on any matter which will injuriously affect their interests.[125]

[123] O'Dowd v. Russell, 14 Wall. 404; Inglehart v. Stansbury, 151 U. S. 68; Masterson v. Herndon, 10 Wall. 416.

In Masterson v. Herndon, *supra*, the supreme court said: "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of the appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and to stop that party from bringing an appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this."

[124] Inglehart v. Stansbury, 151 U. S. 68, and cases collated in the opinion.

[125] Terry v. Abraham, 93 U. S. 38.

It is equally well settled that where the judgment is severable in fact and in law one party thereto may be allowed to prosecute an appeal therefrom without joining a codefendant who does not desire to appeal.[126] Thus it would seem that an appeal from a judgment rejecting several distinct debts or claims that any one debtor or claimant would be entitled to prosecute an appeal without joining the others. Where such an appeal is taken it carries with it so much of the case and such of the parties as are necessary for the determination of his rights.[127]

All the parties whose rights would be affected should be made appellees. Thus, in an appeal by a bankrupt from an adjudication in bankruptcy upon an involuntary petition, he should make appellees the petitioning creditors and probably such other creditors as have entered their appearance to join in the petition under section 59*f*. In an appeal from a judgment denying a discharge the bankrupt should make the creditors opposing the discharge appellees. In an appeal by creditors from a judgment rejecting a debt or claim the trustee should be made appellee. He represents all the creditors and therefore the creditors are not necessary parties. In an appeal from a judgment refusing to adjudicate the defendant a bankrupt, or granting a discharge, the bankrupt only should be made appellee. In an appeal from a judgment allowing a debt or claim of five hundred dollars or over the creditor or creditors only, owning such claims, need be made appellees.

On an appeal by a bankrupt from an order refusing to conform a composition the creditors must be made appellees and the trustee does not represent them for this purpose.[128] When an appeal is taken by a creditor from an order approving a composition all the creditors assenting to such composition and having received money due them under the composition must be made parties to the appeal.[129]

[126] Forgay v. Conrad, 6 How. 201; City National Bank v. Hunter, 129 U. S. 557, 578; Brewster v. Wakefield, 22 How. 118, 128.

[127] Milner v. Meek, 95 U. S. 252.

[128] Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[129] Marshall, Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815.

§ 318. Petition for appeal.

The petition for appeal is regularly entitled in the court of bankruptcy, together with the style of the case. It may be substantially in the following words: "The above-named A. B., conceiving himself aggrieved by the judgment made and entered on the —— day of ——, in the above-entitled cause, does hereby appeal from such judgment to the United States circuit court of appeals for the —— circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such judgment was made, duly authenticated, may be sent to the United States circuit court of appeals for the —— circuit." [130] This petition should be signed by the petitioner or his counsel and dated. The judge ordinarily endorses upon the petition that the foregoing claim of appeal is allowed and signs it, together with the date of the allowance. The approving of an appeal bond or signing a citation is a sufficient allowance.[130*]

§ 319. Assignments of error.

The appellant must file with the clerk of the court below, with his petition for the appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged.[131] No appeal will be allowed until such assignment of errors has been filed. Such assignment of errors forms part of the transcript of the record and must be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.[132]

[130] See Form No. 166, *post*.

[130*] R. R. Co. v. Bradleys, 7 Wall. 577; Sage v. R. R. Co., 96 U. S. 712; Brown v. McConnell, 124 U. S. 489.

[131] Rule 11, C. C. A., and cases collated in 99 Fed. Rep., p. cxlvi, *et seq.*; *In re* Dunning (C. C. A. 9th Cir.), 94 Fed. Rep. 709; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599.

For forms of assignment of errors, see Loveland's Forms of Fed. Prac., Nos. 1403 to 1407.

[132] Dufour v. Lang, 4 C. C. A. 663, s. c. 54 Fed. Rep. 913, 917; Mitchell v. Marker, 10 C. C. A. 306, s. c. 62 Fed. Rep. 139; McClellan v.

It has been held that where the assignment of errors is included in the petition it is sufficient.[133]

§ 320. Bond on appeal.

An appeal bond is ordinarily essential to the prosecution of an appeal, although it is not to the taking of an appeal.[134] It has been permitted to be given by the appellant in the appellate court.[135] Trustees are not required to give such bonds.[136]

The bond on appeal is regularly conditioned that the plaintiff shall prosecute his appeal to effect and answer all damages and costs if he fail to make such plea good.[137] All the appellants need not join in the bond.[138] The bond is made payable to the appellees.[139] It should not be made pavable to any other person.[140]

The amount of the bond is fixed by the judge allowing the appeal. He is the sole and exclusive judge of what it should be and his decision is final, unless he violates a statute or rule of practice.[141] The judge can not delegate the approval of the bond to the clerk [142] or to a commissioner.[143] It is not neces-

Pyeatt, 50 Fed. Rep. 686, s. c. 1 C. C. A. 613; Haldame v. U. S., 69 Fed. Rep. 819, s. c. 16, C. C. A. 447; Prichard v. Budd, 76 Fed. Rep. 710, s. c. 22 C. C. A. 504. Rule 2 C. C. A., and cases collated in 90 Fed. Rep., p. cxlvi, *et seq.*

[133] Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. 517, s. c. 30 C. C. A. 235.

[134] R. S. Secs. 1000 and 1012; Dodge v. Knowles, 114 U. S. 430; Peugh v. Davis, 110 U. S. 227; The Dos Hermanos, 10 Wheat. 306, 311.

[135] Anson, Bangs & Co. v. Blue Ridge R. R. Co., 23 How. 1; Brobst v. Brobst, 2 Wall. 96; Seymour v. Freer, 5 Wall. 822. See also Peugh v. Davis, 110 U. S. 227.

[136] B. A. 1898, Sec. 25*c*.

[137] For form of bond, see Form No. 169, *post*. See also Gay v. Parpart, 101 U. S. 391; Chateaugay Ore and Iron Co., 35 Fed. Rep. 804; Phosphate v. Edwards, 70 Fed. Rep. 728, s. c. 17 C. C. A. 358.

[138] Brockett v. Brockett, 2 How. 238.

[139] Bigler v. Waller, 12 Wall. 142.

[140] Davenport v. Fletcher, 16 How. 142.

[141] Jerome v. McCarter, 21 Wall. 17.

[142] O'Reilly v. Edrington, 96 U. S. 724; Nat'l Bank v. Omaha, 96 U. S. 737; Freeman v. Clay, 48 Fed. Rep. 849, s. c. 1 C. C. A. 115.

[143] Haskins v. R. R. Co., 109 U. S. 106.

sary that the judge approve the bond in court.[1] The appellate court, however, may change the amount of the bond, in a proper case, where the circumstances have changed so that the security which was good and sufficient at the time it was taken does not continue to be so.[2] Where an appeal bond is defective the appellate court will not, for that reason, dismiss the appeal, but will give the appellant an opportunity to furnish new security.[3]

§ 321. Supersedeas.

An appeal does not necessarily operate as a supersedeas to stay proceedings in a court of bankruptcy. A supersedeas is a statutory right. It follows as a matter of law from a compliance by the appellant with the provisions of the act of congress in that behalf.[4] Without such compliance no court can confer it.[5]

The statute which regulates the matter of supersedeas is as follows: "In any case where a writ of error may be a supersedeas the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of (*the said term of sixty*) (ten) days."[6]

[1] Hudgins v. Kemp, 18 How. 530.

[2] Jerome v. McCarter, 21 Wall. 17; Williams v. Claflin, 103 U. S. 753; Harwood v. Dickerhoff, 117 U. S. 200; Johnson v. Waters, 108 U. S. 4.

[3] Davis v. Wakelee, 156 U. S. 684-5; N. O. Ins. Co. v. Albro Co., 112 U. S. 506; Union Pacific Co. v. Callaghan, 161 U. S. 95.

[4] R. S. Sec. 1007; Goddard v. Ordway, 94 U. S. 672; Gay v. Parpart, 101 U. S. 391.

[5] French v. Shoemaker, 12 Wall. 100; Kitchen v. Randolph, 93 U. S. 86; Sage v. R. R. Co., 93 U. S. 416.

[6] R. S. Sec. 1007.

The allowance of an appeal with reference to superseding a judgment is considered the equivalent of a writ of error. It has accordingly been held that an appeal, to operate as a supersedeas, must be perfected and the security given in accordance with the provision quoted above.[1] Where a petition for rehearing, or a motion to set aside the judgment, is filed, the time does not begin to run until such petition or motion has been denied.[2]

The application for a supersedeas is regularly made to the court of bankruptcy and not to the appellate court.[3] The amount of the bond is fixed by the judge allowing it. He is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of practice.[4] The appellate court, however, may, in a proper case and under proper circumstances, change the amount of the bond,[5] or vacate a supersedeas when the approval of the bond was obtained by fraud or perjury; and in such cases may refuse to accept a new bond.[6] The approval of the bond need not be in writing.[7] The signing of a citation and taking the oath of the sureties as to their sufficiency is a sufficient approval of the bond.[8] The bond when approved is a matter of record in the bankruptcy court, and a copy thereof should be included in the transcript of the record.

§ 322. Citation.

The object of a citation on an appeal is to give notice of the removal of the case into the appellate court. The citation

[1] Adams v. Law, 16 How. 148; Hudgins v. Kemp, 18 How. 535; French v. Shoemaker, 112 Wall. 100; Bigler v. Walker, 12 Wall. 149; Kitchen v. Randolph, 93 U. S. 86.

[2] Texas & P. Ry. Co. v. Murphy, 111 U. S. 488; Brockett v. Brockett, 2 How. 238; Memphis v. Brown, 94 U. S. 715. In computing this time, Sundays are excluded. See Danville v. Brown, 128 U. S. 503.

[3] Covington Stock Yards v. Keith, 121 U. S. 248.

As to when the appellate court will grant a supersedeas, see Hunt v. Oliver, 109 U. S. 177; Railroad v. Bradleys, 7 Wall. 575.

[4] Jerome v. McCarter, 21 Wall. 17.

[5] Jerome v. McCarter, 21 Wall. 17; Williams v. Claflin, 103 U. S. 753; Harwood v. Diekerhoff, 117 U. S. 200; Johnson v. Waters, 108 U. S. 4.

[6] R. R. Co. v. Schutte, 100 U. S. 644.

[7] Davidson v. Lanier, 4 Wall. 447.

[8] Silver v. Ladd, 6 Wall. 440.

is usually presented to and signed by the judge[1] at the time the appeal is allowed. It may, however, be signed by the judge subsequently or issued by the appellate court.[2] The issuing of the citation is not jurisdictional, but the court will not hear a case until the parties are brought into court by citation.[3] The order in cases, where all of the necessary parties have not been served, is that the case stand over for the purpose of giving the appellant an opportunity to apply for a citation.

The chief justice, speaking for the supreme court, has said of the practice in the matter of appeals:[4] "It must be regarded as settled that (1) where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary; (2) where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed; (3) where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before; (4) but a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative." Although the bankrupt act confers new and distinct powers and jurisdiction upon certain courts in bankruptcy, it adopts

[1] R. S. Secs. 998 and 999. For Form of Citation, see Form No. 170, *post*.

[2] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. —; Altenberg v. Grant, 54 U. S. App 312, s. c. 83 Fed. Rep. 980; R R Equipment Co. v. Southern Ry. Co. C. C. A., 6th Cir., decided March 7, 1899.

[3] Mendenhall v. Hall, 134 U. S. 559; Chicago & P. R. Co. v. Blair, 100 U. S. 661; R. R. Equipment Co. v. Southern Ry. Co., C. C. A., sixth circuit, decided March 7, 1899; Evans v. State Bank, 134 U. S. 330; Richardson v. Green, 130 U. S. 104.

[4] In Jacobs v. George, 150 U. S. 415

the several courts as organized, including their respective terms.

The citation must be served upon the appellee or his attorney of record in the court below.[1] It may be served by the marshal. The usual practice, however, is for counsel for the appellee to accept service in writing upon the citation without formal service by the marshal.[2] Where the citation is actually issued upon the allowance of an appeal the omission to serve it before the first day of the term does not avoid the appeal. A new citation may be ordered to be issued and served.[3] It is not a sufficient proof of service of a citation to file an affidavit that notice of citation was given to defendant's attorneys by depositing in the postoffice a copy of said citation, postpaid, addressed to them at their respective places and giving the names and places.[4]

Where a party dies before an appeal is allowed and prosecuted, the suit should be revived in the court of bankruptcy and the citation should be addressed to the proper party in the record at that time.[5]

All appeals and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.[6]

A general appearance by the appellee, at the term the record is filed, is a waiver of the issuing and serving of a citation.[7] The appearance of counsel at a subsequent term and making a motion to dismiss does not waive a citation.[8] A general

[1] Bacon v. Hart, 1 Black, 39; Chicago & P. R. Co. v. Blair, 100 U. S. 661; Nations v. Johnson, 24 How. 195.

[2] Bigler v. Waller, 12 Wall. 142.

[3] Dayton v. Lash, 94 U. S. 112; Altenberg v. Grant, 83 Fed. Rep. 980, s. c. 28 C. C. A. 244.

[4] Tripp v. Santa Rosa Street R. Co., 144 U. S. 126.

[5] Bigler v. Waller, 12 Wall. 142.

[6] Rule 14, C. C. A., 90 Fed. Rep. clviii; Phosphate Co. v. Edwards, 70 Fed. Rep. 728, s. c. 17 C. C. A. 358; Altenberg v. Grant, 83 Fed. Rep. 980, s. c. 28 C. C. A. 244; Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. s. c. 517, s. c. 30 C. C. A. 235; Freeman v. Clay, 48 Fed. Rep. 849, s. c. 1 C. C. A. 115.

[7] Richardson v. Green, 130 U. S. 104; Buckingham v. McLean, Assignee in bankruptcy, 13 How. 150; U. S. v. Armejo, 131 U. S. Appendix, lxxxii.

[8] Radford v. Folsom, 123 U. S. 725.

appearance can not be withdrawn or changed to a special appearance without leave of court.[1]

A writ of mandamus is not ordinarily granted to compel a judge to sign a citation.[2] If the judge refuses to sign a citation, resort should be had to a judge of the appellate court.

§ 323. The record.

When an appeal has been allowed, a transcript of the record of the proceedings in the court of bankruptcy must be prepared and filed in the appellate court. It is the duty of the clerk to make it after and not before he is directed by counsel to do so. His fees are prescribed by statute[3] and should be paid before the transcript is delivered for filing. If a clerk refuses to produce the transcript he may be compelled to do so by mandamus or order of court.[4]

No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in the appellate court, shall be filed.[5] Where a case has been before an appellate court on a former appeal the record on the second appeal should be complete in itself, for the reason that an appellate court is not bound to take judicial notice of its own records.[6] The record should contain only such matter as is necessary to the hearing, and not irrelevant matter or

[1] U. S. v. Armejo, 131 U. S. Appendix, lxxxii; U. S. v. Curry, 6 How. 106.

[2] *Ex parte* Virginia Commissioners, 112 U. S. 177.

[3] R. S. Sec. 828.

[4] U. S. v. Gomez, 3 Wall. 766; U. S. v. Booth, 18 How. 477.

[5] Rule 14, C. C. A., 90 Fed. Rep. clvii; Williams Bros. v. Savage (C. C. A. 4th Cir.), 120 Fed. Rep. 497, 9 Am. B. R. 720; Cunningham v. German Ins. Bank (C. C. A. 6th Cir), 103 Fed. Rep. 932, 4 Am. B. R. 192; Devries v. Shanahan (C. C. A. 4th Cir.), 122 Fed. Rep. 620, 10 Am. B. R. 518.

[6] *In re* Osborne (C. C. A. 1st Cir.), 115 Fed. Rep. 1, 8 Am. B. R. 165, the court said: "While it is well settled that we can take judicial knowledge of our own records, it is not at all clear that we are always required to do so. Machine Co. v. Goddard, 37 C. C. A. 221, 95 Fed. Rep. 664, 666. The proper and safe way of proceeding even with reference to the tribunal in which the prior record remains, is by plea and proof. Nevertheless, as the practice with reference to a petition of the character now before us is not yet fully understood, even if it may be said to be thoroughly settled, we will avail ourselves of the right which we have to take judicial knowledge of our own proceedings."

useless repetitions.[7] It is the duty of the parties or their counsel to attend to this.[7] In taking appeals in bankruptcy it will frequently occur that many papers and proceedings ought not to be included in the record. That the clerk may not be left in doubt, he may require of the attorney for the appellant a præcipe, stating specifically what the record shall contain, and attach a copy of the præcipe to the transcript.[8] The certificate in such case should be that it is a true and correct transcript, according to the præcipe. If the attorney for the appellee asks him to include other parts of the record in the transcript, he may apply to the court of bankruptcy for directions in respect to such matter.[9] Where the record is filed in an appellate court and it is made to appear by the appellee that necessary papers, etc., have been omitted in making the transcript, they may be supplied upon application to that court.[10] Where witnesses are examined orally, the testimony presented in that form or its substance must be stated in writing and made a part of the record, or it will be entirely disregarded on appeal.[11] Exhibits attached to depositions are properly included in a record.[12] The opinion of the court of bankruptcy, if in writing, should be annexed to the transcript.[13] The transcript must be authenticated under the seal of the court and be signed by the clerk.[14] Where the certificate is under the

[7] See observation of the supreme court in Railway Co. v. Stewart, 95 U. S. 279, 284; Burnham v. Street Ry. Co., 87 Fed. Rep. 168, s. c. 30, C. C. A. 594; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. Rep. 237, s. c. 9 C. C. A. 468; Union Pac. R. Co. v. U. S., 116 U. S. 402.

If the record contains such parts as is called for by either party it is sufficient; Blanks v. Klein, 49 Fed. Rep. 1, s. c. 1 C. C. A. 254.

[8] Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Burnham v. Street Ry. Co., 87 Fed. Rep. 168, s. c. 30 C. C. A. 594. See also Penn. Co. v. Ry. Co., 55 Fed. Rep. 131, s. c. 5 C. C. A. 53; R. R. Co. v. Schutte, 100 U. S. 644, 647.

[9] Hoe v. Kahler, 27 Fed. Rep. 145.

[10] R. R. Co. v. Schutte, 100 U. S. 644, 647. See also Certiorari to complete record, Sec. 306, *ante*.

[11] Williams Bros. v. Savage (C. C. A. 4th Cir.), 120 Fed. Rep. 497, 9 Am. B. R. 720; Blease v. Garlington, 92 U. S. 1. See Rule of May 15, 1893, 149 U. S. 793.

[12] Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481.

[13] Rule 14 C. C. A.

[14] Blitz v. Brown, 7 Wall. 693.

A certificate signed "A. B., clerk of said court, by C. D., deputy," is a sufficient signature; Garneau v. Dozier, 100 U. S. 7.

seal of the court it may be amended by adding the signature of the clerk.[15]

A judge of a court of bankruptcy is not required to make findings of fact for the record on an appeal from his decision.[16]

§ 324. Amendments to the record.

Where, from inadvertence or mistake of the clerk of the court below, or from any other cause, the record transmitted to the appellate court is defective or incorrect, the errors or mistakes are regularly corrected by a writ of *certiorari* to bring up a full and true transcript of the record.[17] The clerk of the court of bankruptcy may supply an omission in a record by certifying such omitted parts without an order of court.[18] He can not in this manner correct an erroneous statement in a transcript.[19]

Appeals are heard upon the pleadings and proofs below. No new evidence can be admitted, and the record will not ordinarily be amended in the appellate court.[20] It is true, an

[15] Idaho & Ore. Land Imp. Co. v. Bradbury, 132 U. S. 509.

[16] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

[17] See Sec. 306, *ante*.

In Devries v. Shanahan (C. C. A. 4th Cir.), 10 Am. B. R. 518, the court said: "The record in this case, whilst it suggests facts material to its consideration, does not set them forth as clearly as is necessary to its decision. It is, therefore, ordered that the cause be remanded to the district court, with instructions to require all the facts connected with the failure to prove and prosecute the claim of the estate of John M. Orem, deceased, against the bankrupt estate of W. Morris Orem, prior to the petition of the appellee, to be inquired into and reported to it, and, when such facts are so reported, to pass upon the same."

In Barbour v. Coit (C. C. A. 6th Cir.), 118 Fed. Rep. 272, the following order was made: "The decree of the district court of the United States is reversed and the cause remanded to said court, with directions that the cause be remitted to the referee by said court with directions that he take proof of the pleadings in said Ohio case, and that upon the record as thus completed the referee proceed to rehear the matter. This order is made because the case is not properly prepared for decision and because great injustice may be done if the cause is to be decided on present record. The order is made upon our own motion on authority of Estho v. Lear, 7 Pet. 130-1, and Illinois Cent. Rd. v. Illinois, 146 U. S. 387. The costs of this appeal will be divided."

[18] Crandall v. Nevada, 6 Wall. 35.

[19] Hudgins v. Kemp, 18 How. 530.

[20] Pacific R. Co. v. Ketchum, 95 U. S. 1; Udall v. Steamship "Ohio," 17 How. 17; Hudgins v. Kemp, 18 How. 530; The Protector, 11 Wall. 82.

amendment may be had in the appellate court by consent of parties,[21] and so also amendments have been allowed in the appellate court to substitute the name of an officer as appellant in place of his predecessor in office;[22] and where it appeared by the certificate of the clerk that he had committed a clerical error in the transcript it was corrected in the appellate court without issuing a writ of *certiorari*.[23]

§ 325. Perfecting an appeal and filing the record.

An appeal is taken within the contemplation of the statute when it is allowed and the papers filed in the clerk's office.[24] The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal. It can only assist in perfecting the appeal. An appeal does not affect its jurisdiction over other matters in the proceedings from which no appeal is taken. Perfecting an appeal by giving a bond,[25] issuing and serving a citation,[26] and filing the record in the appellate court is essential to the prosecution of a suit in an appellate court.

It is the duty of the appellant to file the record with the clerk of the appellate court by or before the return day, whether in vacation or in term time.[27] The appeal and citation must be made returnable not exceeding thirty days from the date of the signing of the citation.[28] The time for filing the record may be enlarged before its expiration by the justice

In Kennedy v. Georgia State Bank, 8 How. 610, the supreme court said: "There is nothing in the nature of appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc., but the practice has been to remand the cause to the lower court for amendment." See also Denny v. Pironi, 141 U. S. 121; Metcalf v. Watertown, 128 U. S. 586; Tug River Coal & Salt Co. v. Brigel, 67 Fed. Rep. 625, remanded and amendment allowed in circuit court in 73 Fed. Rep. 13.

[21] As was done in Fletcher v. Peck, 6 Cranch, 87.

[22] Bowden v. Johnson, 107 U. S. 251; Gates v. Goodloe, 101 U. S. 612; U. S. v. Hopewell, 51 Fed. Rep. 798, s. c. 2 C. C. A. 510.

[23] Woodward v. Brown, 13 Pet. 1.

[24] Sec. 316, *ante*.

[25] Sec. 320, *ante*.

[26] Sec. 322, *ante*.

[27] Rule 16, C. C. A., 90 Fed. Rep. clix; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370. See also Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496.

[28] Rule 14 C. C. A., 90 Fed. Rep. clviii.

or judge who signed the citation, and the order of enlargement should be filed with the clerk of the appellate court.[29] This rule is directory, and it is within the sound discretion of the appellate court to relieve parties who have not complied with it.[30] Unless the record is filed during the next term succeeding the allowance of the appeal, the appeal has spent its force and should be dismissed.[31] One term is held annually by the circuit court of appeals in the several judicial circuits.[32] Where the appellant without fault on his part is prevented from filing the transcript within such time by the fraud of his opponent or the contumacy of the clerk or the order of the court below, his time to file the transcript may be enlarged by the appellate court.[33] Where the record is filed at the next term, but after the return day, or the time as enlarged for filing it, and before a motion to dismiss is filed, the objection that the record was not filed in time is not sufficient to dismiss the appeal.[34]

If the appellant fails to file his record on or before the return day, the appellee may have the case docketed and dismissed upon producing a certificate, whether in term time or in vacation, from the clerk of the court of bankruptcy, stating the case and certifying that such appeal has been duly allowed.[35]

[29] Rule 16, C. C. A., 90 Fed. Rep. clix.

An order extending the time for filing the record on appeal, made after the time had expired, is ineffective. *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

No other judge is entitled to extend the time for filing record; West v. Irwin, 54 Fed. Rep. 419, s. c. 4 C. C. A. 401.

[30] Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, s. c. 17 C. C. A. 472.

[31] Wauton v. DeWolf, 142 U. S. 138; Evans v. State Bank, 134 U. S. 330; Grigsby v. Purcell, 99 U. S. 505.

[32] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 3. In some circuits more than one term is held. Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496.

[33] See U. S. v. Gomez, 3 Wall. 752; Ableman v. Booth, 21 How. 506, 512.

[34] Bingham v. Morris, 7 Cranch, 99; Farmers Loan & Trust Co. v. Chicago N. P. R. Co., 73 Fed. Rep. 314, s. c. 19 C. C. A. 477; Altenberg v. Grant, 83 Fed. Rep. 980, s. c. 28 C. C. A. 244; Jones v. Mann, 72 Fed. Rep. 85, s. c. 18 C. C. A. 442; Andrews v. Thum, 64 Fed. Rep. 149, s. c. 12 C. C. A. 77; R. R. Co. v. Ellsworth, 77 Fed. Rep. 664, s. c. 23 C. C. A. 393; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. Rep. 237, s. c. 9 C. C. A. 468.

[35] Rule 16, C. C. A., 90 Fed. Rep. clx. See Loveland's Forms of Fed. Prac., Form No. 1490.

In no case is the appellant entitled to docket the case and file the record after the same has been docketed and dismissed, unless by order of the court.[36] The appellee may, at his option, docket the case and file a copy of the record with the clerk of the appellate court; and if the case is docketed and a copy of the record filed with the clerk of the appellate court by the appellant within the period limited and prescribed by the rules or by the appellee at any time thereafter, the case shall stand for argument at the term.[37]

Upon filing the transcript of record the appearance of counsel for the party docketing the case must be entered.[38]

Filing the record and docketing the case in the appellate court confers jurisdiction upon that court of that case.

§ 326. Proceedings in a circuit court of appeals.

The practice in a circuit court of appeals generally is substantially the same as that of the supreme court of the United States. In certain respects it has been changed by rules. When a transcript of record is filed in the office of the clerk, it is his duty to docket the case. He enters upon a docket all the cases brought to and pending in the court in their proper chronological order. The transcript of the record is then printed in the manner prescribed by the rules of the circuit court of appeals in which the case is pending.[39] The printing rules vary in the several courts. Printed briefs are required. The number of briefs, what they shall contain, and the time within which they must be filed is prescribed by the rules of the several circuit courts of appeals.[40] Counsel must also

This was done *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[36] Rule 16, C. C. A., 90 Fed. Rep. clx; Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, s. c. 17 C. C. A. 472.

[37] Rule 16, C. C. A., 90 Fed. Rep. clx.

[38] Rule 16, C. C. A., 90 Fed. Rep. clx.

[39] See Rule 23, C. C. A.

[40] Rule 24, C. C. A.; Van Gunden v. Iron Co., 52 Fed. Rep. 838, s. c. 3 C. C. A. 294; Lincoln v. Street Light Co., 59 Fed. Rep. 756, s. c. 8 C. C. A. 253; Vider v. O'Brien, 62 Fed. Rep. 326, s. c. 10 C. C. A. 385; Ry. Co. v. Reeder, 76 Fed. Rep. 550, s. c. 22 C. C. A 314; Doe v. Mining Co., 70 Fed. Rep. 455, s. c. 17 C. C. A. 190.

In Milwaukee v. Schailer & Schniglau Co., 91 Fed. Rep. 858, the circuit court of appeals for the seventh circuit said: "Error is as-

examine the rules of the particular court in which a case is pending with reference to the time allowed for argument and the manner of setting the case for hearing.

On an appeal the appellate court will review both law and facts as distinguished from the supervisory jurisdiction where only questions of law are subject to review.[41]

The decree of an appellate court is regularly an affirmance, reversal or modification of the decree of the court below. The decree should provide for the costs and may allow interest in a proper case.[42] It may contain a direction to the court below with reference to further proceedings to be taken by the court of bankruptcy. The appellate court does not execute its own decrees, but directs the court of bankruptcy with reference to what should be done by it. The mandate is directed to the particular court which is constituted a court of bankruptcy from which the appeal was taken.

signed upon the several rulings stated, but the brief for the appellant does not contain, as required by rule 24, 'a specification of the errors relied upon.' The intention of that rule is that the brief shall contain, in the order stated, (1) a statement of the case, (2) a specification of errors relied upon, and (3) a brief of the argument. Each of these should be under an appropriate heading, in enlarged type."

[41] Courier-Journal Job Printing Co. v. Brewing Co. (C. C. A. 6th Cir.), 101 Fed. Rep. 699, 4 Am. B. R. 183; Rush v. Lake (C. C. A. 9th Cir.), 10 Am. B. R. 455; *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234.

[42] In Hutchinson v. Otis (C. C. A. 1st Cir.), 115 Fed. Rep. 937, 8 Am. B. R. 382, the court said: "Ordinarily, an appellant, or other party, who has postponed by a proceeding in an appellate tribunal the payment of an amount justly due, should pay damages therefor equal, at least, to legal interest, even if he has not received any increment of the fund corresponding thereto. In Hutchinson v. Le Roy (C. C. A. 1st Cir.), 8 Am. B. R. 20, 113 Fed. 202, we allowed interest against the petitioner; but there the fund which it was determined belonged to him, had been held adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, however, the fund came into the hands of the trustee in bankruptcy, not through any tort, but through the oversight of Otis, Wilcox & Co. The trustee merely held it until the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof. Under the circumstances, and as this appeal was taken by the trustee in his official capacity to settle a question involving substantial doubts, we think that interest should not be allowed."

A petition for rehearing may, in the discretion of the court, be allowed at any time during the term, but will not be allowed after the end of the term at which the decree was entered.[43] The proper practice for a party who desires a rehearing is to submit a printed brief or petition or suggestion of the points thought important without oral argument.[44] No reply to the petition is allowed to the other side, nor does the court usually write an opinion when the petition is denied. If the court so desires, it will order the adverse counsel to file a brief, showing why a rehearing should not be granted, or it may order the case to be reheard or may modify its decree or opinion if it contains incorrect statements.

§ 327. **Death of a party.**[45]

Whenever, pending a writ of error or appeal in a circuit court of appeals, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case is heard and determined as in other cases, and if such representatives do not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, is entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record and on hearing have the judgment or decree reversed if it be erroneous: *Provided, however*, that a copy of every such order shall be personally served on said representative at least thirty days before the expiration of such sixty days.

When the death of a party is suggested and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken

[43] Hudson v. Guestier, 7 Cranch, 1; Rule 29 C. C. A.; Bushnell v. Crooke Min. & Smelting Co., 150 U. S. 83, and cases there collated.

[44] Public Schools v. Walker, 9 Wall. 603.

[45] Rule 19, C. C. A.

by the opposite party within that time to compel their appearance, the case abates.

When either party to a suit in a circuit or district court of the United States desires to prosecute a writ of error or appeal to a circuit court of appeals from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the suit is dead and has no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but has a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such a writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and thereupon proceeds with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in the appellate court the plaintiff in error or appellant must make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative and the state or territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant is entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *Provided, however*, that a proper citation reciting the substance of such order is served upon such representative, either personally or by being left at his residence at least thirty days before the expiration of such ninety days: *Provided also*, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and

the measures above provided to compel the appearance of such representative have not been taken within the time, as above required, by the opposite party, the case abates: *And provided also,* that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case proceeds and is heard and determined as in other cases.

§ 328. The mandate.

When a case is finally determined, a mandate or other proper process in the nature of *procedendo* is issued to the court of bankruptcy for the purpose of informing that court of the proceedings in the appellate court, so that further proceedings may be had in court of bankruptcy as to law and justice may appertain.[1] It is not necessary to recite in the mandate every step in the various stages of a cause.[2] It should contain the decree of the appellate court and its directions to the court of bankruptcy.

The court of bankruptcy is bound by the decree contained in the mandate as the law of the case, and must carry it into execution according to the mandate. That court can not vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on the appeal, or intermeddle with it other than to settle so much as has been remanded.[3] If the court of bankruptcy mistakes or misconstrues the decree of the circuit court of appeals and does not give full effect to the mandate, its action may be controlled either by a new appeal or by writ of mandamus to execute the mandate.[4] The court of bankruptcy may consider and decide any matters left open by the mandate of the appellate court; and its decision of such matters can be reviewed by a

[1] Rule 32, C. C. A.

[2] Andrews v. Thum, 72 Fed. Rep. 290, s. c. 18 C. C. A. 566.

[3] Texas & Pac. Ry. v. Anderson, 149 U. S. 237; Sibbald v. U. S., 12 Pet. 488, 492.

[4] Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. Rep. 519 s. c. 19 C. C. A. 25; *In re* Postal Telegraph Co., 85 Fed. Rep. 853, s. c. 29 C. C. A. 456; Perkins v. Fourniquet, 14 How. 313, 330; *In re* Washington & Georgetown R. R., 140 U. S. 91; City Bank v. Hunter, 152 U. S. 512; City Bank, Petitioner, 153 U. S. 246.

new appeal only.[5] The opinion of the appellate court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus or upon a new appeal, it is for the appellate court to construe its own mandate and to act accordingly.[6]

[5] *In re* Sandford Fork & Tool Co., 160 U. S. 247; Hinckley v. Morton, 103 U. S. 764; Mason v. Pewabic Co., 153 U. S. 361; Nashua & Lowell R. R. v. Boston & Lowell R. R., 51 Fed. Rep. 929, s. c. 5 U. S. App. 97.

[6] Gaines v. Rugg, 148 U. S. 228, 238, 244; Supervisors v. Kennicott, 94 U. S. 498; West v. Brashear, 14 Pet. 51.

GENERAL ORDERS AND FORMS

GENERAL ORDERS IN BANKRUPTCY.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

See B. A. 1898, Sec. 30.

I.

Docket.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

See secs. 37, 61, *ante*.

II.

Filing of Papers.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

See secs. 34, 37, 61, 137 and 142, *ante*.

Consult *in re* Dean, No. 3699, Fed. Cas., s. c. 1 N. B. R. 249.

As to correcting an erroneous filing, see Alabama, etc., R. Co. v. Jones, No. 127, Fed. Cas., s. c. 7 N. B. R 145.

III.

Process.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

See secs. 31, 37, 71 and 207, *ante*. Consult also R. S. Secs. 911–913.

IV.

Conduct of Proceedings.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

See secs. 61, 80 and 276, *ante*.

V.

Frame of Petitions.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

See secs. 59 and 69, *ante*.

That an illegible petition can not be filed, see Anon., 1 N. B. R. 215; *In re* Malcom, No. 8986, Fed. Cas., s. c. 4 Law Rep. 488.

That illegible schedules should be amended, *in re* Hall, No. 5922, Fed. Cas., s. c. 2 N. B. R. 192.

That dots can not be used to indicate anything necessary to be stated, *in re* Orne, No. 10582, Fed. Cas., s. c. 1 Ben. 420.

VI.

Petition in Different Districts.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in

such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

See secs. 68 and 98, *ante*.

Consult *in re* Boston H. & E. R. R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409.

VII.

Priority of Petitions.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

See secs. 68 and 98, *ante*.

VIII.

Proceedings in Partnership Cases.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same

manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

See sec. 98, *ante*.

IX.

Schedule in Involuntary Bankruptcy.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

See secs. 33 and 81, *ante*.

As to the duty of the referee to cause such schedules to be filed, see B. A. 1898, Sec. 39, clause 6.

X.

Indemnity for Expenses.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal

or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

See secs. 36, 38, 40 and 61, *ante*.

Compare B. A. 1898, Secs. 62 and 64*b*, clause 1.

XI.

Amendments.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of error in the paper originally filed.

See secs. 62, 63 and 92, *ante*.

XII.

Duties of Referee.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

See secs. 29, 62, 77, 90, 103, 204, 206 and 246, *ante*.

Consult *in re* Holmes, No. 6632, Fed. Cas., s. c. 8 Ben. 74; *In re* Hatcher, No. 6210, Fed. Cas., s. c. 1 N. B. R. 390; *In re* Stafford, No. 13274, Fed. Cas., s. c. 13 N. B. R. 378.

XIII.

Appointment and Removal of Trustee.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

See secs. 107 and 142, *ante*.

XIV.

No Official or General Trustee.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

See sec. 142, *ante*.

XV.

Trustee Not Appointed in Certain Cases.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

See secs. 106, 108, 142 and 271, *ante*.

XVI.

Notice to Trustee of His Appointment.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

See secs. 29, 107 and 142, *ante*.

XVII.

Duties of Trustee.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make a report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

See secs. 144, 186 and 264, *ante*.

As to computing the twenty days when property is in litigation, see *in re* Shields, No. 12785, Fed. Cas., s. c. 1 N. B. R. 603.

As to the meaning of "may" in this rule, see *in re* Perdue, No. 10975, Fed. Cas., s. c. 2 N. B. R. 183.

As to filing exceptions, see *in re* Perdue, No. 10975, Fed. Cas., s. c. 2 N. B. R. 183; *In re* Gainey, No. 5181, Fed. Cas., s. c. 2 N. B. R. 525; *In re* Jackson, No. 7127, Fed. Cas., s. c. 2 N. B. R. 508.

XVIII.

Sale of Property.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

See secs. 259 and 260, *ante*.

XIX.

Accounts of Marshal.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

See sec. 40, *ante*.

As to fees, see B. A. 1898, Sec. 52*b*; R. S. Sec. 829; act of May 28, 1896, Sec. 6, 29 Stat. at L. 179.

As to the necessity of producing vouchers, or explaining why they are omitted, see *in re* Comstock, No. 3075, Fed. Cas., s. c. 9 N. B. R. 88; *In re* Donahoe, No. 3979, Fed. Cas., s. c. 8 N. B. R. 453. But see *in re* Talbot, No. 13727, Fed. Cas., s. c. 2 N. B. R. 280.

XX.

Papers Filed After Reference.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

See secs. 29, 103 and 137, *ante*.

XXI.

Proof of Debts.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and there-

after, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination,

and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

See secs. 105, 131, 133, 140, 207 and 265, *ante*.

As to re-examination of claims, *in re* Lount, No. 8543, Fed. Cas., s. c. 11 N. B. R. 315; *In re* Robinson, No. 11938, Fed. Cas., s. c. 8 Ben. 406; Canby v. McLear, No. 2378, Fed. Cas., s. c. 13 N. B. R. 22.

XXII.

Taking of Testimony.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

See secs. 31, 34, 140 and 208, *ante*.

XXIII.

Orders of Referee.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

See sec. 29, *ante*.

XXIV.

Transmission of Proved Claims to Clerk.

The referee shall forthwith transmit to the clerk a list of the claims proved againt an estate, with the names and addresses of the proving creditors.

XXV.

Special Meeting of Creditors.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

See sec. 108, *ante*.

XXVI.

Accounts of Referee.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

See sec. 36, *ante*.

XXVII.

Review by Judge.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

See secs. 29, 30, 32*a*, 34, 62, 63, 90, 92, 105, 141 and 208, *ante*.

XXVIII.

Redemption of Property and Compounding of Claims.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

See secs. 253, 256 and 263, *ante*.

XXIX.

Payment of Moneys Deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

See sec. 269, *ante*.

XXX.

Imprisoned Debtor.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

See secs. 204, 218 and 226, *ante*.

The statute (Sec. 9) provides for an exemption from arrest except upon process founded upon "a debt or claim from which his discharge would not be a release." Many debts are provable which are not released. The statute undoubtedly controls. See Sec. 218, *ante*. The same discrepancy existed between the statute of 1867 and General Order 27, promulgated under that act. In repeated decisions under that act the rule was laid down that if the debt was one from which a discharge was not a release, the bankrupt could not be released from imprisonment if the arrest was based upon such a debt; *In re* Robinson, 6 Blatch. 253, s. c. 36 How. Pr. 176; *In re* Patterson, 2 Ben. 155, s. c. No. 10817, Fed. Cas.; *In re* Boyst, 2 B. R. 171; *In re* Kimball, No. 7769, Fed. Cas., s. c. 6 Blatch. 292; s. c. below, No. 7768, Fed. Cas., s. c. 2 Ben. 554; *In re* Whitehouse, 1 Lowell, 429, s. c. No. 17564, Fed. Cas.; *In re* Migel, No. 9538, Fed. Cas., 2 B. R. 481; *In re* Seymour, Fed. Cas. No. 12684, s. c. 1 Ben. 348; *In re* Williams, 6 Biss., 233, s. c. No. 17700, Fed. Cas.

XXXI.

Petition for Discharge.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

See sec. 273, *ante*.

XXXII.

Opposition to Discharge or Composition.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

See secs. 247, 275, 276 and 277, *ante*.

Consult *in re* Grefe, No. 5794, Fed. Cas., s. c. 2 N. B. R. 329; *In re* Baum, No. 1116, Fed. Cas., s. c. 1 Ben. 274; *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257.

XXXIII.

Arbitration.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

See secs. 253 and 263, *ante*.

XXXIV.

Costs in Contested Adjudication.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

See sec. 88, *ante*.

XXXV.

Compensation of Clerks, Referees and Trustees.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings

in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

See secs. 38, 61 and 148, *ante*.

XXXVI.

Appeals.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

See Chapter XXVII.

XXXVII.

General Provisions.

In proceedings in equity, instituted for the purpose of

carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supeme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to faciliate a speedy hearing.

XXXVIII.

Forms.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

See secs. 59, 60, 69 and 133, *ante*.

Consult *in re* Sallee, No. 12256, Fed. Cas., s. c. 2 N. B. R. 228.

BANKRUPTCY.

PETITIONS, SCHEDULES ADJUDICATION AND ORDER OF REFERENCE.

No. 1.

Debtor's Petition (1).

(Official Form No. 1.)

To the Honorable ——, Judge of the District Court of the United States, for the —— District of ——:

The petition of ——, of ——, in the county of ——, and district and state of ——, —— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or,* has resided, *or,* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——,

——, Attorney.

United States of America, District of ——, ss.

I, ——, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. ——,

Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. (2.)

[*Official character.*]

(1) See Gen. Ords. 5 and 11. B. A. 1898, Sec. 4. As to who may be bankrupts see Loveland's Bankruptcy, sec. 42 *et seq.*

As to the district in which petition should be filed, see *in re* Williams, 99 Fed. Rep. 544, 3 Am. B. R. 677; *in re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *in re* Waxelbaum, 97 Fed. Rep. 562, 3 Am. B. R. 267.

As to the form of petition, see Mahoney *vs.* Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770.

A creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition by setting up that the petitioner is not insolvent. *In re* Carleton, 8 Am. B. R. 270, Fed. Rep.

(2) Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt Act of 1898, ch. 4, sec. 20.

The oath should be made by the petitioner or some one familiar with the facts. *In re* Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. *vs.* Stengel (C. C. A. 6 Cir.) 95 Fed. Rep. 637, 2 Am. B. R. 283; *in re* Chequasset Bank, 7 Am. B. R. 87; Green River Deposit Bank *vs.* Craig Bros., 6 Am. B. R. 381.

No. 2. **Schedule A.—Statement of all Debts of Bankrupt.**

In the District Court of the United States for the —— District of ——.

In the matter of A. B., Bankrupt. } In Bankruptcy, No. ——.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

N. B.—Claims are to be entered in the following order, viz.: (1).—Taxes and debts due and owing to the United States. (2).—Taxes due and owing to the state, or to any county, district, or municipality. (3).—Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition. (4).—Other debts having priority by law.

This sheet must be signed by the bankrupt at the end of the statement.

REFERENCE TO LEDGER OR VOUCHER.	NAMES AND RESIDENCES OF CREDITORS. IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	WHERE AND WHEN CONTRACTED.	NATURE AND CONSIDERATION OF DEBT, AND WHETHER CONTRACTED AS PARTNER OR JOINT CONTRACTOR; AND IF SO, WITH WHOM.	AMOUNT.
			Taxes and debts to United States.	$ —— ——
			State and county taxes payable to Treasurer of —— county, ——.	—— ——
15	C. D. No. —— —— St. ——.	At ——, from —— —— 190—, to —— —— 190—.	For wages as clerk.	—— ——
15	E. F. No. —— —— St. ——.	At ——, from —— —— 190—, to —— —— 190—.	For wages as laborer.	—— ——
	I owe no other debts having priority by law.		Total	$ —— ——
			A. B., Petitioner.	

Schedule A. (2)

Creditors Holding Securities.

N B.— Particulars of securities held, with date of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by Acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.
This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of creditors. If residence unknown that fact must be stated.	Description of securities.	When and where debts were contracted.	Value of securities.	Amount of debts.
42	S. Trust Co., ——— Bldg., ———, ———.	Mortgage on lots —— and ——, —— subdivision ———, ——.	At ———, ———. ———, —— 190—.	$ ——— ———	$ ——— ———
57	——— Nat. Bank, ———, ——.	—— shares stock of Z. F. Co., held as collateral.	At ———, ———. ———, —— 190—.	——— ———	——— ———
			Total	$ ——— ———	$ ——— ———
			A. B., Petitioner.		

SCHEDULE A. (3)

Creditors Whose Claims are Unsecured.

N. B.— When the name and residence [*or* either] of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.
This sheet should be signed by the bankrupt at the end of the statement.

REFERENCE TO LEDGER OR VOUCHER.	NAMES AND RESIDENCES OF CREDITORS. IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	WHEN AND WHERE CONTRACTED.	NATURE AND CONSIDERATION OF THE DEBT, AND WHETHER ANY JUDGMENT, BOND, BILL OF EXCHANGE, PROMISSORY NOTE, ETC., AND WHETHER CONTRACTED AS PARTNER OR JOINT CONTRACTOR WITH ANY OTHER PERSON; AND IF SO, WITH WHOM.	AMOUNT.
18	G. H. No. ——— ——— St.	At ———— ——, 190—.	Merchandise.	$ —— ——
24	J. J. No. ——— ——— St.	At ———— ——, 190—.	Professional services.	—— ——
			The above were contracted by me individually. The following were contracted by me as partner in the firm of A. B. & Co., and for which the other partners, X. Y. and W. Z., are liable jointly with me..	
134	L. K. No. ——— ——— St.	at ———— —— 189—	Merchandise.	—— ——
17	M. N. No. ——— ——— St.	at ———— —— 189—	Evidenced by promissory note of A. B. & Co.	—— ——
			Total.....	$ —— ——

A. B.,
Petitioner.

Schedule A. (4)

Liabilities on Notes or Bills Discounted, which ought to be paid by the Drawers, Makers, Acceptors, or Indorsers.

N. B.— The dates of the notes or bills, and when due, with their names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.

This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of holders as far as known. If residence unknown, that fact must be stated.	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and if so, with whom.	Amount.
	C. Bank, ———, ———.	———, ———.	Note of R. D., endorsed to said holder by said firm of A. B. & Co., of which X. Y., and W. Z. were the other partners. A. B., Petitioner.	$ ——— ———

Schedule A. (5)

Accommodation Paper.

N. B.— The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.
This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of holders. If residences unknown, that fact must be stated.	Names and residences of persons accommodated.	Place where contracted	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
	P. Q. No. —— —— St. ——, ——.	R. S. No. —— —— St. ——, ——.	——	Liable individually.	$ ——	——
	T. U. No. —— —— St. ——, ——.	V. W. & Co. No. —— —— St. ——, ——.	——	Liable jointly with X. Y. and W. Z., as partner in firm of A. B. & Co.	$ ——	——
				Total	$ ——	——

A. B.,
Petitioner.

OATH TO SCHEDULE A.

United States of America, District of ——, ss.

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ——, A. D. 18—. —— ——,

[Official character.]

(1) Loveland's Bank., secs. 60 and 81.

No. 3.

Schedule B.—Statement of all Property of Bankrupt.

In the District Court of the United States for the —— District of ——.
In the matter of A. B., Bankrupt. } In Bankruptcy, No. ——.

SCHEDULE B. (1)
Real Estate.

N. B.— This sheet must be signed by the bankrupt at the end of the statement.

LOCATION AND DESCRIPTION OF ALL REAL ESTATE OWNED BY DEBTOR, OR HELD BY HIM.	INCUMBRANCES THEREON, IF ANY, AND DATES THEREOF.	STATEMENT OF PARTICULARS RELATING THERETO.	ESTIMATED VALUE.
Lots —— and —— in —— subdivision, ——, ——-, together fronting —— feet on —— side of —— street, and running back —— feet to alley.	Mortgage of $—— to S. Trust Co., dated —— ——, 190—.	Said mortgage given by A. Z. and assumed by me.	$ —— ——
Tract of —— acres in N. E. quarter of sect. ——, T——-, R——, —— county, ——, more particularly described in deed recorded in said county in Deed Book ——, page ——.	No incumbrances.		$ —— ——
			$ —— ——
		Total	$ —— ——
		A. B., Petitioner.	

Schedule B. (2)

Personal Property.

N. B.— This sheet must be signed by the debtor at the end of the statement.

A. Cash on hand,	$ ———	——
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).		
Promissory note of B. R., endorsed by X. Z.,	$ ———	——
C. Stock in trade in my business of dry goods merchant ——— at ——— of the value,	$ ———	——
D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz., all situated at No. ——— ——— St., ———, ——, valued at,	$ ———	——
E. Books, prints, and pictures, viz., family pictures at No. ——— ——— St., ———, ———, valued at,	$ ———	——
F. Horses, cows, sheep, and other animals (with number of each), viz.,	None.	
G. Carriages, and other vehicles, viz.,	None.	
H. Farming stock, and implements of husbandry, viz.,	None.	
I. Shipping, and shares in vessels, viz.,	None.	
K. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.,	None.	
L. Patents, copyrights, and trade-marks, viz.,	None.	
M. Goods or personal property of any other description, with the place where each is situated, viz.,	None.	
Total,	$ ———	——

A. B.,
Petitioner.

Schedule B. (3)

Choses in Action.

N. B.— This sheet must be signed at the end thereof by the debtor.

A. Debts due petitioner on open account, as follows:		
J. S. ——— ——	$ ——— ——	
L. R. ——— ——	$ ——— ——	
M. P. ——— ——	$ ——— ——	
	——— ——	
		$ ——— ——
B. Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds, as follows:		
—— shares stock of Z. F. Co.		
The above are held as collateral security by —— National Bank of —— —— as set forth in Schedule A (2).		$ ——— ——
C. Policies of Insurance, as follows:		
No. —— in N. Y. L. Co. surrender value.		$ ——— ——
No. —— in X. Y. Z. Co. surrender value.		None.
D. Unliquidated Claims of every nature, with their estimated value, as follows:		None.
E. Deposits of money in banking institutions and elsewhere, as follows:		None.
Total,		$ ——— ——

A. B.

Schedule B. (4)

Property in reversion, remainder, or expectancy, including proprty held in trust for the debtor or subject to any power or right to dispose of or to charge.

N. B.— A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor. This sheet must be signed at the end thereof by the debtor.

GENERAL INTEREST.	PARTICULAR DESCRIPTION.	SUPPOSED VALUE OF MY INTEREST.
Interest in land,	A beneficial interest under will of J. B. to house and lot on V. St. ——— —— held by M. Trust Co. in trust for C. B. for life with remainder after her death to A. B., G. B. or the survivor.	$ ——— ——
Personal property,		None.
Property in money, stocks, shares, bonds, annuities, etc.		None.
Rights and powers, legacies and bequests.		None.
	Total,	$ ——— ——

PROPERTY HERETOFORE CONVEYED FOR BENEFIT OF CREDITORS.	AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	None.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	$ —— ——
Total,	$ —— ——

A. B.

SCHEDULE B. (5)

A particular statement of the property claimed, as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

N. B.— This sheet must be signed by the debtor at the end of the statement.

Military uniforms, arms, and equipments.	None.
Property claimed to be exempted by State laws, its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption, as follows:	
All household furniture, household stores and wearing apparel and family fixtures claimed by me as a married man, the head and support of a family, under section —— Revised Statutes of ——.	$ —— ——
Total.	$ —— ——

A. B.

SCHEDULE B. (6)

Books, Papers, Deeds, and Writings relating to Bankrupt's Business and Estate.

N. B.— This sheet must be signed at the end thereof by the debtor.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Journal, ledger, cash book, and bank book.

Deeds.

Deed to lots —— and —— ——— subdivision.

2 deeds for —— acre tract N. E. ¼ sect. —— T—— R——.

Papers. None.

A. B.

OATH TO SCHEDULE B.

United States of America, District of ——, ss.

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

——, [*Official character.*]

(1) Loveland's Bank. secs. 60 and 81. Gen. Ord. 38; Mahoney *vs.* Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770.

Schedules should not be filed with judge or referee but with the clerk. *In re* Sykes, 106 Fed. Rep. 669.

SUMMARY OF DEBTS AND ASSETS.

[From the statement of the bankrupt in Schedules A and B.]

Schedule A....	1 (1)	Taxes and debts due United States			
" "....	1 (2)	Taxes due states, counties, districts, and municipalities.....			
" "....	1 (3)	Wages			
" "....	1 (4)	Other debts preferred by law....			
Schedule A....	2	Secured claims			
Schedule A....	3	Unsecured claims			
Schedule A....	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A....	5	Accommodation paper			
		Schedule A, total.....			
Schedule B....	1	Real estate			
Schedule B....	2-a	Cash on hand.....			
" "....	2-b	Bills, promissory notes, and securities			
" "....	2-c	Stock in trade.....			
" "....	2-d	Household goods, etc.....			
" "....	2-e	Books, prints, and pictures.....			
" "....	2-f	Horses, cows, and other animals..			
" "....	2-g	Carriages and other vehicles.....			
" "....	2-h	Farming stock and implements...			
" "....	2-i	Shipping and shares in vessels....			
" "....	2-k	Machinery, tools, etc.....			
" "....	2-l	Patents, copyrights, and trademarks			
" "....	2-m	Other personal property.....			
Schedule B....	3-a	Debts due on open accounts.....			
" "....	3-b	Stocks, negotiable bonds, etc.....			
" "....	3-c	Policies of insurance.....			
" "....	3-d	Unliquidated claims			
" "....	3-e	Deposits of money in banks and elsewhere			
Schedule B....	4	Property in reversion, remainder, trust, etc.			
Schedule B....	5	Property claimed to be excepted..			
Schedule B....	6	Books, deeds, and papers.....			
		Schedule B, total.....			

No. 4.

Partnership Petition (1).

(Official Form No. 2.)

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— respectfully represents:

That your petitioners and —— have been partners under the firm name of ——, having their principal place of business at ——, in the county of ——, and district and state of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and

such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be

adjudged by a decree of the court to be bankrupts within the purview of said acts.

——,
——,
——,
Petitioners.

——, Attorney.

——, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of their knowledge, information and belief.

——,
——,
——,
Petitioners.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]
——.

[Schedules to be annexed corresponding with schedules Nos. 1114 and 1115.]

(1) See Loveland's Bank. sec. 96 *et seq.* Gen. Ords. 5 and 7. The general scheme with reference to the settlement of the estates of firms and the partners is founded upon and its provisions are merely declaratory of recognized equitable principles of the admnistration of insolvent partners. *In re* Meyer (C. C. A. 2nd Cir.) 98 Fed. Rep. 976, 3 Am. B. R. 559.

Where the petition is by an individual partner the co-partners cannot come in voluntarily and make themselves parties to the proceedings for the purpose of adjudging the firm bankrupt. Mahoney *vs.* Ward, 100 Fed. Rep. 278. As to when a partnership creditor may join in a petition against one of the partners individually see *in re* Mercur, 95 Fed. Rep. 634.

It has been held that a discharge upon an individual petition releases the debtor from his liability for individual and partnership obligations. Jarecki *vs.* M'Elwaine, 107 Fed. Rep. 249; *in re* Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260. The safer course is, however, to have the partnership and himself adjudicated bankrupt upon a petition by less than all of the partners. *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *in re*

Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601. At least the individual partner should give notice to his partners of the proceedings and his desire to be discharged from partnership debts; *in re* Meyers, 96 Fed. Rep. 408, S. C. 97, Fed. Rep. 757; *in re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *in re* McFaun, 96 Fed. Rep. 592; *in re* Elliott, 2 N. B. N. 350.

A partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more but less than all of the partners where such act was within the scope of the partnership business so as to constitute in fact an act of the firm. *In re* Meyer (C. C. A. 2nd Cir.) 98 Fed. Rep. 976, 3 Am. B. R. 559; *in re* Grant, 106 Fed. Rep. 496; *in re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794. Where a partnership has made a general assignment which is charged as an act of bankruptcy it should be adjudged bankrupt irrespective of its solvency. West Co. *vs.* Lea, 174 U. S. 590.

For form of notice when service is made by publication, see *in re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601.

A petition by or against a partnership is one proceeding and only one deposit for costs need be made. *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *in re* Langslow, 98 Fed. Rep. 869. In some districts, however, separate deposits are required for the firm and each individual partner. See *in re* Barden, 101 Fed. Rep. 553, 4 Am. B. R. 31.

A partnership may be adjudged bankrupt in a voluntary or involuntary proceeding, without an adjudication against any or some of the partners individually. *In re* Meyer (C. C. A. 2nd Cir.) 98 Fed. Rep. 976, 3 Am. B. R. 559; *in re* Stokes, 106 Fed. Rep. 312; *in re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794. Partners are not entitled to a discharge if they are not adjudged bankrupts. Strause *vs.* Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225.

No. 5.

Creditors' Petition.

(Official Form No. 3.)

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The petition of ——, of ——, and ——, of ——, and ——, of ——, respectfully shows:

That ——, of ——, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business [*or,* resided, *or* had his domicile] at ——, in the county of ——, and state and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said —— is insolvent, and that within four months next preceding the date of this petition the said —— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of

---

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——,
——,
——,
Petitioners.

——, Attorney.

United States of America, District of ——, ss.

——, ——, ——, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

Before me, ——, this —— day of ——, 189—.

——,
——.
[*Official character.*]

[Schedules to be annexed (filed by bankrupt) corresponding with schedules Nos. 1114 and 1115.]

---

(1) Loveland's Bank., sec. 66 *et seq.* Gen. Ords. 5 and 7.

The wife of a bankrupt may file a petition against her husband where there are less than twelve creditors. *In re* Novak, 101 Fed. Rep. 800.

A person who holds an unliquidated claim against an insolvent debtor is not a creditor who can file a petition. *In re* Brinkmann, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers *vs.* Hanlin, 99 Fed. Rep. 695; *in re* Morales, 105 Fed. Rep. 761. A person who has not surrendered a preference cannot join in instituting involuntary proceedings. *In re* Rogers Milling Co., 102 Fed. Rep. 687; *in re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119; *in re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140. A creditor who has assented to a general assignment is not to be counted in determining the number of creditors. *In re* Miner, 104 Fed. Rep. 520, 4 Am. B. R. 710. As to when a creditor may be estopped by his own consent to file a petition, see Simonson *vs.* Sinsheimer (C. C. A. 6th Cir.) 95 Fed. Rep. 948; *in re* Romanow, 92 Fed. Rep. 510; Leidigh Carriage Co. *vs.* Stengel (C. C. A. 6th Cir.) 95 Fed. Rep. 637; *in re* Curtis (C. C. A. 7th Cir.) 94 Fed. Rep. 630, 2 Am. B. R. 226.

In what court the involuntary petition should be filed, see Loveland's Bank., sec. 68; *in re* Plotke (C. C. A. 7th Cir.) 104 Fed. Rep. 964, 5 Am. B. R. 171; *in re* Filer, 5 Am. B. R. 332; *in re* Dressel vs. North State Lumber Co., 107 Fed. Rep. 255.

As to the form of petition, see Mahoney *vs.* Ward, 100 Fed. Rep. 278. See also criticism of Judge Woolson, 1 N. B. N. 239; *in re* Taylor (C. C. A. 7th Cir.) 102 Fed. Rep. 729, 4 Am. B. R. 515.

The petition must be in duplicate. See *in re* Bellah, 8 Am. B. R. 323.

The petition should not include an application for a warrant to seize property. *In re* Kelly, 91 Fed. Rep. 504; Mather *vs.* Coe, 92 Fed. Rep. 333; *in re* Ogles, 93 Fed. Rep. 426.

The petition should be verified by the petitioner and not by the attorney, unless the facts stated are within the knowledge of the attorney. *In re* Nelson, 98 Fed. Rep. 76; Green River Deposit Bank *vs.* Craig Bros., 6 Am. B. R. 381; *in re* Chequasset Lumber Co., 7 Am. B. R. 87. The objection that a petition is not properly verified may be waived. Leidigh Carriage Co. *vs.* Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, or petition may be amended to cover same. *In re* Bellah, 8 Am. B. R. 310.

The act of February 5, 1903, amending the Bankruptcy Act, as to who may be adjudged involuntary bankrupts, provides that subdivision *b* of section four of said act be, and the same is hereby, amended so as to read as follows:

"*b.* Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

"The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States."

No. 6.

Affidavit by Attorneys to Creditor's Petition.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Charles M. Leslie and John Ledyard Lincoln, who severally made solemn oath that they are attorneys and counselors-at-law of the Supreme Court of the state of Ohio and of the District, Circuit and Circuit Court of Appeals of the Southern District of Ohio, and that said John Ledyard Lincoln is a counselor-at-law admitted to practice in the Supreme Court of the United States, and that they are the attorneys and agents of the said petitioners in all matters recited in and relating to the said petition; that they have read the foregoing petition and know the contents thereof, and that the facts stated therein are true; that their sources of information and the grounds of their belief are among other things, examination of the original notes recited in the said petition; examination of the books of the said The Chequasset Lumber Company now in the possession of the said receiver, Eugene F. Perry, at 66 Broadway, in the city, county and state of New York; statements made to them by the officers of the said petitioning banks and by the said receiver; that the reason this affidavit is made by the said Leslie and Lincoln is that each of the said petitioners is a corporation organized under the laws of the United States, having its only office and place of business in Cincinnati, Ohio, more than 100 miles from the city of New York, and having no officer within this judicial district; and

that they have full authority from the said petitioning banks and have been authorized by them to make this affidavit.

Charles M. Leslie.
John Ledyard Lincoln.

Sworn to before me this 14th day of November, 1901.

[*Seal.*] John A. Valentine,
Notary Public, Kings Co.

Certificate filed in N. Y. County.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Henry Melville, who made solemn oath that he is an attorney-at-law duly admitted to practice in the District Court of the United States for the Southern District of New York, and the attorney of record of the foregoing petitioning creditors; that he has read the foregoing petition in bankruptcy and knows the contents thereof, and that the facts stated therein are true; that the sources of his information as to the truth of said facts are the statements made to him by Charles M. Leslie and John Ledyard Lincoln, attorneys and counselors-at-law, residing in the city of Cincinnati and state of Ohio, attorneys and general counsel for the said petitioners; that the said statements have been made under oath, as appears by the foregoing affidavits and otherwise; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation organized under the laws of the United States, having its principal and only place of business in Cincinnati, Ohio, more than one hundred miles from the city of New York, and having no officer within this judicial district; and that the deponent has been duly authorized to make this verification.

Henry Melville.

Sworn to before me this 14th day of November, 1901.

[*Seal.*] John A. Valentine,
Notary Public, Kings Co.

Certificate filed in N. Y. County.

(1) This affidavit was held sufficient *in re* Chequasset Lumber Co., 7 Am. B. R. 87.

That an attorney may make affidavit when familiar with the facts, see also *in re* Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. *vs.* Stengel, 95 Fed. Rep. 637; 2 Am. B. R. 283; Green River Deposit Bank *vs.* Craig Bros., 6 Am. B. R. 381.

No. 7.

Order to Show Cause upon Creditors' Petition.

(Official Form No. 4.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

Upon consideration of the petition of —— that —— be declared a bankrupt, it is ordered that the said —— do appear at this court, as a court of bankruptcy, to be holden at ——, in the district aforesaid, on the —— day of ——, at —— o'clock in the ——noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

No. 8.

Subpoena to Alleged Bankrupt (1).

(Official Form No. 5.)

United States of America, —— District of ——. To ——, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ——, in said district, on the —— day of ——, A. D. 190—, —— to answer to a petition filed by —— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the honorable ——, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

(1) Seen Gen. Ord. 3; R. S. secs. 911 and 912; B. A. 1898, sec. 18*a*. Loveland's Bank., secs. 71-76. Eq. Rule 13.

Secs. 18 *a* and *b* of the Bankruptcy Act were amended by the act of February 5, 1903, to read as follows:

"*a*. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the

return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

"*b*. The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow."

As to the effect of a voluntary appearance, see *in re* Columbia Real Estate Co., 101 Fed. Rep. 965.

As to the practice in bankruptcy when service is made by publication, see *in re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 301.

As to effect of service beyond the jurisdiction of the court, *in re* Appel, 103 Fed. Rep. 931, 2 N. B. N. 907.

No. 9.

Denial of Bankruptcy (1).

(Official Form No. 6.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

At ——, in said district, on the —— day of ——, A. D. 190—.

And now the said —— appears and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or,* he demands that the same may be inquired of by a jury].

———.

Subscribed and sworn to before me this day of ——, A. D. 190—. ———,

[*Official character.*]

(1) B. A. 1898, sec. 19. Loveland's Bank., sec. 83.

The debtor may set up any defense which tends to prevent an adjudication, *in re* Paige, 99 Fed. Rep. 538; Mather *vs.* Coe, 92 Fed. Rep. 333; *in re* Etheridge Furniture Co., 92 Fed. Rep. 329.

No. 10.

Order for Jury Trial (1).

(Official Form No. 7.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of } In Bankruptcy.
—— —— ——
—— —— ——

At ——, in said district, on the —— day of ——, 19—.

Upon the demand in writing filed by ——, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered that said issue be submitted to a jury.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 19. Loveland's Bank., sec. 87.

Day *vs.* Beck & Gregg Hardware Co., 8 Am. B. R. 175; Mattoon Nat. Bank, 102 Fed. Rep. 728; 4 Am. B. R. 515; Leidigh Carriage Co. *vs.* Stengel, 95 Fed. Rep. 637, 2 Am. B. R. 283; *in re* Bauman, 96 Fed. Rep. 946, 3 Am. B. R. 196.

A bankruptcy proceeding is in equity, and does not fall within the seventh amendment to the Constitution, governing the right of trial by jury, which can be had in bankruptcy only under the provisions of sec. 19 of the Bankruptcy Act. Elliott *vs.* Toeppner (Sup. Ct.), 9 Am. B. R. 50. *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R., 99; the only issues to be submitted as of right to a jury are those of insolvency, and the fact of an act of bankruptcy in involuntary proceedings as provided in sec. 19. Simonson *vs.* Sinsheimer, 3 Am. B. R. 824 (C. C. A., 6th Cir.), 100 Fed. Rep. 426.

As to the right to a trial by jury, see *in re* Rude, 4 Am. B. R. 319; Day *vs.* Hardware Co., 8 Am. B. R. 175.

No. 11.

Answer to Creditor's Petition (1).

The District Court of the United States for the —— District of ——.

In the matter of E. F. & Co., F. Brothers,

and N. & Co., Petitioners,

vs.

A. B. & Company, Respondents.

Joint plea of the defendant, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company.

The defendants, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company, by protestation, not confessing nor acknowledging all or any of the matters or things in the said petition of said petitioners mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged, for plea to the whole of said petition:

These defendants say that said petitioners are not, nor is either of them, creditors or a creditor in the manner or form alleged in their said petition, of these defendants or their said firm, and that the alleged demands of said petitioners mentioned and referred to in their said petition, are not provable against defendants or their said firm as in petition alleged, nor do the alleged demands of said petitioners against defendants' firm amount to $——, and that the petitioners, E. F. & Company, were not at the time of filing said petition herein, entitled to demand of defendants' firm for the alleged sale or delivery referred to in petition, the sum of $——, nor any other sum on account of said alleged sale or delivery, nor is said sum of $——, or any other sum for the alleged sale and delivery of said goods, due to said petitioners, E. F. & Company. That the petitioners, F. Bros., had no such demand as set forth in petition, nor had the demand amounting

to $——, nor was that sum, or any other sum, due from defendants' firm to said F. Bros. for said goods, nor for the alleged sale or delivery referred to in petition by F. Bros. to defendants' firm. That the petitioners, N. & Company, had no such demand as set forth in said petition for any goods, wares or merchandise sold or delivered, amounting in the aggregate to $——, or any other such sum due, owing or unpaid for any such sale or delivery of goods.

These defendants further say that heretofore, to wit, several months before this proceeding was instituted, to wit, on ——, an action in equity was instituted in the Circuit Court for the county of —— and state of ——, at ——, in and by which the defendant, L. C., as trustee, was plaintiff, and these defendants and all creditors of these defendants and their said firm were defendants, in which said L. C. set forth the assignment for the benefit of creditors, and sued for a settlement of his trust as assignee thereunder, and that in that settlement suit all of the petitioners in this proceeding, long before the institution of this proceeding, were parties defendant, and entered their appearance and filed their claims therein, and have ever since such entry of their appearance been at all times and are now parties to said settlement suit in said Circuit Court of —— county, ——, therein suing and seeking in the state court to recover their proportion, as creditors of defendants' firm, of the assets of defendants' firm so assigned, which proportion would be the same proportion that they would obtain if said estate were distributed in bankruptcy in this court; they have never dismissed their proceeding in said court, but were, at the time of the institution of this proceeding, and still are, seeking to recover in said action their proportionate share of the proceeds of said estate as creditors thereof, and that before the service of process or any notice or information of this proceeding the defendant, L. C., as assignee of these defendants, under orders of the —— Circuit Court, which had jurisdiction of the estate, the parties and the action

at that time, paid into court into the hands of the receiver of the court, and deposited in court in said action, all of the funds in his hands, to wit, all of the proceeds of the estate of these defendants so assigned to him for the benefit of creditors, and all of said funds have been ever since and now are in said court in said action in the actual control and custody of the court for distribution therein, and but for the proceedings in this court would be ready now for prompt distribution among the creditors in the same proportion and in the same manner that they would be distributed here, without the extra costs of the proceedings in this court, and these defendants rely on and plead said other action, suit and proceeding in the Circuit Court of —— county, in the state of ——, in bar and estoppel of petitioners' claim herein, and as a good and valid defense to said proceeding.

These defendants further state that before the institution of this proceeding, there was an agreement and composition offered by defendants' said firm to their creditors, including the petitioners in this proceeding, at the rate of fifty cents on the dollar, which proposition was offered by defendants to petitioners and other creditors and accepted by petitioners, and almost all of the creditors of defendant, and that as between defendants' firm and petitioners, the original indebtedness and obligation was by said agreement of composition terminated, and the right of petitioners against said defendants' firm is no longer upon the original accounts, sale or delivery of goods and original indebtedness, but upon the contract or composition and compromise agreed upon between defendants' firm and said petitioners and other creditors of defendants' firm.

These defendants further say that this proceeding was not instituted, nor has it ever been prosecuted in good faith on behalf of the petitioners or any of them for the relief afforded by the National Bankruptcy Law of 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," but was instituted for sinister, oppressive and

vicious purposes, this proceeding being part of a plan or scheme begun by petitioners in 1898 for the avowed purpose of forcing defendants and their said firm to pay said petitioners more than other parties claiming to be creditors of defendants' firm, were to receive any more than the assigned estate could pay.

These defendants further state that in December, ——, the defendant, L. C., as assignee of defendants' firm, filed said suit in the —— Circuit Court of the state of ——, asking as aforesaid, a settlement of his accounts and distribution of the proceeds of the assigned estate among the creditors of defendants' firm, without preference as provided by the laws of ——, that the petitioners in this proceeding, as parties to said suit, joined therein and united in an order entered in that action, referring said action in the —— Circuit Court to the commissioner of said court as a Commissioner in Chancery to make a settlement of the accounts to said L. C., as assignee, and a distribution among the creditors; that excepting a few outstanding accounts of little or no value, all of the assets of defendants' said firm assigned to said L. C. have long since been converted into money and the proceeds paid into court as hereinbefore set forth, for distribution; that said court is now, and has been for some time, ready to distribute said fund ammong the creditors in the same proportion, and with the same respective legal rights as they would be distributed in this court, and in this proceeding, if the funds should be brought into this court, waiting only for the time for creditors to present their claims as required by law, to pass, which time expired ——. That the proceedings herein were taken and the petition of petitioners herein filed long after said State Court had taken and exercised complete jurisdiction and control of the defendants' said firm and their said estate assigned to said L. C., and of the said assignment and all of the claims of all of the creditors of defendants' said firm, and of all the estate of defendants' said firm, and had all of the

transactions, property and parties under its jurisdiction and control, and of all of the proceeds of all of its property in its possession, and was ready to distribute the proceeds and long after the assignee had paid the said proceeds into court in that proceeding, where the same now remains, and that neither these defendants nor said L. C., nor either of them, has or has ever had since the time of the filing of petition of petitioners herein, any possession or control of said estate, or any part thereof, or of the proceeds thereof, all of which matters and things these defendants do aver and plead to the petitioners' said petition, and humbly crave whether they shall make any further answer to the said petition.

And these defendants not waiving their said pleading, but relying thereon, for answer to the said bill and in support of said plea say that they and each of them know not and have not been informed save by said petitioners' said petition, and cannot set forth as to their belief or otherwise; that the petitioners were partners as set forth in petition, and they deny that the demands of petitioners set forth in petition were or are provable against defendants' firm in accordance with the provisions of the Act referred to in said petition, or at all; deny that the demands of petitioners against defendants' firm exceeded $——, or any other sum above $——, and deny that petitioners, or either of them, at the time of filing the petition in this proceeding, had any such claim or demand as set forth in petition, or any other claim or demand excepting a claim upon the contract and agreement between petitioners and defendants' firm, to compromise at fifty cents on the dollar. They deny that the defendant, L. C., had at the time of the filing the petition herein, or has now, the sum of $——, or any other sum, realized from the said assigned estate or any proceeds of the said assigned estate.

These defendants, for further answer herein, state that they are advised and believed that neither the petitioners, nor either of them, nor any creditor of these defendants, desires

the court to proceed further on said petition in involuntary bankruptcy; that no creditor has applied to the court for an adjudication in bankruptcy; that the matter was not brought to the court's attention by any creditor, but was brought to the court's attention without the intervention or desire or suggestion of any creditor by some one of the officers of the court, and not for the benefit of any creditor.

These defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said petition charged, without this, that there is any other matter, cause or thing in said petition contained, material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avowed or deny, is true to the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Y. & Y.,
Attorneys for Defendants.

State of ——, County of ——, ss.

A. B., makes solemn oath and says he is the above named defendant; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

A. B.

Sworn to before me this —— day of ——.

[*Seal.*]

N. R., Notary Public,
—— County, ——.

(1) See note to No. 1121.

No. 12.

Petition of Administrator of Deceased Partner Asking Leave to Settle Partnership Affairs (1).

District Court of the United States, —— District of ——.

In re A. B. & Co.

To the Honorable E. S., Judge of the District Court of the United States for the —— District of ——.

The petition of the Memphis Trust Company, administrator of A. B., deceased.

Petitioner respectfully shows that it was appointed administrator of A. B., deceased, by the Probate Court of —— county, ——, at its August Term, ——. It files herewith certified copies of its letters of administration.

It shows further that the said A. B. was the senior member of said firm of A. B. & Co., referred to in the original petition herein. It shows further that the individual assets, real and personal, of the said A. B., deceased, together with the partnership assets of the said firm of A. B. & Co. will, as it verily believes, be more than sufficient to pay all of the individual debts of the said A. B., and the firm liabilities of A. B. & Co. It shows further that before the petition in bankruptcy was filed herein against the said C. B. and D. B., it had taken steps in the Chancery Court of —— county, ——, to have the partnership property and assets of said firm of A. B. & Co., administered by said Chancery Court. On its application said Chancery Court of —— county, ——, appointed a receiver for said partnership assets on the —— day of ——, and said receiver was in charge of said assets when the petition in bankruptcy was filed in this cause.

Petitioner now presents this petition to this honorable court for the purpose of showing that as administrator of said A. B., deceased, it does not consent if said C. B. and D. B. are adjudged bankrupts, that partnership property shall be administered in bankruptcy.

Petitioner shows further that at its instance and on its application said partnership business is now being settled through said receivership mentioned above as expeditiously as its nature will permit.

Petitioner now asks leave to file this petition herein, and thereby set up its right to settle said partnership business in the manner set forth above.

Turley & Wright,
Solicitors for Mem. Trust Co., Admr.

(1) Taken from the record in Vaccaro *vs.* Security Bank, 103 Fed. Rep. 436.

No. 13.

Order Permitting Creditor to Join in Creditor's Petition.

[*Caption.*]

Be it remembered that this cause came on for hearing on this day upon the petition of the Security Bank of —— and other creditors of the said A. B. & Co., the exhibits to said petition and the proof, etc., when H. W., a citizen of ——, appeared by his counsel, and represented to the court that he is a creditor of said A. B. & Co. (his debt being evidenced by the promissory note of said firm of date February 20th, 1897, and due December 20th, 1897, and for the sum of $—— with interest at six per cent. per annum from date), and asked that he be allowed to join in the petition filed herein for involuntary bankruptcy, and the court doth hereby order that the said H. W. be and he is hereby allowed to become a party of this proceeding and that his name be inserted in the original petition as one of the petitioning creditors. Done this —— day of ——, A. D. ——.

No. 14.

Special Warrant to Marshal (1).

(Official Form No. 8.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

To the Marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ——, A. D. 19—, filed against ——, of the county of —— and state of ——, in said district and said petition is still pending; and whereas it satisfactorily appears that said —— has committed an act of bankruptcy [*or,* has neglected, *or,* is neglecting, *or,* is about to so neglect his property that it has thereby deteriorated, *or,* is thereby deteriorating, *or,* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——, and of all his deeds, books of account and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the honorable ——, judge of the said court and the seal thereof, at ——, in said district, on the —— of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——, and of all his deeds, books of account and papers which have come to my knowledge.

——,
Marshal [*or,* Deputy Marshal.]

FEES AND EXPENSES.

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way		
3. Actual expenses in custody of property and other services, as follows.....		
[*Here state the particulars.*]		

——,

Marshal [*or,* Deputy Marshal].

District of ——, A. D. 19—.

Personally appeared before me the said ——, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 69 and sec. 3*c*. Loveland's Bank., sec. 79.

An application to seize property should not be joined in petition for an adjudication. *In re* Kelly, 91 Fed. Rep. 504; Mather *vs.* Coe, 92 Fed. Rep. 333.

No. 15.

Bond of Petitioning Creditor (1).

(Official Form No. 9.)

Know all men by these presents: That we, ——, as principal, and ——, as sureties, are held and firmly bound unto ——, in the full and just sum of —— dollars, to be paid to the said ——, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our

heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this —— day of —— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said —— has applied to that court for a warrant to the marshal of said district, directing him to seize and hold the property of said —— subject to the further orders of said District Court.

Now therefore if such a warrant shall issue for the seizure of said property and if the said —— shall indemnify the said —— for such damages as he shall sustain in the event such seizure shall prove to have beeen wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of —— [*Seal.*]
—— —— [*Seal.*]
—— —— [*Seal.*]

Approved this —— day of ——, A. D. 190—.

——,
District Judge.

(1) B. A. 1898, sec. 3*e*. Loveland's Bank., sec. 79.

No. 16.

Bond to Marshal (1).

(Official Form No. 10.)

Know all men by these presents: That we, ——, as principal, and ——, as sureties, are held and firmly bound unto ——, marshal of the United States for the —— District of ——, in the full and just sum of —— dollars, to be paid to the said ——, his executors, administrators or assigns, to

which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 190—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said District Court, upon a petition of said ——, has ordered the said property to be released to him.

Now, therefore, if the said property shall be releasd accordingly to the said ——, and the said ——, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —— [*Seal.*]
—— —— [*Seal.*]
—— —— [*Seal.*]

Approved this —— day of ——, A. D. 19—.

——,
District Judge.

(1) B. A. 1898, sec. 69.

No. 17.

Petition to Enjoin Bankrupt or His Agent from Disposing of Property of the Estate.

In the District Court of the United States for the —— District of ——.

In the matter of E. B., bankrupt. In bankruptcy.

Respectfully represents E. M., trustee of the bankrupt herein, that as shown by the testimony in this case the said bankrupt

pretends that the $——, being the proceeds of the sale of the stock of goods and the mortgage upon the real estate on Third Street, in ——, is in the possession of his son, F. B.; that as shown by the record in this cause an order was entered requiring the said F. B. to appear before the referee herein and testify concerning the estate herein, and that said order has been returned "not found," and that a second order to such effect for his appearance has been entered and the same is now in the hands of the officers for execution. He says that the said F. B. so conceals his whereabouts that it is impossible for this petitioner, and, as he is informed, for the marshal of this court having said second order for execution, to learn of his said whereabouts; that petitioner is informed that there are persons offering to divulge the whereabouts of the said F. B. so that said order can be executed, upon the payment of the sum of $50.00.

He further reports that as shown by the evidence herein the said F. B. was authorized by the bankrupt herein to receive the said fund of $——, and that while said bankrupt pretends that he requested the payment of said money by said F. B. to said bankrupt he has made no effort to get said money and put it into the hands of this petitioner either as receiver of this court or as trustee, and that, notwithstanding that said bankrupt further pretends that he and his son were proposing to use said money to settle with the creditors and start another business elsewhere; and petitioner further reports that notwithstanding the said F. B. was present in —— up to the time of the proceeding in bankruptcy herein, he immediately thereon or immediately thereafter concealed his whereabouts from this petitioner and has kept them so concealed since that time.

Petitioner further refers to the record herein as to the order entered herein on the —— day of ——, A. D. ——, directing the said E. B. to pay said sum of money to this petitioner on or before the —— day of ——, and though petitioner says that he does not know whether said money is in the hands of said E. B. or under his control or in the hands of the said F. B.,

or under his control, he is fearful that said fund will be dissipated, and that said order may not be wholly effectual unless an injunction or restraining order be entered herein enjoining or restraining the said F. B. from disposing of any part of said funds and further ordering him to pay said fund into the hands of this petitioner. Petitioner says that from the evidence in this case already taken it appears, and petitioner believes, that the said sum of $—— is a part of the estate and property of the bankrupt herein; that the same did not come into the hands of the said F. B., if at all, as a common or simple debtor, and that he does not occupy that relation to this estate, but that said sum is a fund belonging to this estate and should be in the hands of this petitioner.

The premises considered, he prays for instruction as to the said matter as herein set up concerning the payment of the said sum of $50.00 as an aid to ascertain the whereabouts of the said F. B.; he prays for an order enjoining and restraining the said F. B. from disposing of the said money or any part thereof and further ordering and directing him to pay all, or so much thereof as he may have in his hands into the hands of this petitioner.

X. & X.,
Attorneys for Trustee.

E. M. says that he is trustee of the estate of the bankrupt herein, and that the statements contained in the foregoing petition are true, as he believes. E. M.

Subscribed and sworn to before me by E. M., this —— day of ——, A. D. ——. W. W., Notary Public,
Within and for County of ——
State of ——.

(1) Taken from the record in Mueller *vs.* Nugent, 184 U. S. 1.

No. 18.

Motion for Injunction.

In the District Court of the United States,

For the —— District of ——

In the matter of A. B., Bankrupt No. —— in bankruptcy.

At ——, in said District, on the —— day of —— A. D. 190—, —— District of ——, ss.

R. X. Esq., attorney for petitioning creditors [*or as may be*] moves the court for a writ of injunction against E. F., G. H. and J .K. according to the prayer of petition filed by R. S., E. T. and G. W. in this matter. R. X.

Attorney for [*as may be.*]

No. 19.

Temporary Restraining Order.

[*Caption.*]

And now, this —— day of —— 190—, on motion of said attorney, it appearing to the court that notice of this motion has been duly given to the proper parties, viz., E. F., G. H. and J. K. and that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at ——, on the —— day of —— A. D. 190—, at 10 a. m.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from any and all interference, by execution, levy, sale, or in any other manner whatever, with the property or estate of the above named debtor.

(1) B. A. 1898, sec. 2, clause 15; sec. 718, R. S.

No. 20.

Petition to Stay Pending Suit.[1]

In the District Court of the United States
For the —— District of ——.

In re A B., }
Bankrupt }

Your petitioner, A M, respectfully shows that A B was duly adjudicated a bankrupt herein on the —— day of —— 19— upon a petition filed the —— day of ——, 19—, and your petitioner A M was on the —— day of —— appointed and duly qualified as trustee of the estate of the said A B in bankruptcy, and is now acting as the said trustee.

That among the debts scheduled by said bankrupt proceedings is one for ——— dollars ($———), due C D and that such debt is of such a nature as to be released by a discharge in bankruptcy.

That at the time of the filing of the petition, on which said adjudication was made a suit was pending in the —— court of —— entitled C D vs. A B, founded upon the debt aforesaid from which a discharge in bankruptcy would be a release, and that the suit is still pending therein, and that if such suit is not stayed, great injury will be done your petitioner and the estate of A B to be administered in bankruptcy herein.

Wherefore your petitioner prays that further proceedings in said suit may be stayed pursuant to the bankruptcy laws of the United States in such cases made and provided, and that an injunction may be issued out of this Honorable Court directed to the said C D, restraining him, his agents, servants, attorneys and counselors from further prosecuting said suit in said court and for such other and further relief as to the court may seem just.

A. M.,
Trustee Petitioner.

State of——— }
County of——— } ss.

I, A M, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge, information and belief.

A. M.

Subscribed and sworn to before me this —— day of —— 19—.

J. N.
Notary Public in and for said County and State.

[1] This petition may be used with slight changes for stay prior to an adjudication, The bankrupt or the petitioning creditors may apply for a stay if no trustee has been appointed.
See also Loveland's Bank., sec. 22.

No. 21.

Injunction to Stay Suit. (1)

The United States of America,)
—— District of —— } ss.
—— Division)

The President of the United States of America, to R. S. and S. T., greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for —— Division of the ——District of ——, praying for an injunction to restrain the prosecution of a certain suit pending in the —— court in the county of —— state of —— in which you are plaintiffs and A. B. bankrupt is defendant, and has obtained an allowance for an injunction, as prayed for in said petition, from the District Court of the United States for the ——District of ——.

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said R. S. and S. T., or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said court, and from taking any further steps or proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe and obey until twelve months after the —— day of ——, the date the said A. B. was adjudged a bankrupt, or if within that time the said A. B. applies for a discharge, then until the question of such discharge is determined, or until our said District Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable G. R., District Judge of the United States for the —— District of ——, this —— day of —— A. D., 19—, and in the —— year of the independence of the United States of America.

B. R.,
Clerk of said Court.

[SEAL.]

(1) See Loveland's Bank., sec. 22.

No. 22.

Order Denying Preliminary Injunction Against Execution Creditors.

[*Caption.*]

Ordered that the application of the trustee for a preliminary injunction against the E. F. Company and C. & D., restraining them from proceeding with their executions against the bankrupt's wife, be denied and the petition filed ——, in that behalf be dismissed, also that the sheriff be directed to pay the money in his hands to the plaintiffs in the executions, as if the proceedings here had not been taken. But this order is without prejudice to the trustee to proceed at law or in equity in any court of competent jurisdiction to recover the money from the execution creditors aforesaid, as he may be advised.

The complainant herein will pay the costs of this cause, for which execution is hereby awarded against him, and K. D., surety on his cost bond herein.

No. 23.

Petition for the Appointment of a Receiver.

[*Caption.*]

Respectfully show, American Cutlery Co., A. M., engaged in business under the name and style of W. & Co. H. L., and R. Foundry Co., that heretofore, to wit, on the —— day of ——, ——, your petitioners filed an involuntary petition in bankruptcy against the A. B. Co., to which petition reference is here made for the specific allegations thereof. That the estate of said The A. B. Co., consisting of goods, wares and merchandise, accounts, etc., have been set over, transferred and delivered to the assignee, C. W., with general authority to sell and dispose of the same, and that furthermore certain creditors of

said company are seeking the appointment of a receiver to take charge of said property, under the orders of the Chancery Court of —— County, ——; that said property is in danger of being disposed of in some way not to the best advantage of your petitioners, and that large costs are being incurred, which are unnecessary and improper, and that therefore there may be considerable loss to the estate.

Wherefore, your petitioners pray that a temporary receiver to take charge of said estate, until a trustee can be elected, be at once appointed by your honor, and be empowered to take charge of and impound all of the property of said The A. B. Co. and hold the same subject to the further orders of this court.

American Cutlery Co.,
W. & Co.,
H. L.,
R. Fdy. Co.,
By R. X.,
Their Attorney.

No. 24.

Order Refusing to Appoint a Receiver.

[*Caption.*]

And on the —— day of ——, came the parties, by their attorneys. The court being now fully advised of the petitioners' motion for the appointment of a receiver herein, it is therefore considered by the court that the said motion be, and the same is hereby, overruled.

No. 25.

Order Appointing a Receiver in Bankruptcy (1).

The District Court of the United States, —— District of ——. } In bankruptcy.

In the matter of the petition of A. B. & Company and others to have The F. Company declared bankrupt.

This cause coming on to be heard upon the petition of A. B. & Company a creditor, to have a receiver appointed for said alleged bankrupt The F. Company, and due notice having been served of this application, and it appearing to the court that it is absolutely necessary for the preservation of the estate of said alleged bankrupt that a receiver be forthwith appointed, to take charge of, hold, manage and conduct the estate, property and assets of said alleged bankrupt;

It is therefore ordered, adjudged and decreed that W. R. be and he is hereby appointed receiver of all the assets and property of every kind and character of and belonging to the said F. Company, and said receiver is hereby clothed with all the power and authority of receivers in bankruptcy in like cases.

It is further ordered that said receiver within three days from this date, file a bond as such receiver, in the usual form, in the penal sum of $—— with surety to be approved by the clerk of this court.

It is further ordered that said receiver continue and conduct the business of said alleged bankrupt until the further order of this court, and said receiver is hereby authorized and directed to employ any and all necessary help, including counsel, in the administration of his trust, therefore personally came the said W. R. and qualified as such receiver.

(1) The authority for the appointment of receivers in bankruptcy is purely statutory. For the powers of a receiver, see Booneville Nat. Bank *vs.* Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13. He may be authorized to conduct the bankrupt's business for a limited period. Bank-

ruptcy Act 1898, sec. 21, clause 5. A receiver should be appointed by the judge, but in his absence the referee may make the appointment. *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *in re* Florcken, 107 Fed. Rep. 241.

Sec. 2, clause 5, of the Bankruptcy Act was amended by the Act of February 5, 1903, to read as follows:

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

No. 26.

Order to Put Receiver in Possession.

[*Caption.*]

It appearing to the referee from the petition of J. M., receiver, filed herein on the —— day of ——, that he, the said J. M., as receiver, acting under an order of this referee, acting in the absence of the judge of this court from the —— Division of the —— District of ——, lawfully proceeded to take charge of all of the properties of the defendant, A. B. Co., in the possession of C. W., assignee, under authority and power contained in said order of appointment, and it further appearing to the referee that the said C. W. has refused to surrender the possession thereof to the said J. M., receiver, who is an officer of this court under appointment of date ——, and that the said C. W. has openly, defiantly and in disobedience of an order of this court refused to set over and surrender to the said J. M. the moneys and other properties belonging to the defendant company and in his possession, and unlawfully withholds the same from the said receiver, it is, therefore, ordered that the marshal of the United States for the —— Division of the —— District of ——, proceed at once to take charge of and seize all of the properties of the defendant, The A. B. Co., of whatsoever kind and description in the possession of C. W., assignee, or his agents, or the agents or employes of the said A.

B. Company, and put the said J. M., receiver, in lawful and peaceable possession thereof, and the said marshal will carry into effect this order and report his action to this referee. This —— day of ——.

R. D.
Referee in Bankruptcy.

No. 27.

Marshal's Return on Above Order.

United States of America,
—— District of ——, ss.

Came to hand this the —— day of ——, and executed as therein commanded, by making known the contents of said writ, and receiving from the said C. W., assignee, the front door keys of the four story brick building, No. 401 Main St., and all contents therein of this date. Also front door keys to the four story brick building, No. 257 Main St., and all contents of said building of this date, and all keys and combinations to one large iron safe in building No. 401 Main St., ——. Also three checks amounting to sixteen and 40-100 dollars and cash $9.06 *(*nine and 06-100*)* for which I gave the said C. W. a receipt, and for which a receipt was taken from the said J. M., receiver. Formal demand was also made upon the said C. W., assignee, for any and all cash belonging to the said A. B. Co. in his possession as assignee in any of the banks of ——, which demand was refused by the said C. W.

V. F.
United States Marshal.

No. 28.

Adjudication that Debtor is not Bankrupt (1).

(Official Form No. 11.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
—— —— ——
} In Bankruptcy.

At ——, in said district, on —— day of ——, A. D. 19—, before the honorable ——, judge of the —— District of ——.

This cause came on to be heard at ——, in said court, upon the petition of —— that —— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— was not a bankrupt, and that said petition be dismissed with costs.

Witness the honorable ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. Loveland's Bank., sec. 88.

An order of adjudication should not be made until the expiration of the time for creditors to intervene and oppose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service. *In re* Humbert Co., 100 Fed. Rep. 439; *in re* Columbia Real Estate Co., 101 Fed. Rep. 965. Day *vs.* Beck & Gregg Hardware Co., 8 Am. B. R. 175.

No. 29.

Adjudication of Bankruptcy (1).

(Official Form No. 12.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
——— ——— ———
Bankrupt } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before the honorable ——, judge of said court in bankruptcy, the petition of —— that —— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said —— is hereby declared and adjudged bankrupt accordingly.

Witness the honorable ——, judge of said court, and the seal thereof, at —— in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. Loveland's Bank., sec. 88.

An order of adjudication should not be made until the expiration of the time for creditors to intervene and oppose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service. *In re* Humbert Co., 100 Fed. Rep. 439; *in re* Columbia Real Estate Co., 101 Fed. Rep. 965. Day *vs.* Beck & and Gregg Hardware Co., 8 Am. B. R. 175.

A secured or general creditor or a person who is not interested in an adjudication will not be entitled to make a motion to set it aside. *In re* Columbia Real Estate Co., 101 Fed. Rep. 965.

No. 30.

Order of Adjudication and Designating Newspaper.[1]

In the District Court of the United States
—— District of ——

In the matter of A. B., bankrupt. No. —— } In Bankruptcy.

At ——, in said district, on the —— day of ——, 190—, before the said Court in Bankruptcy, the petition of A. B. that he be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said A. B. is hereby declared and adjudged bankrupt accordingly.

It is further ordered that all notices required to be published in the above entitled matter, and all orders which the court may direct to be published, be inserted in —— a newspaper published in the —— County of ——, State of ——, within the territorial district of this court, and in the County within which said bankrupt resides.

Dated, ——

——
District Judge.

(1) The above form is used in some districts. In others a general designation of newspapers for each county is made which by its terms is applicable to all subsequent cases.

No. 31.

Order of Reference (1).

(Official Form No. 14.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

Whereas, ——, of ——, in the county of ——, and district aforesaid, on the —— day of ——, A. D. 19.., was duly adjudged a bankrupt upon a petition filed in this court by [*or,* against] him on the —— day of ——, A. D. 19—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to ——, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of —— at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said —— bankruptcy.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. *In re* Bellamy, No. 1268, Fed. Cas., s. c. 1 Ben. 474; Gen. Ord. 12. Loveland's Bank sec. 90.

No. 32.

Order of Reference in Judge's Absence (1).

(Official Form No. 15.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of } In Bankruptcy.
—— —— ——
—— —— ——

Whereas, on the —— day of ——, A. D. 19—, a petition was filed to have ——, of ——, in the county of ——, and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas, the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said mater be referred to ——, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of ——, A. D. 19—, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*f* and *g;* Gen. Ord. 12.

No. 33.

Referee's Oath of Office.

(Official Form No. 16.)

I, ——, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 190—.

——,
District Judge.

(1) B. A. 1898, sec. 36.

No. 34.

Bond of Referee (1).

(Official Form No. 17.)

Know all men by these presents: That we, ——, of ——, as principal, and ——, of ——, and ——, of ——, as sureties, are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 19—.

The condition of this obligation is such that whereas the said —— has been, on the —— day of ——, A. D. 19—, appointed by the honorable ——, judge of the District Court of the

United States for the —— District of ——, a referee in bankruptcy in and for the county of ——, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said —— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of —— [*Seal.*]
—— [*Seal.*]
—— [*Seal.*]

Approved this —— day of ——, A. D. 19—.

——,
District Judge.

(1) B. A. 1898, sec. 50.

PROCEEDINGS BEFORE REFEREE.

No. 35.

Notice of First Meeting of Creditors (1).

(Official Form No. 18.)

In the District Court of the United States
For the —— District of ——. In Bankruptcy.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

To the creditors of ——, of ——, in the county of —— and district aforesaid, a bankrupt:

Notice is hereby given that on the —— day of ——, A. D. 18—, the said —— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——, in ——, on the —— day of ——, A. D. 19—, at —— o'clock in the ——noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting.

——,
Referee in Bankruptcy.

——, 19—.

(1) B. A. 1898, secs. 55 and 58*b* and *c;* Gen. Ord. 12.
How to conduct the first meeting of creditors see *in re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

No. 36.

Affidavit in Proof of Publication of Notice of the First Creditors' Meeting.

The District Court of the United States
—— District of —— Division—In bankruptcy.
State of ——,
County of ——, ss.

Personally appeared before me, a notary public, in and for said County, E. S., for the publisher of The Court Index, who, being duly sworn, says that the annexed advertisement was published —— times, on the ——, 190—, and that said publication was made in The Court Index, a newspaper printed and of general circulation in said county, and the paper duly designated by the District Court of the United States for —— District of ——, —— Division, sitting as a Court of Bankruptcy, for the publication of all notices required to be published within the District of —— County, under the act of Congress, approved July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States."

E. S.

Sworn to before me, and signed in my presence, this —— day of ——, 190—.

J. N.
Notary Public, within and for
—— County, ——.
——, 190—.

I hereby certify that this day I mailed a copy of the notice above set forth to each of the creditors named in the schedules filed herein.

A. M.,
Referee in Bankruptcy.

No. 37.

Appointment, Oath, and Report of Appraisers (1).

(Official Form No. 13.)

In the District Court of the United States
For the ——District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

It is ordered that ——, of ——, —— of ——, and ——, of ——, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

—— District of ——, ss.

Personally appeared the within-named —— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

——,
——,
——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a

strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ——, this —— day of ——, A. D. 19—. ——,

——,

——

(1) B. A. 1898, sec. 70*b*.

No. 38.

List of Debts Proved at First Meeting.

(Official Form No. 19.)

In the District Court of the United States
For the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——,
Referee in Bankruptcy.

No. 39.

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law (1).

(Official Form No. 20.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

To ——,
——:

I, ——, of ——, in the county of —— and state of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and

there from time to time, and as often as there may be occasion, for me and my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 19—.

—— [*Seal.*]

Signed, sealed and delivered in presence of

——.

Acknowledged before me this —— day of ——, A. D. 19—.

——,

[*Official character.*]

(1) When executed on behalf of a partnership or of a corporation the person executing the instrument must make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. Gen. Ord. 21, par. 5.

An attorney at law cannot vote at a creditors' meeting without producing a letter of attorney, duly appointing him an attorney in fact. *In re* Sugenheimer, 91 Fed. Rep. 744; *in re* Blankfein, 97 Fed. Rep. 191

No. 40.

Special Letter of Attorney in Fact.

(Official Form No. 21.)

In the matter of ——— ——— ———, Bankrupt. ——— ——— ———	In Bankruptcy.

To ———,

———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the ——— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, A. D. 19—.

——— [*Seal.*]

Signed, sealed and delivered in presence of

———.

Acknowledged before me this ——— day of ———, A. D. 19—.

———,

[*Official character.*]

See note to Form No. 39.

No. 41.

Appointment of Trustee by Creditors. (1).

(Official Form No. 22.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——, of ——, in the county of —— and state of ——, to be the trustee —— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be and the same is hereby approved

———,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 44 and sec. 50*c*. No official or general trustee can be appointed by the court. Gen. Ord. 14.

A trustee is elected by the majority of the creditors present at the

meeting and not of those who have proved claims against the estate. *In re* Henschel, 113 Fed. Rep. 443, 7 Am. B. R. 662.

If the creditors fail to appoint, the referee may do so, but if the referee refuses to confirm the trustee elected by creditors, he cannot appoint but should call another meeting for the purpose of a new election. *In re* Lewensohn, 3 Am. B. R. 299, 98 Fed. Rep. 576; *in re* Mackellar, 116 Fed. Rep. 547.

No. 42.

Appointment of Trustee by Referee. (1).

(Official Form No. 23.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——, of ——, in the county of —— and state of ——, as trustee of the same.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 44. No general or official trustee can be appointed to act in cases generally. Gen. Ord. 14.

A referee cannot appoint a trustee simply because he declines to approve one elected by the creditors. He must call another meeting for an election. *In re* Lewensohn, 3 Am. B. R. 299, 98 Fed. Rep. 576; *in re* Mackellar, 116 Fed. Rep. 547.

No. 43.

Notice to Trustee of His Appointment (1).

(Official Form No. 24.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

To ——, of ——, in the county of ——, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or*, one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of —— A. D. 19—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——, the —— day of ——, A. D. 19—.

———,
Referee in Bankruptcy.

(1) Gen. Ord. 16. The creditors fix the amount of the bond. B. A. 1898, sec. 50*c*.

No. 44.

Bond of Trustee. (1).

(Official Form No. 25.)

Know all men by these presents: That we, —— ——, of ——, as principal, and —— ——, of ——, and —— ——, of ——, as sureties, are held and firmly bound unto the United States of America in the sum of —— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this —— day of ——, A. D. 190—.

The condition of this obligation is such, that whereas the above-named —— —— was, on the —— day of ——, A. D. 190—, appointed trustee in the case pending in bankruptcy in said court, wherein —— —— is the bankrupt, and he, the said —— ——, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said —— ——, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of

—— —— —— —— [*Seal.*]
—— —— —— —— [*Seal.*]
—— —— [*Seal.*]

(1) B. A. 1898, secs. 50*b* and *c*.

No. 45.

Order Approving Trustee's Bond.

(Official Form No. 26.)

At a court of bankruptcy, held in and for the —— District of ——, at ——, ——, this —— day of ——, 190.—.

Before —— ——, referee in bankruptcy, in the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

It appearing to the court —— ——, of ——, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for faithful performance of his official duties, in the amount fixed by the creditors [*or*, by order of the court], to wit, in the sum of —— dollars, it is ordered that the said bond be and the same is hereby approved. ——.

Referee in Bankruptcy.

——

No. 1156.

Order that no Trustee be Appointed. (1).

(Official Form No. 27.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no

assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——,
Referee in Bankruptcy.

(1) Gen. Ord. 15.

No. 47.

Order for Examination of Bankrupt. (1).

(Official Form No. 28.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

Upon the application of ——, trustee of said bankrupt [*or,* creditor of said bankrupt], it is ordered that said bankrupt attend before ——, one of the referees in bankruptcy of this court, at ——, on the —— day of ——, at — o'clock in the ——noon, to submit to examination under the Acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 7, clause 9; sec. 21, and sec. 38, clause 2. Gen. Ord. 22. See also note to No. 48.

No. 48.

Examination of Bankrupt or Witness. (1).

(Official Form No. 29.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, one of the referees in bankruptcy of said court.

——, of ——, in the county of ——, and state of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says [*here insert substance of examination of party*].

——,
Referee in Bankruptcy.

(1) Loveland's Bank., sec. 204, B. A. 1898, sec. 21. Gen. Ord. 22.

Sec. 21*a* of the Bankruptcy Act is amended by act of Feb. 5, 1903, to read: "*a*. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act; provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

A large latitude of inquiry is allowed in the examination of the bankrupt and other persons closely connected with him in his business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor. *In re* Horgan (C. C. A., 2nd Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *in re* Bard, 108 Fed. Rep. 208; *in re* Foerst, 93 Fed. Rep. 100, 1 Am. B. R. 259; *in re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; Peoples' Bank *vs.* Brown (C. C. A. 3rd Cir.) 112 Fed. Rep. 652; 7 Am. B. R.

475; *in re* Cliffe, 97 Fed. Rep. 540, 3 Am. B. R. 257. A trustee in insolvency under a state law may be examined. *In re* Pursell, 114 Fed. Rep. 371, 8 Am. B. R. 96.

It is not necessary that there be a formal application for an examination showing the particular questions proposed to be asked or the particular facts as to which the examination is to be made. *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

Testimony taken upon the examination of the bankrupt is taken in the whole pending proceeding and may be introduced and read upon the hearing of a petition for a discharge. *In re* Wilcox (C. C. A., 2nd Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *in re* Cooke, 109 Fed. Rep. 631, 5 Am. B. R. 434; *in re* Bard, 108 Fed. Rep. 208. But where a claimant was not in fact a party and could not exercise the right of cross examination at the time the witnesses were examined, the witnesses, including the bankrupt, must be recalled unless the party consents to the use of the testimony as it appears in the proceedings. *In re* Kellar, 6 Am. B. R. 334.

It has been held that a bankrupt or other witness is not entitled as a matter of right to be attended and cross-examined by his own attorney. *In re* Cobb, 7 Am. B. R. 104; *in re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

No. 49.

Summons to Witness (1).

(Official Form No. 30.)

To ——:

Whereas, ——, of ——, in the county of ——, and state of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the —— district of ——.

These are to require you, to whom this summons is directed, personally to be and appear before ——, one of the referees in bankruptcy of the said court, at ——, on the —— day of at —— o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Hon. ——, judge of said court, and the seal thereof at ——, this —— day of ——, A. D. 19—.

——,

Clerk.

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

On this —— day of ——, A. D. 19—, before me came ——, of ——, in the county of ——, and state of ——, and makes oath, and says that he did, on ——, the —— day of ——, A. D. 19—, personally serve ——, of ——, in the county of ——, and state of ——, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——.

(1) Gen. Ord. 3. R. S. sec. 911, *et seq.*

No. 50.

Minutes of Creditors' Meeting (1).

The District Court of the United States
For the —— District of ——
In the matter of N. W., bankrupt.
Before A. M., referee, on the —— day of ——, 19—, at — o'clock. Present: The referee, bankrupt and various attorneys for creditors, and also creditors.
The motion of the B. Mfg. Co., filed on the —— day of ——

19—, coming on for hearing, I heard evidence in relation to the same, and ordered as follows, viz.:

I ordered and directed the trustee to pay over to W. K., attorney for the B. Mfg. Co., the sum of $—— being $—— less ten per cent. the amount of merchandise belonging to said company and held on consignment by the bankrupt and since sold by the receiver herein and realizing said sum; I finding the said amount to belong to the said company, I also ordered and directed the trustee to turn over to said company all the —— now on hand, or that may hereafter come to the trustee's hands, the same being the property of said company and never sold by them. I also found that the said company has a claim as per schedule, for $—— goods sold up to the —— day of ——, 19—, the same being a general claim. I also found that the said company has an additional claim for the sum of $—— goods sold from the —— day of ——, 19—, up to the date of assignment, the same being a general claim.

The attorney for the C. B. Association, mortgagee consenting, I directed the trustee to commence proceedings for the sale of real estate under mortgage in the District Court of the United States, said mortgagee agreeing to enter its appearance and consent to jurisdiction. And I directed the same proceedings to be brought in relation to the other mortgaged real estate, in the event similar consent of mortgagee can be secured.

The bill of the heirs of G. W. for rent from the —— day of ——, 19—, to the —— day of —— 19—, amounting to $—— being presented as a claim entitled to preference on the ground of expense incurred by the assignee and trustee, and it appearing that possession was not taken until the —— day of ——, 19—, I accordingly reduced said claim to $——, which sum I directed the trustee to pay as a preferred claim.

The matter of disposition of the assigned bankrupt's stock of merchandise, etc., being heard, on motion of the creditors the trustee herein was directed to sell the same at private sale at not less than —— per cent. of the appraised value, and was

also authorized to employ a man to assist in said work at not exceeding $—— a week.

The bankrupt stated that his wife withdraws all claims herein, and that she would not file any claim herein.

The application of F. Q., for the payment of the proceeds of —— bales out of —— bales of ——, sent to the bankrupt on consignment, was heard, and it appearing that said goods were on consignment and that —— bales have been sold by the trustee herein as receiver herein, for the sum of $——, it is ordered that said sum less —— per cent. the usual commission, to wit the sum of $—— be paid to said F. Q. as a preferred claim herein.

It also appearing that the trustee herein has in his possession —— bales of spoiled —— sent by F. Q. to the bankrupt on consignment, and which property was not appraised herein or included in the appraisement, I ordered that the trustee deliver said property to the said F. Q.

The application of the appraisers for $—— compensation each, was rejected by me as excessive charges, and on motion of the creditors and with their consent, I directed the trustee to pay to each of the appraisers herein the sum of $——.

In relation to the disposition of the bank stock and the B. Brewing Co. bonds, the trustee was directed to get offers for the purchase of the same, and report to the referee.

In relation to policy No. —— N. Y. L. Insurance Company, the trustee was directed to inquire into its value of the company, and report to the referee.

The trustee was ordered to collect from E. T., assignee, the sum of $——, collected by the said assignee.

The trustee was directed to pay all tax bills and delinquent taxes on real or personal property.

The trustee was directed to sell the real estate at ——, for not less than —— per cent. of its appraised value.

The bankrupt was examined and further examination continued until —— day of ——, 19—, at — o'clock, and the trustees authorized to employ an accountant to furnish to the court

and creditors information of payments made by the bankrupt within the past four months preceding his assignment.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 51.

Order that Bankrupt Deliver Assets to Trustee (1).

[*Caption.*]

This cause having been referred to the undersigned A. M., as referee, after an examination of said bankrupt and evidence having been fully had before said referee in accordance with the statutes in such cases made and provided, the evidence having been submitted upon argument, the undersigned referee does hereby make the following order on said A. B., bankrupt:

First. That said bankrupt A. B., within twenty days from and after the service of a copy of this order having been made, pay to B. M. Esq., trustee, the sum of $——, and deliver to said trustee, United States three per cent. coupon bonds of the face value of $——, or $—— in money.

Second. That in the event of the said A. B. failing or neglecting to obey this order to pay to the said trustee the above amount and deliver said bonds or money, the said B. M., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Section 29 of the Bankrupt Act of 1898, and

It is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X. Esq., attorney for the bankrupt, and on B. M. Esq., said trustee.

Dated at —— this —— day of ——. A. M.,
Referee.

(1) For proceedings if bankrupt fails to obey this order, see Nos. 115, *et seq.*

No. 52.

Order that Trustee Apply to be Made Party to Suit in State Court.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

On motion of the S. Trust Company, trustee herein, it is ordered that said trustee file a petition to be made a party to the suit pending in the —— Circuit Court, styled L. S., etc., against D. G., etc., and said trustee is further directed in said petition to pray the Honorable —— Circuit Court to turn over to it, the S. Trust Company, trustee in bankruptcy, the fund in said —— Circuit Court, in the cause aforesaid.

A. M.,
Referee in Bankruptcy.

No. 53.

Order of State Court to Pay Over to Trustee in Bankruptcy Fund in Court.

State of ——.
Circuit Court, Common Pleas Division.
L. C. assignee of C. D. & Co., Plaintiff,
vs.
D. G. etc., Defendants.

Motion and Order.

This day came the A. B. Trust Company, Trustee in Bankruptcy of C. D. & Co., D. G. and C. D., by R. Y., its attorney, and presented to the court its petition presented to the court June ——, and heretofore filed herein claiming the fund in court herein, together with the exhibits referred to therein and the notice therewith served on the plaintiff, L. C., assignee of C. D. & Co., and on M. A. of the firm of M. A., D. A. and J. G., attorneys for said plaintiff, and also presented a copy of said letter to said L. C., assignee, and his said attorneys, showing that the motion would be presented at this time and hour, viz.,

on the —— day of —— at 10 o'clock a. m, and answer of M. A., D. A. & J. G., attorneys thereto, and thereupon said petitioner, by R. Y., attorney, moved the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy of said bankrupts, C. D. & Co., D. G. and C. D., be made a party defendant to this action, and thereupon said trustee moved the court that said petition be taken as the answer and petition of the said A. B. Trust Company, as such trustee, claiming the fund in court herein, which is so ordered by the court, and thereupon the said A. B. Trust Company, Trustee in Bankruptcy of said C. D. & Company, D. G. and C. D., moved the court for leave to withdraw from the fund in court herein the sum of $——, and thereupon, the court being sufficiently advised, it is ordered by the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy, of said C. D. & Co., D. G. and C. D., be, and is, allowed to withdraw this day from the fund in court the sum of $——.

E. F.,
Judge of the —— Circuit Court,
Common Pleas Division.

No. 54.

Proof of Unsecured Debt (1).

(Official Form No. 31.)

In the District Court of the United States
For the —— District of ——.
In the matter of A. B., bankrupt.

At ——, in said district of ——, on the —— day of ——, A. D. 190—, came E. F., of ——, in the county of ——, in said district of ——, and made oath, and says that A. B., the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt

is as follows: Goods sold and delivered at the dates and for the agreed prices set forth in the statement of account hereto attached and made part hereof as Exhibit "A"; that no part of said debt has been paid [*except*——]; that there are no set-offs or counterclaims to the same [*except* ——]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. E. F.,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. J. M.,
[*Official character.*]

(1) Gen. Ord. 21. Loveland's Bank., secs. 109-141.

If the debt to be proven is an open account, maturing on a single date, the following statement should be added, to wit:

"Said debt became [*or*, will become] due on the —— day of ——, 19—, and no note has been received for such account nor any judgment rendered thereon."

If it consists of items maturing at different dates, the following addition to said form is suggested:

"The average due date of the different items of said account is the —— day of ——, 19—, and no note has been received for such account nor any judgment rendered thereon."

If proof is being made by the assignee of a claim transferred before proof, it must be supported by a deposition of the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured [*or*, if secured, the amount and character of securities].

The consideration must be stated. *In re* Scott, 93 Fed. Rep. 418; *in re* Stevens, 107 Fed. Rep. 243.

Debts which are provable against the estate of a bankrupt are stated in sec. 63 of the Bankrupt Act of 1898. It has been held that sec. 63*b* of the Bankrupt Act does not authorize the liquidation and proof of claims except when they may be included in one of the five classes in par. *a* in that section. *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

Referee is entitled to 25c for every proof of claim filed for allowance to be paid from the estate, if any, as a part of the costs of administration. Act of February 5, 1903. Sec. 9.

The following claims have been held not to be provable against the estate of the bankrupt:

A debt not in existence at the time of the filing of the petition, although arising before the adjudication. *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

Claims arising *ex delicto* are only provable when recovery may be had *ex contractu*. *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; Beers *vs.* Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745.

Or alimony; Audubon *vs.* Shufeldt, 181 U. S. 575.

Or a fine in a criminal case. *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. 590. But see *in re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

Or rent to accrue in the future against the estate either as a liquidated or unliquidated claim. Arnstein, 101 Fed. Rep. 706; *in re* Jefferson, 93 Fed. Rep. 948; *in re* Mahler, 105 Fed. Rep. 428; Bray *et al. vs.* Cobb, 100 Fed. Rep. 270; Atkins *vs.* Wilcox (C. C. A., 5th Ct.), 105 Fed. Rep. 598; *in re* Ells, 98 Fed. Rep. 968.

Or contingent claims. *In re* Rosenzweig, 118 Fed. Rep. 112; *in re* Swift (C. C. A., 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 374; Goding vs. Rosenthal, Sup. Ct. Mass. 61 N. E. Rep. 222.

A contract of endorsement is provable. *In re* Gerson (C. C. A., 3rd Cir.), 6 Am. B. R. 11, 107 Fed. Rep. 897.

It has been held that where a company which was furnishing its customers ice at so much per ton, payable weekly, under contracts covering a period of several years, broke such contracts and became unable to continue them in the future, the claims of the customers for damages sustained by reason of the company's inability to fulfil the executory portions of the contracts were "provable claims" in involuntary bankruptcy proceedings against the company. *In re* Stern, 116 Fed. Rep. 604.

No. 55.

Proof of Secured Debt (1).

(Official Form No. 32.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, in

said district of ——, and made oath, and says that ——, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt is as follows: _____; that no part of said debt has been paid [except ————]; that there are no set-offs or counterclaims to the same [except ————]; and that the only securities held by this deponent for said debt are the following: _____

_____

_____

——,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. ——.

——,
[*Official character.*]

(1) See note to Form No. 54.

Where a creditor in proving his debt fails to mention his security he will, as a general rule be deemed to elect to prove as an unsecured creditor, and to have surrendered his security. The courts, however, have permitted such a creditor to amend to change it from unsecured to secured. *In re* Scott, 93 Fed. Rep. 418; *in re* Stevens, 107 Fed. Rep. 243; *in re* Meyers, 99 Fed. Rep. 691; *in re* Wilder, 101 Fed. Rep. 104; *in re* Falls City Shirt Co., 98 Fed. Rep. 592, 3 Am. B. R. 427.

In re Cathcart (Southern District of Ohio), mechanic's lien holders proved their claims as unsecured creditors and voted for and elected a trustee who reduced the estate to money. Thereafter these lien holders proved their liens and were permitted to amend their proof of claims and assert their security and were awarded priority over mortgagees under a mortgage subordinated to the mechanic's liens. Judge Thompson affirmed this ruling of the referee August 21st, 1902. (Case not reported.)

No. 56.

Proof of Debt Due Corporation. (1).

(Official Form No. 33.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, and made oath, and says that he is —— of the ——, a corporation incorporated by and under the laws of the state of ——, and carrying on business at ——, in the county of ——, and state of ——, and that he is duly authorized to make this proof, and says that the said ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows: _____

_____

that no part of said debt has been paid]except———————

_____]; that there are no set-offs or counterclaims to the same]except_____

_____]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever. ——,

—— of said Corporation.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. ——,

[*Official character.*]

(1) The proof should be made by the treasurer, Gen. Ord. 21. See also note to Form No. 54.

No. 57.

Proof of Debt by Partnership. (1).

(Official Form No. 34.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, in said district of ——, and made oath, and says that he is one of the firm of ——, consisting of himself and —— ——, of ——, in the county of ——, and state of ——; that the said ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of —— dollars; that the consideration of said debt is as follows: ——————————————————————————; that no part of said debt has been paid [except ——————]; that there are no set-offs or counterclaims to the same [except ——————————]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]

(1) See note to Form No. 54.

No. 58.

Proof of Debt by Agent or Attorney. (1).

(Official Form No. 35.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, attorney [*or,* authorized agent], of ——, in the county of ——, and state of ——, and made oath, and says that ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——, in the sum of —— dollars; that the consideration of said debt is as follows: ———————————————————; that no part of said debt has been paid [except ———————————————————]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of security for said debt whatever. And this deponent further says that this deposition can not be made by the claimant in person because ———————————————————, and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]

(1) See note to Form No. 54.

No. 59.

Proof of Secured Debt by Agent. (1).

(Official Form No. 36.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, attorney [*or*, authorized agent], of ——, in the county of ——, and state of ——, and made oath, and says that ——, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——, in the sum of —— dollars; that the consideration of said debt is as follows: ——————

——————————————————————————;

that no part of said debt has been paid [except ——————

——————————————————————————];

that there are no set-offs or counterclaims to the same [except

——————————————————————————];

and that the only securities held by said —— for said debt are the following ——————————————————

——————————————————————————;

and this deponent further says that this deposition can not be made by the claimant in person because ——————————

——————————————————————————————,

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated. ——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. ——,

[*Official character.*]

(1) See note to Form No. 54.

No. 60.

Affidavit of Lost Bill or Note.

(Official Form No. 37.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

On this —— day of ——, A. D. 19—, at ——, came —— ——, of ——, in the county of ——, and state of ——, and makes oath, and says that the bill of exchange [*or,* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit: ——————————

——————————————————————————————

——————————————————————————————

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor

has the said ——, or any person or persons, to their use, to this deponent's knowledge or belief, negotiated the said bill [*or,* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

[*Official character.*]

No. 61.

Order Allowing Claim.

[*Caption.*]

This cause coming on to be heard upon the motion of the German Bank for allowance of its claim together with a lien by virtue of a mortgage, and after hearing counsel for the said bank and also counsel for the trustee and counsel for objecting creditors, it is now ordered that the claim of the said bank be and the same is hereby allowed for the sum of $—— as a general claim without security or preference, this being the amount of the claim with interest to the date of the adjudication in bankruptcy.

A. M.,
Referee in Bankruptcy.

No. 62.
Order Allowing Claims.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., referee in bankruptcy.

This cause coming on to be heard upon the claims of E. F., First National Bank and Third National Bank, and after hearing counsel for the parties and for creditors objecting to said claims, it is now ordered that the claim of E. F. be, and the same is hereby allowed for the sum of $——, as a general and unsecured claim; said sum being the balance due upon said debt, with interest to the date of adjudication. It is further ordered that the claim of the First National Bank be, and the same is hereby allowed for the sum of $—— as a general or unsecured claim, said sum being made up of the unpaid principal of said sum, to wit, $——, with interest to the date of adjudication. It is further ordered that the claim of the Third National Bank be, and the same is hereby allowed as a mortgage claim to the extent of $——, with interest thereon from the —— day of ——, that being the day demand by filing claims was made, until the same shall be paid, but this lien shall be subordinate to the mortgage of the S. Trust Company; and further the balance of the claim of the Third National Bank is allowed for the sum of $—— as a general or unsecured claim.

The question of priority between the Third National Bank and parties holding claims for labor performed and materials and supplies furnished is reserved.

A. M.,
Referee in Bankruptcy.

No. 63.
Order Disallowing Claim.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

The claim of the E. F. Company having been presented

for allowance and objection thereto having been made by the trustee, now after hearing counsel in favor of and in opposition thereto, the said objection is sustained, and it is ordered that the said claim be, and the same hereby is, disallowed.

A. M.,
Referee in Bankruptcy.

No. 64.

Order Allowing Attorney Fee (1).

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy:

The petition of the trustee for an allowance to R. X., Esq., for services rendered by him in securing the transfer of the fund from the state court to the trustee in bankruptcy coming on to be heard after notice to all counsel of record, and after hearing such counsel it is ordered that the said R. X., Esq., be, and he is, hereby allowed the sum of $500.00 for the services aforesaid, and the trustee is directed to pay said sum to him at once.

A. M.,
Referee in Bankruptcy.

(1) A referee may allow a reasonable attorney's fee as a part of the costs of administering an estate. *In re* Stotts, 93 Fed. Rep. 438; *in re* Tebo, 101 Fed. Rep. 419; *in re* Dreeben, 101 Fed. 110.

Reasonable fees have been allowed the attorney for the bankrupt in voluntary cases. Fifty dollars was allowed *in re* Beck, 92 Fed. Rep. 889; fifty dollars *in re* Kross, 96 Fed. Rep. 816, being thirty dollars for services prior to the application for discharge, and twenty dollars for prosecuting said application; two hundred dollars *in re* Burrus, 97 Fed. Rep. 926; fifty dollars *in re* Salaberry, 107 Fed. Rep. 95; fifty dollars *in re* Smith, 108 Fed. Rep. 39. Where a referee is not satisfied with the services rendered the bankrupt, he may suspend claim for a time owing to the absence of the bankrupt, but must make an allowance on such evidence as he may have within a reasonable time. *In re* Dreeben, 101 Fed. Rep. 110. A voluntary bankrupt cannot recover fees paid an attorney in preparing a petition and schedules or the deposit fee of twenty-five dollars. *In re* Matthews, 97 Fed. Rep. 772. A fee for the at-

torney for the trustee in voluntary proceedings has been allowed, *in re* Stotts, 93 Fed. Rep. 438; but see *in re* Smith, 108 Fed. Rep. 39, and a fee has been refused where bankrupt's attorney received from the bankrupt's brother a larger fee than he would ordinarily be allowed by the court out of the estate. *In re* O'Connell, 98 Fed. Rep. 83.

The attorney for the creditors in involuntary proceedings has been allowed a fee for services which varied according to the services rendered. One hundred dollars was allowed *in re* Harrison Mercantile Co., 95 Fed. Rep. 123; seventy-five dollars *in re* Woodard, 95 Fed. Rep. 955; two thousand dollars *in re* Curtis, 100 Fed. Rep. 784; fifteen hundred dollars *in re* Rude, 101 Fed. Rep. 805; seventy-five dollars *in re* Silverman, 97 Fed. Rep. 325, and twenty-five dollars *in re* Carolina Cooperage Co., 96 Fed. Rep. 950. Bankrupt's attorney in involuntary proceedings has been allowed a fee of twenty-five dollars per day for attending examinations, *in re* Mayer, 101 Fed. Red. 695, but was refused compensation for services defending the bankrupt against charges of fraud and concealment of assets or other matters involving the bankrupt's personal liability, civil or criminal, including a promised retainer, *in re* Mayer, 101 Fed. Rep. 695. The attorney for a trustee when such is deemed necessary is entitled to compensation. *In re* Little River Lumber Co., 101 Fed. Rep. 558. A trustee who was an attorney at law has been allowed compensation for his professional services such as he would have been obliged to pay had he employed other counsel, *in re* Mitchell, 1 Am. B. R. 687; to the same effect *in re* Welge, 1 Fed. Rep. 216, *contra in re* Muldaur No. 9905 Fed. Cas., S. C. 2 Ben. 65. The attorney for a trustee is not entitled to a fee for professional services for attending examinations where his services were rendered in behalf of creditors who were his real clients, *in re* Rozinsky, 101 Fed. Rep. 229, or in general where when the attorney for the trustee is also attorney for the creditors; *in re* Carolina Cooperage Co., 96 Fed. Rep. 950. A fee of seven hundred dollars has been allowed counsel for a receiver, *in re* Gerson, 2 N. B. N. & R. 497; but see *in re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528. Attorneys for creditors are not entitled to fees for attending creditors' meetings or procuring bidders for property at a sale, *in re* Harrison Mercantile Co., 95 Fed. Rep. 123; *in re* Rozinsky, 101 Fed. Rep. 229. The court will not enforce a provision in a mortgage for the payment "of an attorney's fee of ten per cent. of the amount of the debt," *in re* Roche, 101 Fed. Rep. 956.

Attorney's fees are costs of administration under the Bankrupt Act, sec. 64*b*, and are entitled to have priority. The amount may be fixed by the judge or referee without notice to creditors, *in re* Stotts, 93 Fed. Rep. 438. The amount rests in the discretion of the court, *in re* Beck, 92 Fed. Rep. 889; *in re* Burrus, 97 Fed. Rep. 926; *in re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *in re* Tebo, 101 Fed. 419; *in re* Mayer, 101 Fed. Rep. 695, but this discretion may be reviewed on appeal, *in re* Roche (C. C. A., 5th Cir.), 101 Fed. Rep. 958, 4 Am. B. R.

369; *in re* Curtis (C. C. A., 7th Cir), 100 Fed. Rep. 784, 4 Am. B. R. 17.

A court of bankruptcy cannot ordinarily tax as costs attorneys fees upon the dismissal of a petition in involuntary bankruptcy, *in re* Ghilione, 93 Fed. Rep. 186. When, however, an application to seize and hold the property of the bankrupt pending the hearing has been granted and the petition afterwards dismissed, the court may allow attorneys fees as costs of the proceedings, *in re* Abraham (C. C. A., 5th Cir.), 93 Fed. Rep. 767 (785).

A court of bankruptcy has refused to dismiss a voluntary petition until the attorney for the trustee had been paid. *In re* Salaberry, 107 Fed. Rep. 95.

No. 65.

Order Allowing Attorney's Fees (Another Form) (1).

[*Caption.*]

This cause coming on to be heard upon the report of A. M., referee, upon application for the allowance of attorney's fees, the court upon consideration thereof does allow F. Y., R. Y. and R. S., attorneys for creditors, a joint fee in the sum of $——, but the court refuses to allow a fee to R. X., counsel for the bankrupt.

(1) See note to No. 64.

No. 66

Petition to Expunge Claim (1).

District Court of the United States for the —— District of ——, —— Division.

In the matter of F. H., doing business as F. H. & Son, Bankrupt.

No. ——.

In Bankruptcy.

Respectfully represents B. S., trustee of the estate of said bankrupt, that the D. M. Grocery Co., which has this day filed its certain claim herein for allowance and which said claim has been allowed, has received preferences within the four months next immediately preceding the date of the filing

of the petition herein and have not surrendered the preferences so received.

Wherefore, he prays that said claim may be disallowed and expunged from the list of claims against the estate of said bankrupt.

B. S.,
Trustee.

(1) Bank. Ord. 21, par. 6.

No. 67.

Waiver of Notice (1).

The District Court of the United States
For the —— District of —— Division.

In the matter of F. H., doing business as F. H. & Son, bankrupt.

No. ——

In Bankruptcy.

The D. M. Grocery Company hereby waives the issuance and service of notice upon it as to the petition of the trustee heretofore filed herein asking that its claim heretofore allowed herein be disallowed and expunged from the list of claims against said estate and consents that said petition of said trustee may be heard on the —— day of ——, at 11 o'clock a. m.

The D. M. Grocery Co.

(1) If notice is not waived, formal notice should be given by mail to creditor. Bank. Ord. 21, par. 6.

No. 68.

Order that Certain Creditors Surrender Preferences Before Allowed to Prove Claims.

Order that certain creditors surrender preferences before allowed to prove claims.

The District Court of the United States
For the —— District of ——.

In the matter of
F. H.,
Bankrupt.

This cause coming on for hearing at an adjourned meeting of creditors held pursuant to adjournment on the —— day of —— 19—, and the court having heard all the evidence offered upon the matter of the objection of creditors to the claims of creditors who have received payments upon their claims since the —— day of ——, 19—, which motion of creditors was filed herein on the —— day of ——, 19—, and the court being fully advised, does find that the defendant was insolvent on the —— day of —— 19—, that the creditors hereinafter named received the payments hereinafter named upon their claims, since the —— day of —— 19—, and since the defendant became insolvent and within four months preceding the date of the assignment herein and the filing of the petition in bankruptcy herein by the plaintiff.

It is therefore considered, ordered and adjudged by the court that unless the creditors hereinafter named pay to the trustee herein the amounts so received by said creditors respectively since the —— day of —— 19—, and which amounts are set opposite their names, the claims of each of said creditors be, and the same are hereby rejected and disallowed. Said payments to said trustee herein shall be made

by said creditors, respectively, on or before the —— day of —— 19—.

D. & F., $——
L . T. Co., $——
A. P. & S. Co., $——

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Hess Spring & Axle Co. *vs.* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

The claims of creditors who have received preferences, voidable under Sec. 60, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under Sec. 67, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. Sec. 59*g* of Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 69.

Order Disallowing and Expunging List of Claims (1).

The District Court of the United States
For the —— District of ——

In the matter of
F. H.,
Bankrupt.

At ——, in the —— District of ——, on the —— day of —— 19—.

In accordance with the order heretofore made and upon the evidence submitted to the court upon the following claims against the estate of said bankrupt, and it appearing that said claimants have failed to make repayments as heretofore ordered:

It is now ordered that the following claims herein be dis-

allowed and expunged from the list of claims upon the trustee's record in said case, viz:

N. H. Co., $——
M. Pub. Co., $——
C. Bending Wks., $——

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 70.

Order Reducing Claim (1).

(Official Form No. 38.)

In the District Court of the United States for the —— District of ——.

—— —— ——

In the matter of
—— —— —— In Bankruptcy.
Bankrupt.

—— —— ——

At ——, in said district, on the —— day of ——, A. D. 19—.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ——, A. D. 19—.]

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 57*k*. Gen. Ord. 21, par. 6. Loveland's Bankruptcy, sec. 139.

If a party in interest objects to the allowance of said claim he must assume the burden of proof, *in re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681, but see *in re* Wooten, 118 Fed. Rep. 670. Witnesses may be examined orally or by deposition and the hearing may be postponed for the purpose of obtaining evidence in relation to the claim; *in re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681; *in re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146. Where a respondent denied the alleged indebtedness to a petitioning creditor and evidence is offered and the court finds the allegations of the petition true and makes an adjudication the same question cannot be tried upon the petitioning creditor making proof of his claim; *in re* Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425.

The allowance or disallowance of a claim is largely in the discretion of the referee and his decision on the question of fact will not be reversed by a judge unless manifestly contrary to the weight of the evidence; *in re* Rider, 96 Fed. Rep. 811, 3 Am. B. R. 192, 3 N. B. N. 187.

Where no trustee has been appointed the bankrupt may move for a reexamination and expunction of a claim proved and allowed against his estate; *in re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 472. Consult also note to next form *post*.

No. 71.

Order Expunging Claim (1).

(Official Form No. 39).

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—.

Upon the evidence submitted to the court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered that said claim be disal-

lowed and expunged from the list of claims upon the trustee's record in said case. ——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 57*k*. Gen. Ord. 21, par. 6.

It has been held that the provisions relating to the examination of claims does not apply to claims for expenses of administration, such as charges and expenses of a receiver. *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49, 3 N. B. N. 328.

The burden of proof is upon the creditor asking the re-examination to establish the facts which he alleges. *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

An objection to a petition for re-examination on the ground that it lacks particularity should be raised by a motion to make more definite and certain. *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 472, 2 N. B. N. 148.

An inequitable claim has been expunged. *In re* Knox, 98 Fed. Rep. 585, 3 Am. B. R. 371. See also *in re* Flick, 105 Fed. Rep. 593, 5 Am. B. R. 465, 3 N. B. N. 71. So also a claim barred by the statute of limitations. *In re* Lipman, 94 Fed. Rep. 353, 2 Am. B. R. 46.

No. 72.

Petition and Order for Sale by Auction of Real Estate (1).

(Official Form No. 42.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by

auction, in lots or parcels, and upon terms and conditions as follows: _____

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or,* after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 49, clause 1, and sec. 2, clause 7; Gen. Ord. 18.

The court may order a sale of real estate either subject to or free of liens when the interest of the general creditors would be advanced by such a sale. *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *in re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 924; *in re* Shaeffer, 5 Am. B. R. 248; *in re* Sanborn, 3 Am. B. R. 54.

A sale subject to encumbrances includes lien for municipal claims, and where twelve parcels of real estate sold for a lump sum — municipal lien on two, cannot be paid out of proceeds of sale. *In re* Gerry, 7 Am. B. R. 461.

It has been held that a wife, who was also a creditor and claimant of an interest in the real estate, cannot redeem from a sale by the trustee under an order of the referee. *In re* Novak, 7 Am. B. R. 267. The trustee has a right to redeem property sold under a decree of foreclosure. *In re* Novak, 7 Am. B. R. 27.

Sums to be paid upon secured claims or other claims entitled to priority or payment were not "dividends" upon which the trustee or referee may receive a commission. *In re* Utt (C. C. A., 7 Cir.), 105 Fed. Rep.

754, 5 Am. B. R. 387; *in re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *in re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731; *in re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 191. But they are now under sec. 9 of the Act of February 5, 1903, amending sec. 40*a* of Act of 1898.

No. 73.

Petition and Order for Redemption of Property from Lien (1).

(Official Form No. 43.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property*, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days'

notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 74.

Petition to Sell Real Estate Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.
To the Honorable ——
Judge of the District Court of the United States,
For the —— District of ——

The plaintiff C. C., respectfully represents to the court that upon the —— day of ——, 19—, P. R. and others instituted a proceeding, No. —— in this court, to have F. H. declared an involuntary bankrupt; that on the —— day of ——, 19—, the defendant, F. H., was adjudicated a bankrupt in said cause; that on the —— day of ——, 19—, the plaintiff, C. C. was elected trustee in bankruptcy, and immediately accepted the trust and qualified.

Plaintiff further represents to the court that at the time F.

H. was adjudicated a bankrupt he was possessed of the following real estate situated in —— county, ——, to wit:

[*Follow with description of real estate.*]

That the title to said property by operation of law is now vested in this plaintiff as trustee in bankruptcy.

That on the —— day of ——, 19—, after due notice to all parties interested, this plaintiff, as Trustee in Bankruptcy, of F. D., was authorized and directed to bring an action to sell the real estate of said F. H. free from all liens and claims whatsoever; that after the appointment and qualification of the plaintiff as trustee he had the aforesaid real estate appraised, and that the appraisement of Lot No. ——, firstly described above, was returned at $——; that of Lot No. —— secondly described above, was returned at $——; that of Lot No. ——, thirdly described above, was returned at $——.

Plaintiff further represents to the court that the U. Savings Bank, a corporation under the laws of ——, claims to hold a mortgage upon all the aforesaid lots; that the W. G. Bank, a corporation under the laws of ——, claims to hold two mortgages upon Lot —— firstly described above; that O. E. H. claims to have some interest in said Lot No. —— first described above, by way of mortgage; that the defendant O. E. H., wife of the said F. H., claims an inchoate right of dower in said premises.

That plaintiff further represents that, in order to properly administer the estate of the bankrupt, F. H., it is necessary to sell the above described real estate free from all liens and other claims, and to marshal liens; that all the defendants have consented in writing that this proceeding should be brought in the District Court of the United States for the —— District of ——.

Wherefore, the plaintiff C. C., Trustee in Bankruptcy, prays that subpœnas may issue to F. H., O. E. H., the U. Savings Bank and the W. G. Bank commanding them to set up by answer what claim, if any, each has in said premises herein-

before described; that an order may issue to the plaintiff herein as Trustee in Bankruptcy of F. H., to sell the above described premises at such time and upon such terms as the court may direct free from the liens and claims of these defendants, and free from the dower interest of the said O. E. H.; and that the funds arising from said sale be paid into court for further order; that the liens of the defendants be marshalled, and for all relief that may be necessary and proper in the premises.

C. C.,
Trustee in Bankruptcy of F. H.

R. X. & Y.,
Attorneys for Trustee.
(Affidavit).

(1) Taken from the record *in re* Nicholas Wolff, pending the District Court of the United States for the Southern District of Ohio.

No. 75.

Decree for Sale Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This day this cause came on to be heard upon the petition of plaintiff, C. C., trustee, and the answers and cross-petitions of O. E. H., the U. Savings Bank, a corporation under the laws of ——, the W. G. Bank, a corporation under the laws of ——, defendants, and the court finds that it is necessary for the proper administration of the trust of the plaintiff, C. C., Trustee in Bankruptcy of F. H., that the real estate described in his petition should be sold at public sale free from the claims of the defendants herein; and it fur-

ther appearing to the court that the property has already been appraised by appraisers appointed by the referee it is ordered that such appraisement be considered an appraisement for the purposes of this sale.

It is therefore ordered, adjudged and decreed that an order for sale of the various four parcels of real estate described in the petition, issue to C. C., Trustee in Bankruptcy, authorizing and directing him to sell all such property either separately or collectively as to him may seem for the best interests of the estate, as upon execution of property sold by the marshal; that he advertise and sell such parcels either separately or collectively on the premises for not less than —— of their respective appraised values; that he may sell for cash or —— cash, balance in —— and —— years, deferred payments to be secured by mortgage on the premises with interest at six per cent. per annum; and for good cause shown, advertisement in a German newspaper is dispensed with.

The trustee is further ordered to make due return of the order of sale issued herein, and to bring the proceeds of such sale into court for further order herein.

And on motion of the plaintiff, and for good cause shown, the trustee is authorized to employ an auctioneer to conduct the sale who shall receive as compensation a sum not to exceed —— per cent. of the proceeds of the sale, and he may expend the sum of $—— for extra advertising, which compensation and sum shall be taxed as part of the costs herein.

It is further ordered that the sale of said premises free and clear of the dower interest of the defendant O. E. H., shall be without prejudice to her right to have the value of said dower interest ascertained upon the coming in of the report of any sale made hereunder, and that when the value of said dower interest is ascertained, that the same be paid to her out of the proceeds of said sale, but without prejudice to the rights, if any, of the defendants, the U. Savings Bank and the W. G. Bank, under their mortgages set up in their re-

spective answers and cross-petitions filed herein, in the value of said dower interests.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

A court of bankruptcy has power to decree a sale free from liens. Chauncey *vs.* Dyke Bros. (C. C. A.) 119 Fed. Rep. 1.

It is in the province of the referee to direct the manner of sale free and clear of incumbrances, and he may preserve and transfer *bona fide* liens to the fund arising from the same. Trust Co. *vs.* Benbow, 3 Am. Bankr. R. 9, 96 Fed. 514; *in re* Cobb, 3 Am. Bankr. R. 129, 96 Fed. 821. *in re* Pittelkow, 1 Am. Bankr. R. 472, 92 Fed. 901; *in re* Matthews, 6 Am. Bankr. R. 96, 109 Fed. 603; *in re* Kellogg, 7 Am. Bankr. R. 623, 113 Fed. 120.

No. 76.

Final Entry of Distribution on Sale of Real Estate Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This day came the parties hereto, and this cause having been referred to A. M., as Special Master and said Special Master having heard the testimony and determined the questions submitted to him in accordance with this decree, and the parties hereto being satisfied with said determination and desiring to avoid the additional expense of a report by said Special Master, by consent of court, a report of the said Special Master herein is hereby waived.

And the court now coming on to distribute the proceeds of the sales herein, remaining in the hands of C. C., trustee herein, amounting to the sum of $—— does find, and the parties hereto consent thereto, as follows, viz:

The court does find that the defendant, the W. G. Bank has

the first and best lien upon the proceeds arising from the sale of Lot No. —— and the defendant, the U. Savings Bank has the first and best lien upon the proceeds arising from the sale of Lots No. —— and No. —— herein; that the defendant O. E. H., wife of the defendant F. H., is not entitled to any dower in the proceeds arising from sales of any of the lots herein.

The court does find that there are unpaid street assessments due the city of —— upon Lot No. —— amounting to the sum of $—— which should be paid out of the proceeds of the sale of said Lot No. —— before any payment is made to the said W. G. Bank.

The court does find that there are unpaid street assessments due the city of —— upon Lots No. ——, and No. —— herein amounting to the sum of $——, which should be paid out of the proceeds of the sales of said lots, before any payment is made to the said U. Savings Bank.

The court does find that there should be paid by the parties hereto as compensation for the services of the Special Master herein, including the payment of stenographer's services by said Special Master, and also the sum of $—— due the clerk of this court for entering this decree, by said Special Master, the aggregate sum of $—— for his services herein, and which sum should be borne by the parties hereto in proportion to their respective claims herein, to wit: $—— thereof by the W. G. Bank, and $—— by the U. Savings Bank.

The court does find that the proceeds of the sale of said Lot No. —— amounted to $——, from which after deducting the sum of $—— the proportionate part of costs and expenses already paid herein, there is left the sum of $—— and from which after deducting the sum of $—— for street assessments and $—— for Special Master herein, there is left the sum of $——, which should be paid over and distributed to the defendants, the W. G. Bank upon the notes set up by it in its answer and cross-petition herein.

The court does find that the proceeds of the sale of Lots No.

——, and No. —— amounted to $——, from which after deducting the sum of $——, the proportionate part of costs and expenses already paid herein, there is left the sum of $—— and from which after deducting the sum of $—— for street assessments and $—— for the Special Master herein, there is left the sum of $——, which should be paid over and distributed to the defendant, the U. Savings Bank, upon the note set up by it in its answer and cross-petition herein.

It is therefore considered, ordered and adjudged by the court, with the consent of parties hereto, that the said sum of $—— in the hands of the trustee herein, be, and the same is hereby distributed and said trustee is hereby ordered and directed to pay the same as follows; to wit:

First. To A. M., for his services as Special Master herein, including stenographer's costs and $—— to the clerk of this court, the sum of $——.

Second. To J. K., Treasurer of the city of —— in full of unpaid street assessments on the lots sold herein, said sum of $—— and $—— amounting in all to $——.

Third. To the W. G. Bank upon the notes set up in its answer and cross-petition herein the sum of $——.

Fourth. To the U. Savings Bank upon the note set up in its answer and cross-petition herein the sum of $——.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 77.

Petition and Order for Sale Subject to Lien. (1).

(Official Form No. 44.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ——, A. D. 190—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keep-

ing an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 78.

General Notice of Petition to Sell Real Estate.

The District Court of the United States
For the —— District of ——

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy.

To the Creditors of A. B., Bankrupt:

You are hereby notified that on Wednesday, ——, at 2 o'clock p. m., at my office, southwest corner of Third and Walnut streets, ——, I wil hear the petition hereto annexed and make such order as may seem proper and for the best interests of the estate of bankrupt. Your attendance at said meeting is requested.

A. M.,
Referee in Bankruptcy.

Dated at ——.

No. 79.

Trustee's Petition to Sell Portion of Bankrupt's Estate, Subject to Incumbrances (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

Respectfully represents C. C., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: Lot No. —— in E. J. M.'s first subdivision of ——, is subject to a mortgage to the C. B. Loan & Savings Company of ——, in the sum of $—— and is also subject to the dower right of O. E. H., wife of bankrupt, and taxes and assessments, and that it would be for the benefit of said estate that said real estate should be sold, subject to the said mortgage and dower.

Wherefore he prays that he may be authorized to make sale of said real estate subject to the incumbrances thereon.

Dated this —— day of —— 19—.

C. C.,
Trustee in Bankruptcy.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 80.

Order Authorizing Trustee to Sell Portion of Bankrupt's Estate, Subject to Incumbrances. (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This cause coming on for hearing on the petition of the trustee to sell the real estate of bankrupt, subject to liens, and

said petition having been filed on the —— day of ——, 19—, and having come on for hearing before me this day, of which hearing more than —— days notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat, it is ordered that the trustee herein be authorized to sell the portion of bankrupt's estate referred to in his petition, subject to the liens, etc., thereon, at private sale. The trustee is directed to advertise on the —— day of ——, 19—, in the C—— Index, for bids to be sent to the trustee up to —— o'clock on the —— day of ——, 19—. Said trustee is directed to report said bids at a hearing before the undersigned referee on the —— day of ——, 19—, at which time an adjourned meeting will be held for the purpose of accepting or rejecting the highest and best bid so received. Said bids shall be for cash, on confirmation by the court.

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 81.

Notice of Trustee's Sale Subject to Liens.

The District Court of the United States
For the —— District of ——
—— Division No. ——
In re Bankruptcy of F. H.

In pursuance of an order to me directed, I will receive at my office, southwest corner of Third and Walnut streets, ——, up to 2 o'clock p. m., on ——, bids for the purchase of the bankrupt's real estate, known as No. —— K. avenue, ——, and being Lot —— in E. J. M.'s first subdivision of ——, subject to a mortgage to the C. B. Loan and Savings Company of ——, in the sum of about ——, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes

and assessments. Terms of sale to be cash on confirmation by the court. All bids will be reported by me at an adjourned meeting of creditors held before A. M., Referee in Bankruptcy, southwest corner Third and Walnut streets, ——, on ——, at 2 o'clock p. m., for the action of said referee.

C. C.,
Trustee in Bankruptcy.

No. 82.

Report of Trustee of Sale Subject to Incumbrances (1).

The District Court of the United States
For the —— District of ——

In the matter of
F. H.,
Bankrupt.

To A. M., Esq.,
Referee in Bankruptcy.

Dear Sir:

The undersigned trustee herein begs to report that in accordance with the order of court, he advertised for bids for the purchase of the bankrupt's real estate, known as No. —— K. avenue —— and being Lot No. —— in E. J. M.'s first subdivision of ——, subject to the mortgage of the C. B. Loan & Savings Company of ——, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes and assessments. Publication of notice was made in the C. I. on the —— day of ——, 19—, and copies of said publication were also mailed to all creditors, proof of publication of notice in the C. I. is hereto attached and also copy of notice sent to all creditors.

The undersigned trustee reports that he has received the bid hereto attached of O. E. H., offering to pay the sum of $—— for said real estate, subject to said liens, etc. The under-

signed trustee reports that said bid was the only bid received by him and he recommends the acceptance of said bid and asks for such order as the court may see proper to make in the premises.

C. C.,
Trustee in Bankruptcy.

—— day of ——, 19—.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 83.

Petition and Order for Private Sale. (1).

(Official Form No. 45.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

Respectfully represents ——, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit: ——————

_____

_____

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:

_____

_____

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or,* after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,

Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 84.

Petition and Order for Sale of Perishable Property (1).

(Official Form No. 46.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt —— —— ——	In Bankruptcy.

Respectfully represents ——, the said bankrupt [*or,* a creditor, *or,* the receiver, *or,* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit:——————————

———————————————————————

———————————————————————

now in ——, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ——, A. D. 189—.

——.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [*or*, without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition, and —— in opposition thereto], I find that the facts are as above stated and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189—.

——.

Referee in Bankruptcy.

(1) Gen. Ord. 18, par. 3.

An order of sale ought not to be made until after an adjudication of bankruptcy, unless the property is of such a nature that immediate sale is necessary to preserve its value. *In re* Kelley Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

In re Beutel's Sons, 7 Am. B. R. 768, stock of hardware was held not to be "perishable property."

No. 85.

Order for Sale of Uncollected Accounts (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

For good cause shown, and in pursuance of direction of creditors the trustee herein is hereby ordered and directed to advertise for bids for uncollected accounts remaining in the hands of the trustee herein and uncollected. Said advertise-

ment shall give ten days' notice of the time and place when the trustee will receive bids, and such notice shall be advertised once in the —— Enquirer and once in the —— Tribune. Said bids shall be for cash, upon the confirmation of bid by the court. Said trustee is directed to return his report of bids without unnecessary delay.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 86.

Notice of Sale of Uncollected Accounts (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

In pursuance of an order directed to me on the matter of the bankruptcy of F. H., No. ——, in the District Court of the United States for the —— District of ——, I will receive bids for the purchase of all the uncollected accounts of the said F. H., remaining in my hands as trustee, at my office Room —— Building ——, up to the —— day of ——, 19—, at —— o'clock.

Terms of sale, cash on day of sale, subject to confirmation by the court. The right is reserved in the court to reject any or all bids. A list of such uncollected accounts can be seen at my office on application to the undersigned. C. C.,
Trustee in Bankruptcy.

—— day of ——, 19—.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 87.

Notice of Sale of Bank Stock (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

Notice is hereby given pursuant to an order made in the matter of the bankruptcy of F. H., No. —— in the District Court of the United States for the —— District of ——, we will on behalf of the Trustee in Bankruptcy of said F. H., and of all others concerned, offer at public sale to the highest and best bidder on the —— day of ——, 19—, at —— o'clock, at the —— Stock Exchange, No. —— street, —— shares of the capital stock of the W. G. Bank of ——, each of said shares being of the par value of $——. Terms of sale cash on confirmation of sale by the court.

I. B. & Company.

—— day of —— 19—.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 88.

Report of Sale of Bank Stock (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.
To the Referee in the Said Above Cause:

The undersigned auctioneers herein, beg to report that in pursuance of the order of court they sold on the —— day of

——, 19—, at the Stock Exchange in —— shares of stock of the W. C. Bank, each share of the par value of $—— to C. M., at $——, making a total for said —— shares of $——. We attach hereto copy of advertisement and bill for the same. The costs of said sale have been $——, for advertising, and $—— for our commission. The balance amounting to $—— will be paid over to C. C., trustee, on confirmation of said sale. We respectfully ask that the sale be confirmed.

I. B. & Company.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio

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No. 89.

Report of Trustee's Sale of Unmanufactured Stock (1).

The District Court of the United States

For the —— District of ——

In the matter of

F. H.,

Bankrupt.

Pursuant to an order to me directed as Trustee in Bankruptcy of F. H., bankrupt, No. —— District Court of the United States, —— District of ——, I will on the —— day of ——, 19—, at —— o'clock, on the premises on —— street, ——, offer at public sale all the goods, chattels and personal property of said bankrupt [*except book accounts and cash on hand*], consisting of unmanufactured stock used in the manufacture of ——, as per inventory on file with A. M., Referee in Bankruptcy, and a copy of which can be seen at my office No. ——, street, ——. Terms of sale to be cash upon the confirmation by the court. Said property to be sold as an entirety. The highest and best bid to be returned to said court for confirmation or other action on the —— day of ——, 19—.

C. C.,

Trustee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 90.

Notice of Petition and Sale of Chattels (1).

The District Court of the United States
The —— District of ——.
—— Division.
In the matter of
A. B.,
In Bankruptcy.

This day the trustee filed his petition for authority to sell the stock of goods of the bankrupt in lots at public auction to the highest bidder without reserve; said petition will come on for hearing at the office of the undersigned 1603 Union Trust Building, ——, on ——, at —— o'clock —m., and if not then otherwise ordered said sale will be ordered and held ——, as advertised.

M. W.,
Referee.

Dated at ——.

(1) The above form of notice has been used when it was advisable to save time, and the necessity of giving a second notice of sale for ten days after sale is ordered.

No. 91.

Trustee's Report of Exempted Property (1).

(Official Form No. 47.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

At ——, on the —— day of ——, 19—.

The following is a schedule of property designated and set

apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the Acts of Congress relating to bankruptcy:

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments			
Property exempted by state laws			

——,
Trustee.

(1) B. A. 1898, sec. 47, clause 11. Loveland's Bank secs. 177, *et seq.*

No. 92.

Trustee's Return of no Assets.

(Official Form No. 48.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——.	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

On the day aforesaid, before me comes ——, of ——, in the county of ——, and state of ——, and makes oath and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

No. 93.

Account of Trustee (1).

(Official Form No. 49.)

Dr. *The estate of —— ——, bankrupt, in account with ——, trustee.* Cr.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

(1) B. A. 1898, sec. 47, clause 10. Gen. Ord. 17.

Compensation of trustees: Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars, and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. Sec. 48*a* of Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 94.

Oath to Final Account of Trustee.

(Official Form No. 50.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

On this —— day of ——, A. D. 19—, before me comes ——, of ——, in the county of ——, and state of ——, and makes oath, and says that he was, on the —— day of ——, A. D. 19——, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed, containing —— sheets of paper, the first sheet whereof is marked with the letter ——[*reference may here also be made to any prior account filed by said trustee*],

is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——,
Trustee.

Subscribed and sworn to before me at ——, in said —— district of ——, this —— day of ——, A. D. 19—.

——,
[*Official character.*]

No. 95.

Order Allowing Account and Discharging Trustee.

(Official Form No. 51.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

——,
Referee in Bankruptcy.

No. 96.

Notice of Filing Account, Declaration of Dividends, etc.

The District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing $—— balance on hand, and that the final meeting of the creditors of said bankrupt will be held at the office of the undersigned, 1603 Union Trust Building, ——, on the —— day of ——, at 2 o'clock p. m., when the creditors may object to the confirmation of said account, transact other business, and the court will make allowances to counsel for bankrupt and trustee, and will declare a dividend to the creditors who have proved their claims to be paid by the trustee five days thereafter.

M. W.,
Referee in Bankruptcy.

Dated ——.

No. 97.

Notice.

The District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt } In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing no property other than the bankrupt's exemp-

tions, and that the final meeting of the creditors of said bankrupt will be held at the office of the undersigned, 1603 Union Trust Building, ——, on the —— day of —— at 2 o'clock p. m., when the creditors may object to the confirmation of said account, and transact other business.

M. W.,
Referee in Bankruptcy.

Dated at ——.

No. 98.

List of Claims and Dividends to be Recorded by Referee and by him Delivered to Trustee. (1).

(Official Form No. 40.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—.

A list of debts proved and claimed under the bankruptcy of ——, with —— dividend at the rate of —— per cent. this day declared thereon by ——, a referee in bankruptcy.

No	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 39, clause 1.

No. 99.

Notice of Dividend (1).

(Official Form No. 41.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To ——,

Creditor of ——, bankrupt.

I hereby inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——,
Trustee.

CREDITOR'S LETTER TO TRUSTEE.

To ——,

Trustee in bankruptcy of the estate of ——, bankrupt:

Please deliver to —— the warrant for dividend payable out of the said estate to me.

——,
Creditor.

(1) "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends, subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order; provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed. And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared." Sec. 65*b* of the Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 100.

Order for Costs and Confirming Accounts (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

At ——, in the —— District of —— on the —— day of —— A. D. 19—.

This cause coming on for hearing after due notice by mail to each creditor;

It is ordered that the following sums be paid as costs, commissions and fees herein, to wit:

C. C., Trustee's Commissions,	$——
A. M., Referee's Commissions,	$——
B. R., Clerk's Costs,	$——
C. I., Publications, etc.,	$——
C. I., For Discharge,	$——
A. M., Stationery,	$——
T. M. S., Stenographer, etc.,	$——
G. O., Services in Rejecting Claims	$——
Total	$——

It is further ordered that the amended account of the trustee, filed the —— day of ——, 19—, and the amended account of the receiver, filed the —— day of —— 19—, herein, having been examined and found correct are each hereby allowed.

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 101.

Order for Choice of New Trustee (1).

(Official Form No. 55.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

Whereas, by reason of the removal [*or*, the death, *or*, res-

ignation] of ——, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee.

It is ordered that a meeting of the creditors of said bankrupt be held at ——, in ——, in said district, on the —— day of ——, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 44 and 50*c*.

No. 102.

Notice of Final Meeting of Creditors.

The District Court of the United States
For the —— District of ——
No. ——

In re Bankruptcy of A. B.

To the Creditors of A. B., in the County of —— and District Aforesaid, a Bankrupt:

Notice is hereby given that on Tuesday, the —— day of ——, at 3 o'clock p. m., there will be a final meeting of the creditors of the above named bankrupt held at the office of the undersigned referee, southwest corner of Third and Walnut streets, ——, for the purpose of passing upon the accounts of the trustee, declaring a dividend, authorizing the sale of uncollected accounts at a sum to be fixed, and transacting such other business as may properly come before said meeting, and finally closing the affairs of the estate of said bankrupt.

Your presence is requested at said meeting.

A. M.,

Referee in Bankruptcy.

Dated at ——

No. 103.

Record of Proceedings Before Referee — No Trustee and no Assets (1).

In the District Court of the United States
For the —— District of ——
—— Division.

In the matter of A. B., Bankrupt. | No. —— In Bankruptcy. Record of Proceedings Before Referee.

At —— in said District.
Date.

	Order of reference, petition and schedules received from clerk.
	.....
	Bankrupt directed to attend before referee on —— at —— m., being the time fixed by order of reference.
	.....
	.....
	Ordered that first meeting of creditors be held on —— at ——.
	.....
	Notice of first meeting of creditors published —— times in the newspaper designated by the court.
	.....
	.....
	Notice of first meeting of creditors mailed to each creditor listed in schedules.
	.....
	Proof of publication and mailing of notice of first meeting filed.

Date.	
	.....
	.....
	.....
	Held first meeting of creditors; bankrupt present and examined by ——; schedule disclosing no assets and no creditor appearing, ordered that no trustee be appointed and no other meeting of the creditors be called. .
	.....
	.....
	.....
	Forwarded record of proceedings to clerk.
	.....
	Expenses incurred.

	$	cts.
.....	.....	....
.....	.....	....
.....	.....	....

Date.	List of Claims Filed with Referee.	Dollars.	Cents.

[*Add certificate of referee No.* 106.]

(1) This form is conveniently used as a docket containing the steps of the case. With it should be bound all the orders made by the referee and copies of notices as rxhibits, the whole constituting the separate record book of the case, as required by Bank. Act 1898, sec. 42*b*.

When the same is transmitted to the clerk at,the conclusion of the case (Bank. Act 1898, sec. 39*a*, cl. 7) the form of certificate No. 1216 may be used.

No. 104.

Record of Proceedings Before Referee, Claims Proved, Trustees Appointed, Assets Distributed.[1]

[*Proceed as in Form No.* 103 *to "held first creditors' meeting," etc., and then proceed as follows:*]

Date.	
	First meeting of creditors held and —— appointed trustee by creditors *or* referee, creditors failing to appoint, and bond of trustee fixed at $—— notified trustee of —— appointment.
	Received acceptance of trust from trustee.
	.....
	Bond of trustee presented and approved.
	.....
	.....
	.....
	Appointed —— appraisers to appraise real *and* personal property of bankrupt.
	Received report of appraisers.
	.....
	.....
	.....
	Received report of trustee of moneys in —— hands, of no assets.
	Prepared dividend sheets showing —— per cent. of each claim allowed.
	Received final account of trustee.
	Examined the account of ——.
	.....
	.....
	.....
	Entered order discharging trustee.
	Forwarded copy of proceedings to clerk.

Date.	Expenses Incurred.	Dollars.	Cents

Date.	List of Claims Filed with Referee.	Dollars.	Cents

[*Add certificate of reference No.* 106.]

(See note to No. 103.

No. 105.

Record of Proceedings Before Referee on Composition.[1]

[*Proceed as in Form No.* 103 *to "held first creditors' meeting," etc., and proceed as follows:*]

Date.	
	First meeting of creditors held and —— appointed trustee by referee, creditors failing to appoint and bond of trustee fixed at $——.
	Notified trustee of his appointment.
	Received acceptance of trust from trustee.
	Bond of trustee presented and approved.
	Received order referring petition of bankrupt for composition ——.
	Entered order fixing —— at —— for meeting of creditors to consider composition ——.
	Mailed notices to all creditors, mentioned in schedules, of meeting to consider composition.
	Meeting of creditors to consider composition held —— per cent. accepted by creditors.
	. . . . .
	. . . . .
	. . . . .
	Made report to court of proceedings before me on petition for composition.
	Forwarded record of proceedings to clerk.

Date.

Date.	Expenses Incurred.	Dollars.	Cents.

Date.	List of Claims Filed with Referee.	Dollars.	Cents.

[*Attach certificate Form No.* 106.]

(1) See note to No. 103.

No. 106.

Certificate of Referee to Record of Proceedings.

In the District Court of the United States
For the —— District of ——
—— Division.
In the matter of } No. ——
A. B., } In Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that the foregoing is the true and complete record of the proceedings had before me in the above entitled matter, which, together with such papers as are on file before me, I herewith transmit to the court.

Dated at —— the —— day of —— 190—.

A. M.,
Referee in Bankruptcy.

COMPOSITION WITH CREDITORS.

No. 107.

Petition for Meeting to Consider Composition (1).

(Official Form No. 60.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The above-named bankrupt respectfully represent that a composition of —— per cent. upon all unsecured debts, not entited to a priority —— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the Acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of —— creditors whose claims are allowed.

Wherefore, they pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——,
Bankrupt.

(1) B. A. 1898, sec. 12; Loveland's Bank., secs. 245 and 245.

The offer of composition should be made to all the creditors. *In re* Rider, 96 Fed. Rep. 808, 3 Am. B. R. 178.

It is not necessary to call a special meeting of the creditors to receive

an offer of composition. The submission of such offer may be made to the creditors at their first meeting after the examination of the bankrupt. *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

Where there has been a composition it will not be set aside on the ground that one of the creditors has failed to get notice of the proceedings because his address was incorrectly given in the bankrupt's schedule. *In re* Rudwick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

No. 108.

Order for Meeting to Consider Composition.

In the District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

On reading and filing the verified petition of A. B., the bankrupt showing that he verily believes that a composition upon all unsecured debts not entitled to a priority will be accepted by a majority in number and in value of his creditors whose claims are allowed.

It is ordered that a meeting of the creditors of said A. B., bankrupt, be held at —— before A. M., Esq., Referee in Bankruptcy, for the purpose of considering the composition proposed to be offered in satisfaction of the debts due from said bankrupt to his creditors and that notice of the time, place and purpose of said meeting be sent by said above named referee, by mail, to each of the known creditors of said bankrupt whose name and address appear in schedules on file in this matter at least ten days prior to the day appointed for the holding of such meeting.

Witness the Honorable G. R., Judge of the said court, and the seal thereof, at ——, this —— day of —— A. D., 190—.

B. R.,
Clerk of Said Court.

No. 109.

Notice to Creditors of Meeting to Consider Composition.

In the District Court of the United States
For the —— District of ——
In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

Notice to creditors to consider composition offered by bankrupt.

Take notice, that a meeting of the creditors of the above named bankrupt will be held at Room 13, third floor, Post-office Building, city of ——, before the undersigned Referee in Bankruptcy, on the —— day of —— 190— at —— o'clock a. m., for the purpose of considering a proposed composition made by the said bankrupt to his creditors in satisfaction of the unsecured debts, [not entitled to priority] owed by him to each of said creditors, which proposed composition is to pay —— per cent.

A. M.,
Referee in Bankruptcy.

I hereby certify that I have on this —— day of —— A. D., —— sent by mail copies of the above notice of the meeting for composition and have duly published the same, as appears from the proof of publication hereto annexed.

A. M.,
Referee.

No. 110.

Report of Referee on Composition.

In the District Court of the United States
For the —— District of ——.
In the matter of
A. B.,
Bankrupt. } Referee's Report.

Pursuant to an order made by the court on the —— day of —— 190—, a meeting of the creditors of the above named

bankrupt to consider a composition of —— per cent. upon all unsecured debts not entitled to a priority in satisfaction of said debts, was on the —— day of ——, A. D. 190—, held before me at Room 13, Union Trust Building in the city of ——, at —— o'clock in the forenoon of the said day.

Proof of mailing of notice to each of the creditors, mentioned in the bankrupt's schedules, of the time, place, and purpose of said meeting, is hereto annexed.

That the said above named bankrupt was present at the said meeting and offered himself for examination by any of the creditors represented at said meeting.

That an offer of composition with his said creditors was accepted by a majority in number and in value of all his creditors whose claims have been allowed, which acceptance is hereto annexed and made a part of this report.

Proofs of claims of creditors voting for said composition were presented and allowed before signing of said resolution which are hereto annexed.

That the following are the names of those creditors who have presented claims against the said bankrupt's estate and were duly allowed, but who did not consent to, or sign said composition. [*Set out list of names of such creditors and amount of claims proved.*]

No. 111.

Application for Confirmation of Composition (1).

(Official Form No. 61.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——.

At ——, in said district, on the —— day of ——, A. D. 189—, now comes ——, the above named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or*, at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of —— dollars, has been deposited, subject to the order of the judge, in the —— National Bank, of ——, a designated depository of money in bankruptcy cases.

Wherefore, the said —— respectfully asks that the said composition may be confirmed by the court.

——,
Bankrupt.

(1) B. A. 1898, sec. 12 and sec. 2, clause 9. Loveland's Bank., sec. 246.

The application for a confirmation must be made to the judge and the acceptance of the compromise offered by the creditors is not conclusive but may be disallowed by the court under sec. 27 of the Bankrupt Act. *In re* Heyman, 108 Fed. Rep. 207.

A composition will be confirmed when it appears to the court that the composition was fair and for the best interests of the creditors. *In re* Wilson, 107 Fed. Rep. 83, 5 Am. B. R. 849; City Nat. Bank *vs.* Doolittle (C. C. A., 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 737.

But where it is not for the best interests of the creditors the court will refuse to confirm and the decision of the trial judge will not be disturbed by an Appellate Court unless grossly biased. Adler *vs.* Jones (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. Rep. 967.

As to the duty of the referee and his authority arising out of applications for composition, see *in re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

The specifications in opposition to an application for confirmation of a composition should be similar to those required in opposition to a discharge. City Nat. Bank *vs.* Doolittle (C. C. A., 5th Cir.) 107 Fed. Rep. 236, 5 Am. B. R. 736.

No. 112.

Order for Hearing on Petition to Confirm Composition.

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B.,
Bankrupt.
} In Bankruptcy.

At ——, in said district, on the —— day of —— A. D., —— on reading and filing the application of the above named bankrupt for confirmation of a composition offered, and it appearing satisfactorily to the court, from the report of A. M., Esq., referee, of all proceedings herein, that a majority in number and in value of his creditors whose claims have been allowed and whose claims were proved by proofs of claim presented to said referee, and which are presented to the court with said report, did, at said meeting pass and vote [as appears by the said report of the proceedings of said meeting] in favor of a composition, which is set forth at length in said proceedings, resolving that the composition proposed by said bankrupt at said meeting shall be accepted in satisfaction of the unsecured debts due from said bankrupt to his creditors; now therefore on motion of R. X., Esq., attorney for said bankrupt.

It is ordered that a hearing in the matter of composition by said bankrupt be had before this court at the United States Court Rooms, Postoffice Building, in the city of ——, on the —— day of —— A. D., —— at 10 o'clock a. m., for the purpose of said court inquiring, upon hearing whether the said composition so proposed by said bankrupts has been passed in the manner directed by the Act of Congress relating to bankruptcy, approved July 1, 1898, and has been accepted by the signatures required by said act and whether it is for the best interest of the creditors; that a notice of the time, place and purpose of said hearing be sent by the clerk of

this court, by mail, to each of the creditors to their respective addresses as they appear in the list of creditors of the bankrupt or as afterwards filed with the papers in the case by the creditors (1) at least ten days prior to the said day appointed herein for such hearing.

(1) See Bank. Act 1898, sec. 58.

No. 113.

Order Confirming Composition (1).

(Official Form No. 62.)

In the District Court of the United States for the —— District of ——.

In the matter of —— —— —— Bankrupt.	In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be and it hereby is confirmed.

Witness the Honorable ——, judge of said court, and the seal thereof, this —— day of —— A. D. 19—.

[*Seal of the court.*]

——,
Clerk.

(1) B. A. 1898, sec. 2, clause 9 and sec. 12; Gen. Ord. 32. Loveland's Bank., sec. 249.

See note to last form No. 1221.

This order will not be entered until costs have been provided for by bankrupt or creditors. *In re* Harris, 9 Am. B. R. 20.

It has been held that an appeal will lie to an order refusing to confirm a composition. U. S. *vs.* Hammond, 104 Fed. Rep. 862, 4 Am. B. R. 736. But see Ross *vs.* Saunders (C. C. A., 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

No. 114.

Order of Distribution on Composition.

(Official Form No. 63.)

United States of America:
In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

The composition offered by the above named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: *First.* To pay the several claims which have priority. *Second.* To pay the costs of proceedings. *Third.* To pay, according to the terms of the composition, the several claims of general creditors which have been allowed and appear upon a list of allowed claims on the files in this case, which list is made a part of this order.

Witness the Hon. ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 190—.

[*Seal of the court.*] ——,
Clerk.

PROCEEDINGS BEFORE JUDGE SUBSEQUENT TO ADJUDICATION.

No. 115.

Motion for Rule to Show Cause Against Bankrupt for Contempt.

[*Caption.*]

Now come the undersigned creditors herein, and move the court that a rule issue herein directing A. B., the bankrupt, to appear in this court at —— County of ——, on the —— day of —— 19—, at —— o'clock a. m., and show cause why an atachment for contempt should not issue against him for disobedience of the order of A. M., referee herein, a copy of which order is as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him, pay over to B. M., Esq., trustee, the sum of $—— and deliver to said trustee United States three per cent. coupon bonds, face value of $——, or $—— in money.

Second. That in the event of the said bankrupt A. B., failing or neglecting to obey this order to pay to the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Sections 29 of the Bankruptcy Act of 1898.

And it is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

E. F.,
G. H.,
By Y. & Y., their Attorneys.

No. 116.

Affidavit of Trustee that Bankrupt Has Not Obeyed Order of Referee.

[*Caption.*]

B. M., being first duly sworn says on oath that he is the duly appointed trustee herein, and that the said bankrupt has not in any way complied with the order of the referee herein heretofore made, requiring said bankrupt to pay to the trustee the sum of $—— and —— United States Government bonds, three per cent. face value of $——, that he has not paid said sum or any part thereof to the said trustee.

Affiant further says not.

B. M.,

Sworn to and subscribed before me this —— day of —— 19—. T. H.,

[*Seal.*]

Notary Public,
—— County, ——.

No. 117.

Rule to Show Cause Against Bankrupt for Contempt.

[*Caption.*]

On motion of creditors herein, a rule is allowed to issue herein directing A. B., the bankrupt, to appear before this court at ——, —— County, ——, on the —— day of —— 19—, at —— o'clock, a. m., and show cause why an attachment for contempt should not issue against him for disobedience of the order of A. M., refere herein, and which order reads as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him pay over to B. M., Esq., trustee, the sum of $—— and deliver to said trustee United States three per cent. coupon bonds, face value of $——, or $—— in money.

Second. That in the event of said bankrupt A. B., failing or neglecting to obey this order to pay the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B., in accordance with the provisions of Section 29 of the bankruptcy act of 1898.

Third. And it is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

The United States of America
—— District of —— ss.
—— Division.

I, B. R., clerk of the District Court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of ——, this —— day of —— A. D., 19—.

[*Seal.*]

B. R., Clerk.

No. 118.

Answer of Bankrupt to Rule to Show Cause for Contempt.

[*Caption.*]

Now comes A. B., and in obedience to the rule issued by this court, says that the attachment for contempt ought not to issue against him for disobedience of the order of A. M., referee, for the following reasons:

First. He says that he can not comply with the order of this court, because he has not the bonds ordered turned over or sum of money ordered by said A. M. to be paid to him.

Second. That said order of said referee is not a lawful order within the contemplation of the bankruptcy act, or such an order, the disobedience of which would be punishable by attachment for contempt, and said order is not an order of this court.

Third. Said order is in effect a judgment directing the payment of money, and is not enforceable by proceedings in contempt.

Fourth. Section 29 of the bankruptcy act provides that such offenses, as those charged by the referee in his finding, shall be punishable only in the manner prescribed therein, to wit, by information or indictment.

Wherefore, said A. B. prays the court that said rule may be dismissed, and that he may be discharged.

X. & X.,
Attorneys for Bankrupt.

State of ——,
—— County ss.

A. B., being first duly sworn, says that the allegations contained in his foregoing answer are true. A. B.,

Sworn to and subscribed before me this —— day of —— A. D., 19—. T. H.,

Fees —— cents. Notary Public,
—— County, ——.

[*Seal.*]

No. 119.

Order to Take Additional Evidence on Rule to Show Cause.

[*Caption.*]

This cause coming on to be heard on the rule issued on the bankrupt and his answer, and on the findings and order of the referee filed herein, it appearing to the court that on this hearing the said bankrupt desires to offer additional testimony of F. H., O. H. and F. K., it is ordered that the referee take

said additional testimony, together with such evidence as the creditors of said bankrupt may offer in rebuttal, and that the referee report said evidence, together with whatever, if any, modification he may decide ought to be made of his former report and order [*filed herein*] upon consideration of the whole evidence taken before him in this matter. It is ordered that this entry be made as of the —— day of ——, 19—.

No. 120.

Order Finding that Bankrupt has Concealed Assets (1).

[*Caption.*]

This cause coming on to be heard upon the motion filed herein on the —— day of —— 19—, for an order of the court requiring the said bankrupt, A. B., to show cause why he should not be attached for contempt for disobedience of the order of A. M., Esq., the referee herein, and upon the answer of said A. B., thereto, and upon the evidence, and was argued by counsel representing creditors of said bankr upt and by counsel representing said bankrupt; and on consideration whereof the court finds upon the evidence that said bankrupt does conceal, and has in his possession the sum of $—— in money, and the further sum of $—— face value United States bonds for money in said amount, all of which he refuses to deliver to said B. M., trustee appointed herein, in accordance with the order of said referee to that effect, and which order has been served upon said bankrupt more than twenty (20) days before said —— day of ——, 19—, that the said sums constitute property belonging to the estate of said bankrupt, and the court doth to said extent confirm said finding and order of said referee, and doth approve of the referee's order made on said A. B., on the —— day of ——, 19—; and the court does further find that said A. B. has not obeyed the said order of the referee to the extent of the

amounts here found to be in his possession, and that he is thereby guilty of contempt.

It is therefore ordered that said A. B., on or before the —— day of ——, 19—, pay to said B. M., trustee, the sum of $——, and also deliver to him United States bonds face value of $——, or in lieu thereof money in the sum of $—— in money, and that he appear for further orders and proceedings herein in this court at —— o'clock a. m., on the —— day of ——, 19—.

It is ordered that for his appearance in court on the —— day of ——, 19—, at —— o'clock a. m., to abide the further orders of this court in these proceedings, said A. B. execute bond in the sum of $—— in the form, and with good and sufficient surety, as provided by law, to be approved of by the clerk of this court, and in default thereof he be committed to the custody of the marshal, and by him committed to the —— County Jail.

And said bankrupt by his attorney objects to said finding of said court and gives notice of his intention to appeal therefrom.

(1) This order must be made by the judge and not by the referee.

No. 121.

Order Committing Bankrupt for Contempt in Not Obeying Order to Pay Over Assets (1).

[*Caption.*]

Now comes the said A. B., in accordance with his undertaking heretofore made in compliance with the order heretofore made on the —— day of ——, 19—, and it appearing from the report of B. M., trustee, and from the evidence, that said A. B. has wholly refused and neglected to perform and comply with the order of court made the —— day of ——, 19— and has wholly failed to pay and deliver said moneys and bonds or any of them to said trustee, the court

do find that he has been and is guilty of contempt. It is thereupon ordered and adjudged that he, said A. B., be confined in the county jail of the county of ——, State of ——, until he comply with said order and make said payment and deliveries as directed in said order of the —— day of ——, 19—, and that a warrant issue for such commitment.

(1) This order must be made by the judge and not by the referee.

No. 122.

Order of Referee Recommending Commitment for Contempt.

In the District Court of the United States

For the —— District of ——. In Bankruptcy.

In the matter of
A. B. Co., *et al.*
vs.
E. B.,
Bankrupt.

Report of
Referee.

I, J. S., one of the referees in bankruptcy of this court, do respectfully report that on the —— day of ——, I entered an order requiring F. B., to pay to E. M., Trustee in Bankruptcy in this cause, on or before 9:30 o'clock a. m., ——, the sum of $—— which came to his hands as bailee or agent of the bankrupt, E. B.; which sum said F. B. has not accounted for.

At the time of the entry of said order said F. B., was before me in person and by counsel, R. X., Esq. A copy of said order is filed herewith and made part hereof, marked No. 1.

I further certify that said F. B. has failed to comply with said order in whole or in part.

I therefore find that said F. B. is in contempt of court, and therefore recommend that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of $——.

All of which is respectfully submitted. J. S.,
Referee in Bankruptcy.

No. 123.

Order Committing Agent of Bankrupt for Contempt in Not Obeying Order of Referee to Pay Over Assets of Bankrupt.

In the District Court of the United States
For the —— District of ——.
[*Caption.*]

This cause coming on to be heard on the petition of W. T. for a review of the order of court entered herein by J. S., one of the referees of this court, requiring W. T. to pay over to E. M., Trustee in Bankruptcy of the bankrupt herein, and the certification of said referee as to the disobedience of said W. T. of said order and the recommendation of said referee that said W. T. be punished for his contempt of the order of this court, and the court being fully advised, it is hereby ordered that the said W. T., be committed for contempt of court as charged and confined in the jail of —— County until further order of this court.

No. 124.

Commitment for Contempt.

In the District Court of the United States
For the —— District of ——.
—— Division.

In re A. B., Bankrupt.	No. —— In Bankruptcy.

The defendant A. B., —— having been adjudged guilty for contempt of court in failing to pay and deliver moneys and bonds or any of them to the trustee herein ——

Thereupon the court pronounced the following sentence, to wit: That the said A. B. be imprisoned in the jail of ——

County, State of —— until he comply with the order of the —— day of ——, 19—, and make said payments and deliveries as directed in said order.

This, therefore, is to commend the marshal of said district to take the body of the said A. B. and commit the same to the said jail of —— County, —— pursuant to the above sentence.

Witness, the Honorable G. R., Judge of the District Court of the United States, this —— day of ——, A. D., 19—, and in the —— year of the Independence of the United States of America.

[*Seal.*] B. R.,
Clerk of the District Court of the United States —— District of ——.

No. 125.

Order Purging A. B. of Contempt and Directing His Release from Jail (1).

[*Caption.*]

It appearing that the order herein made against the bankrupt A. B., and after failure to comply therewith is imprisoned in the jail of —— County, in the State of ——, has now been complied with, it is hereby ordered that said A. B. is purged of contempt for his disobedience to the order of court.

It is ordered that said A. B., upon payment of costs taxed at $——, be now released and discharged from said imprisonment, and the marshal is hereby ordered to deliver a copy of this order to the sheriff of —— County, in the State of ——, who is hereby directed upon receipt thereof to release the said A. B. from his custody.

(1) This order must be made by the judge and not by the referee.

No. 126.

Rule to Show Cause Why Assignee for Creditors Should Not Pay Over Funds to Trustee in Bankruptcy (1).

[*Caption.*]

The President of the United States of America to L. C., assignee for the benefit of the creditors of A. B.:

You are hereby cited and admonished to be and appear before the District Court of the United States within and for the —— District of —— on the —— day of —— A. D., —— at 10 o'clock a. m., to show cause, if any you know or have, why you should not pay over and deliver to J. R., Trustee in Bankruptcy, the funds and assets of the estate of the said A. B. now in your possession or under your control. It is hereby ordered that the marshal of this district make legal service and return of this rule on or before the appearance day above named.

Witness, the Honorable G. R., United States District Judge for the —— District of ——, this —— day of ——, A. D., 19—, and in the —— year of the independence of the United States of America.

B. R.

Clerk of the District Court of the United States for the —— District of ——.

(1) This form can be used for the purpose of compelling the bankrupt or agent to pay over money. See Mueller *vs.* Nugent, 184 U. S. 1.

No. 127.

Order that the Assignee for the Benefit of Creditors Pay Over Funds to the Trustee in Bankruptcy.[1]

[*Caption.*]

This cause came on to be heard upon rule to show cause, etc., and was argued by counsel.

On consideration whereof it is hereby ordered that L. C., assignee for the benefit of the creditors of A. B., forthwith

pay over and deliver to J. R., Trustee in Bankruptcy of the estate of said A. B., all funds and assets of every description belonging to the estate of said A. B. now in his possession or subject to his control.

(1) See note to No. 126.

No. 128.

Order for Assignee for Creditors to Account.

In the District Court of the United States
For the —— District of ——.

A. B., *et al.*
vs. } Bankrupt.
C. D. & Co.,

At ——, in said district, on the —— day of ——, A. D., 19—, before J. B., Referee in Bankruptcy.

Notice having been given, and no adverse interest appearing, it is hereby ordered that L. C., assignee for the benefit of the creditors of C. D. & Co., file with J. B., one of the referees of this court in bankruptcy, at his office, Rooms 1001-1005, Columbia Building, ——, on or before ——, at 9:30 o'clock a.m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of C. D. & Co., together with all vouchers that he may have for any disbursements.

It is further ordered that said L. C. be and appear before the referee aforesaid in person on ——, at 9:30 o'clock a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D., ——.

[*Seal.*]

B. R.,
Clerk of Said Court.

No. 129.

Response of an Assignee for Benefit of Creditors to a Rule to Pay Over Money. (1).

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B. & Co., *et al.*,
vs.
C. D. & Co., D. G. and C. D. } Bankrupts.

L. C. for response to the order herein to show cause why he shall not pay the Receiver in Bankruptcy herein the sum of $—— shown in his report as having been paid Messrs. M. A., D. A. & J. G., and $—— to Z. P. Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof.

He respectfully submits to the court that he ought not to be compelled to pay said money herein.

This respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action or proceeding, he filed his petition and brought action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

He submits to this honorable court that this response be held sufficient and that the "show cause" order herein should be an-

nulled or suspended until he is relieved from his present embarrassing position. L. C.,

Subscribed and sworn to before me by L. C., June ——. My commission expires ——. A. S.,

Notary Public, —— County, ——.

(1) Taken from the record in Louisville Trust Co. *vs.* Cominger, 184 U. S. 18.

As to the right of attorneys for assigdee in state court to pay for services rendered prior to bankruptcy, see Randolph *vs.* Scrugge, trustee, 190 U. S. 533; 10 Am. B. R. 1.

No. 130.

Petition by a Trustee to Review an Order Allowing a Claim (1).

In the District Court of the United States
For the —— District of ——.

In the matter of the estate of
A. B.,
Bankrupt. } In Bankruptcy.

The petition of N. J. M., trustee of A. B., bankrupt, of the village of ——, respectfully represents:

First. That heretofore, to wit, on the —— day of ——, the said A. B., who before that time had been engaged in business at ——, was duly adjudged a bankrupt by an order of this court, and that afterwards your petitioner was chosen and elected trustee in the estate of A. B, and is now and has for some time past been acting as such trustee.

Second. That heretofore, to wit, on the —— day of ——, the S. T. Company, of ——, a corporation organized under the laws of the State of —— and carrying on business under the laws of the State of —— at ——, aforesaid, filed its claim against said estate for —— dollars and —— cents as a preferred claim against said estate for the amount claimed to be due under and by virtue of a certain chattel mortgage made

and executed by the said A. B. to said The S. T. Company, on the —— day of ——, and which said chattel mortgage it was claimed by said, The S. T. Company, was a lien upon the stock of goods, wares and merchandise received by the said trustee and by him converted into cash.

Third. That said, The S. T. Company, petitioned A. M., Esq., referee, in matter of said estate, that said claim be allowed as a preferred claim and that the said trustee should be ordered by the court to pay the same out of the assets of said estate in preference to other claims as a first lien thereon, and that your petitioner as trustee as aforesaid, on the —— day of ——, filed his objections to the allowance of said claim, and afterwards the said matter came on to be heard before A. M., Esq., referee in said estate, and testimony was taken thereon before the said referee and by deposition and the matter submitted to him, and afterwards, on, to wit, the —— day of ——, the said referee made an order allowing the said claim of said The S. T. Company, against the estate of said A. B. to the amount of —— dollars and —— cents, together with costs amounting to —— dollars and —— cents as a preferred claim against the said estate, and ordering and requiring your petitioner as such trustee to pay said amount to said The S. T. Company, out of the moneys in his hands belonging to said estate.

Fourth. That your petitioner claims that the said chattel mortgage upon which said claim is based is void, and that said, The S. T. Company, is not entitled to enforce the same against the property purported to be covered thereby, and against the assets of said estate, and that such mortgage is illegal, fraudulent and void for the specific reasons set forth in his objections filed with said referee to the claim of said, The S. T. Company, to which he hereby makes reference.

Fifth. Your petitioner, therefore, avers that the ruling and decision of the said referee allowing said claim was error, and that no order should have been made by said referee allowing

said claim, and said referee should have made an order disallowing said claim, and holding said chattel mortgage void for the reasons set forth in the petitioner's objection thereto.

Sixth. That your petitioner desires a review by the Judge of this court of the order made by said referee, and filed this petition therefor; and he therefore prays that the error complained of and the questions of law and fact raised before the said referee and decided by him may be certified by the said referee to the Hon. G. R., District Judge; that he may review the order heretofore made and make and enter an order or direct the referee to make and enter an order holding and deciding the said chattel motgage to be illegal, fraudulent and void and that the same constituted no lien upon the property of said A. B. purporting to be covered thereby, and no lien against the assets in said estate in the hands of your petitioner, and disallowing said claim of said The S. T. Company.

And your petitioner ever prays. J. M.,
R. X., Trustee.
Attorney for Petitioner.

United States of America, —— District of ——, Division, County of ——, ss.:

I, J. M., the petitioner mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief. J. M.,
Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D., ——. J. N.,
Notary Public, —— County, ——.

(1) The action of the referee is always subject to review by the judge of the court of bankruptcy. Gen. Ord. 27, B. A. 1898, sec. 38*a*. In any proceeding before a referee, a party dissatisfied with any order of the referee made in the course of such proceeding, may take the opinion of the judge in respect to such matter. The practice is provided for by General Order 27, and should be followed. *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440.

After the referee has made the order sought to be reviewed (*in re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791) and not before (*in re* Smith 93 Fed. Rep. 791), the party dissatisfied must file with the referee a petition that the order be reviewed by the judge in which must be set out the error complained of. *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791.

The limitation of ten days in which appeals must be taken to the Circuit Court of Appeals from the District Court has no application, but the petition for review must be filed within a reasonable time, which may be fixed by the local rule of court. (As to such petitions to C. C. A. which appear to be analagous see *in re* N. Y. Economical Printing Co. (C. C. A., 2nd Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 697, 3 N. B. N. 539).

The district judge may refuse to act without such petition and should not consider exceptions not therein contained. *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791. The referee must forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. Gen. Ord. 27. The certificate will be signed by the referee and transmitted by him to the judge. B. A. 1898, sec. 39*a*, clauses 5 and 9.

The "summary of the evidence" mentioned in the order may be the evidence taken stenographically, or the substance thereof as agreed upon by the parties. B. A. 1898, sec. 39*a*, clauses 5 and 9. A summary and not the complete evidence should be certified wherever the rules of justice will permit. Cunningham *vs.* German Nat. Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 932. Where this is done the district court may require the original evidence or parts thereof certified to it. Cunningham *vs.* German Nat. Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 932.

If the question be improperly certified the court may refuse to give an opinion. *In re* Smith, 93 Fed. Rep. 791. If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him. *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641, or refer the cause to the referee for further proofs. He will not set aside the findings of fact of a referee unless the same are manifestly contrary to the weight of the evidence. *In re* Covington, 6 Am. B. R. 374. But when a referee finds that a bankrupt has property in his possession or control which he conceals from the trustee, and such finding is made the basis of an order of delivery, which is enforceable by imprisonment for contempt in disobeying it, then the judge in reviewing the finding must be satisfied that the evidence establishes the fact beyond

a reasonable doubt. *In re* Mayer, 98 Fed. Rep. 839, 3 Am. B. R. 533; *in re* McCormick, 97 Fed. Rep. 566, 3 Am. B. R. 340, 2 N. B. N. 104.

The judge will probably hear arguments of counsel on the point, and will give his opinion on the point. If the order of the referee is modified or reversed he may direct the proper order to be entered on the journal of the court.

No. 131.

Petition by an Assignee to Review an Order of a Referee on a Rule to Pay Over Money to Receiver in Bankruptcy (1).

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B. & Co., &c.,
vs.
C. D. & Co., D. G. and C. D.
Bankrupts.
} In Bankruptcy.

Respectfully represents the petitioner, L. C., that during the course of the proceedings herein, before J. B., one of the Referees in Bankruptcy of this court, a rule was issued against the petitioner to show cause why he should not be compelled to pay to the receiver the sum of $——; also another rule was issued against the petitioner to show cause why he should not pay the further sum of $—— by him paid to M. A., D. A. & J. G., for services as counsel for him in his capacity as assignee under the general assignment under the State law; that your petitioner filed responses to both of said rules which responses having come on to be heard were adjudged by the said referee insufficient and said rules were made absolute. Your petitioner shows that said referee erred to his prejudice in issuing both of said rules, also in adjudging both of said responses insufficient, also in making both of said rules absolute.

Wherefore, your petitioner prays that the orders of said

referee above set forth may be reviewed by the Honorable Judge of this court.

L. C.,
By his Counsel, X. & X.

[*Verification.*]

(1) As to power of court to review orders of referees and the practice in such cases, see Gen. Ord. 27; Mueller *vs.* Nugent, 184 U. S. 1; Cunningham *vs.* Bank, 103 Fed. Rep. 922; Courier Journal Job Printing Co. *vs.* Brewing Co., 101 Fed. Rep. 699; Loveland Bank., sec. 32*a*.

See also note to No. 130.

No. 132.

Petition to Review Order of Referee Disallowing Claim (1).

[*Caption.*]

To the Honorable A. C., Judge of the District Court of the United States for the —— District of ——.

The Petition of The D. M. Grocery Company, a corporation under the laws of ——, one of the creditors of said bankrupt, respectfully represents that on the —— day of —— 1901, manifest error to the prejudice of complainant, was made by the referee in said matter in a finding and order disallowing and expunging the claim of said corporation against said bankrupt from the list of allowed claims upon the trustee's record in said case; and in ordering said corporation to pay as preferences received from said bankrupt the sum of $——. The errors complained of are:

First. That the evidence adduced before said referee and set out in the agreed statement herewith submitted, shows that no preference in excess of subsequent credits given, were received by said corporation.

Second. Said referee erred in the method adopted for calculating preferences claimed to be within four months of bankruptcy in said case.

Third. Said referee erred in finding from the evidence that the dates of payment on the open account of said bankrupt with said corporation, were those dates shown by the books

of the bankers of said bankrupt, Messrs. R., B. & Company.

Fourth. Said referee erred in finding that any payments made to said corporation by said bankrupt were preferences for any amount.

Fifth. Said referee erred in ordering said corporation to pay the sum of $——, or any sum at all, within five days from said date.

Sixth. Said referee erred in his conclusions of law from the evidence offered at said hearing.

Wherefore the D. M. Grocery Company prays that it may be decreed by the court to have its claim against the said bankrupt estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the referee in said matter.

The D. M. Grocery Company,
By R. X.,
Its Attorney.

[*Verification.*]

(1) See note to No. 130.

No. 133.

Petition to Review Order of Referee to Pay to Trustee Money of Bankrupt (1).

The District Court of the United States for the —— District of ——. In Bankruptcy.

In re
A. B. & Co. *et al.*
vs.
E. T.
} Petition for Review.

Comes W. T., by counsel, and files herewith his petition for review of the order of the referee entered herein on ——, and says that said referee erred in ordering and adjudging as insufficient his response to the rule filed herein on ——; that said referee erred in adjudging that there came to the hands

of said W. T. as the agent of the bankrupt, on ——, the sum of $——, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the City of ——; that said referee erred in adjudging that there came to the hands of said W. T., as the agent of the bankrupt on ——, the further sum of $——, being the net proceeds from the sale of the merchandise sold to H. S.; that said referee erred in adjudging that said sums are the property of the bankrupt E. T., and belong to E. M., trustee in bankruptcy herein of said estate; that said referee erred in ordering that said rule be made absolute to the amount of said two sums aggregating the sum of $——; that said referee erred in ordering and requiring said W. T. to pay to E. M., trustee in bankruptcy in this cause on or before 9:30 o'clock on ——, the said aggregate sum of $——, and said referee erred in entering said order on ——, a copy of which is filed herewith, that said order is erroneous and void, and said referee had no jurisdiction to enter same.

Wherefore, said W. T. prays that said order entered herein by the referee on ——, be reviewed by the Honorable Judge of the District Court of the United States for the —— District of ——, and that said order be adjudged erroneous and void.

X. & X.,
Attorneys for W. T.

(1) Taken from the record in Mueller *vs.* Nugent, 184 U. S. 1. See note to No. 130.

No. 134.

Petition for Review Order on Claims (1).

[*Caption.*]

And now comes the L. Trust Company, trustee in bankruptcy, of the bankrupts in the above styled proceeding, by R. Y., Esq., of counsel, and respectfully represents to the court that said trustee and the lawful creditors of the estate of said bankrupts whom said trustee represents, are aggrieved by the find-

ing of the Hon. A. M., referee herein, with reference to the following matters, to wit:

That the referee in his finding and decision, upon the exceptions of said trustee and of the creditors to the claim of D. L. & Son, erred to the prejudice of these petitioners, the said trustee and the lawful creditors of said bankrupts.

First. In not finding that the sum of $—— had been paid to said D. L. & Son on their claim filed here, by E. F. & Co., endorsers of two $—— notes included in and part of said claim of D. L. & Son.

Second. In not finding that said claim of D. L. & Son had been paid in full, as a preferential payment, out of the proceeds of the fraudulent sale of the remainder of the stock, fixtures, etc., of the bankrupt firm, to E. F. of said firm of E. F. & Co., as provided for in the written agreement between the three members of the bankrupt firm, read in evidence, and in finding that said preferential payment was only one-half of said claim of D. L. & Son, when in fact said claim was paid in full.

Third. In finding that only one-half of the claim of E. F. & Co. was paid as a preferential payment out of the profits of said fraudulent sale to E. F., when in fact said claim was paid in full as shown conclusively by the evidence in said proceeding.

Fourth. Because said referee erred in not disallowing each of said claims of D. L. & Son and E. F. & Co.

Wherefore said petitioners pray this honorable court to review the findings of the said receiver with reference to the matters hereinbefore set forth, and that the referee herein certify the said questions to the court for that purpose and that he send up with said certificate all of the testimony taken on said issues of said bankrupts' estate, etc.

The L. Trust Company,
Trustee in Bankruptcy.
R. Y.,
Attorney.

(1) See note to No. 130.

No. 135.

Petition to Review Order Relative to Exemptions (1).

[*Caption.*]

Now comes E. B. and petitions to the Honorable A. M., Referee, for any order certifying to the Honorable G. R., Judge of the District Court of the United States for the —— District of ——, for review of all matters pertaining in and to the order entered herein on the —— day of ——, A. D. ——, relating to and finding against the claims of said E. B., as widow of said A. B., bankrupt, and respectfully represents that the errors complained of are as follows:

The court erred in not making an order, under Section 8 of the Bankruptcy Act:

First. That the trustee paid to said E. B. the exemptions heretofore demanded by her husband during his lifetime.

Second. That the trustee permit her to remain in her husband's mansion house and in possession of his household property for a period of one year, unless dower is sooner assigned her in said mansion house.

Third. That the trustee pay to her from the assets of said estate the allowance provided for her under Sections 6040 and 6041 of the Revised Statutes of ——, and heretofore fixed by the Probate Court of —— County, ——, at $——.

Fourth. That said trustee permit her to retain as exempt such part of the assets of said estate as are exempt under Section 6038 of the Revised Statutes of ——.

Fifth. That said trustee allow and pay to her such other exemptions as she is entitled to receive under the Revised Statutes of ——.

E. B.,
By R. Y., her Attorney.

(1) See note to No. 130.

No. 136.

Certificate by Referee to Judge (1).

(Official Form No. 56.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

I, ——, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. 18—.

——,
Referee in Bankruptcy.

(1) See note to No. 130.

No. 137.

Certificate of Referee to Judge (1).

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The Third National Bank, of ——, filed a claim evidenced

by one promissory note for $—— and also another promissory note for $——, and asserted a claim to be subrogated to the rights of the mortgagees under three mortgages, to wit, one dated April 15th, 1892, another dated February 19th, 1894, and another dated January 12th, 1897. Prior to the execution of any of said mortgages the bankrupt had also executed to the S. Trust Company a mortgage to secure an issue of $—— of bonds, of which $—— were negotiated and have ever since remained outstanding. Under the provisions of the charter of the bankrupt I find that said bankrupt was limited in its power to execute a mortgage to the extent of $——. I also find that the Third National Bank, through its managing officer, E. C., cashier before making any of said loans had knowledge of the existence of said mortgage to the S. Trust Company, though it is testified by E. C., and not denied, that about the time the Third National Bank made its loans he was informed that the said mortgage to the S. Trust Company was for $——. As a matter of law I find that the information which said E. C. had of the existence of said mortgage was sufficient to put him upon inquiry as to the amount thereof.

I further find that the notes of $—— and $—— filed by said Third National Bank are renewals of various loans made by said Third National Bank to the bankrupt, beginning April 16th, 1892.

The mortgage to the S. Trust Company outstanding amounted to $49,000, and I have allowed a lien to the Third National Bank by way of subrogation to the rights of the mortgagees in the three mortgages dated April 15th, 1892, February 19th, 1894, and January 12th, 1897, to the extent of $——, making together the sum of $——, the limit prescribed by the charter of the bankrupt. The balance of the claim of the Third National Bank, to wit, $——, I have allowed as a general claim.

The Third National Bank has filed a petition for review of the foregoing ruling.

And the said question is certified to the Judge for his opinion thereon.

Dated at —— the —— day of ——, A. D. ——.

A. M.,
Referee in Bankruptcy.

I herewith transmit the testimony pertaining to the claim of said Third National Bank; also the proof of claim of said bank with the mortgages relied on by it attached thereto, and also a memorandum of the reasons for my finding.

A. M.,
Referee.

(1) See note to No. 130.

No. 138.

Certificate of Referee to Judge on Allowance of Claim (1).

[*Caption.*]

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the question came up as to the allowance of the claim of the S. Trust Company, a corporation organized under the laws of the state of —— as a preferred claim against said estate, which said claim has been allowed, and that on account of the allowance thereof a petition to the court has been made on behalf of the trustee asking for a review of the order of said allowance and the question of the allowance of said claim is certified to the Judge for his opinion thereon.

I return herewith as the record the following items:

First. Proof of claim of S. Trust Company filed ——.

Second. Objections as to the allowance of said claim made on behalf of the trustee, filed ——.

Third. A further itemized statement of said claim, filed ——.

Fourth. Depositions taken in favor of said claim, filed ——.

Fifth. Depositions of E. F. in behalf of said claim.

Sixth. Testimony introduced on the part of the estate in said claim.

I also return herewith an order made in respect to said claim and the petition for a review of said order, all being made a part thereof.

Dated at —— the —— day of ——.

A. M.,
Referee.

(1) See note to No. 130.

No. 139.

Certificate of Referee to Judge on Denying Lien on Realty (1).

[*Caption.*]

I, A. M., one of the Referees in Bankruptcy of said court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The First National Bank of —— filed a note for $—— claiming a lien upon the plant and realty of the bankrupt by way of subrogation to the rights of A. S., under two mortgages, dated April 15th, 1892, and February 19th, 1894, executed by the bankrupt to said A. S., and others.

I found that said bank is not entitled to the lien claimed, and a petition for review has this day been filed. In the order complained of I also passed upon claims of E. F. and Third National Bank. A petition for review has heretofore been filed by the Third National Bank, and the mortgages in question have been sent to the court with my reasons for the whole order.

And the said question raised by the First National Bank is also certified to the Judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. ——.

A. M.,
Referee in Bankruptcy.

(1) See note to No. 130.

No. 140.
Certificate of Referee on Finding Creditor Held a Preference (1).

[*Caption.*]

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause, before me the following questions arose pertinent to the said proceedings:

E. F. & Co. filed before me proof of debt for $——, and also another claim verified by the assignee of E. F. & Co. for $——.

D. L. & Son filed a claim for $——, and another claim for $——, which includes and is a duplication of said claim of $——.

The trustee, R. B., and S. G., filed exceptions to said claims, averring that the holders thereof had received preferences.

I found that E. F. & Co. and D. L. & Son had received preferences to the amount of fifty per cent. of their claims and ordered that they elect whether or not they will surrender the preferences received by them or have the claims filed as aforesaid disallowed. To that order and finding said E. F. & Co. and D. L. & Son have filed petitions for review, and the trustee also filed a petition for review.

Said claims, also the exceptions aforesaid, also the order and finding thereon, also said three petitions for review, are all filed herewith and made part hereof, marked exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.

A summary of the evidence taken before me and relating to the question involved is also attached hereto and marked exhibit "Summary of Evidence." An opinion giving my reasons for the finding and order aforesaid is also made part of this certificate, marked exhibit "Opinion of Referee."

And the said questions are certified to the Judge for his opinion thereon.

Dated at ——, this —— day of ——, A. D. ——.

A. M., Referee in Bankruptcy.

(1) See note to No. 130.

No. 141.

Motion to Correct Journal Entry.

Now comes the C. D. Company, a creditor of said bankrupt, and respectfully represents that in the matter heard by the court on the 14th day of February, 1902, on certification from the referee disallowing and expunging the claim of said creditor, the written finding and order of the court in said proceedings was filed in said court and made part of its records on the 6th day of March, 1902, at 8 o'clock a. m.; that a journal entry thereof was filed by said referee in said court on the 28th day of March, 1902, and by the clerk was made part of the records as of said date, to wit; March 28, 1902.

Wherefore, said creditor prays the court for an order correcting the record in said matter, and directing the clerk to make the record of said entry as of the date March 6th instead of the date March 28th, 1902.

The C. D. Company,
By R. Y., Its Attorney

No. 142.

Order Confirming Order of Referee.

In the District Court of the United States
For the —— District of ——.
A. B.,
vs.
C. D. & Co.,

This cause coming on to be heard on the petition of L. C., for review of the order of court entered herein by J. B., one of the referees of this court, requiring L. C. to pay over to the E. F. Trust Company, Trustee in Bankruptcy herein, the sums of $—— and $—— and the court being fully advised, delivered a written opinion which was filed herein, and on —— day of ——, and in pursuance of said written opinion, it is considered ordered and decreed by the court that said order of the

referee is hereby confirmed and the petition for review filed by said L. C. on the —— day of —— is dismissed and it is for this adjudged, ordered and decreed by the court that said L. C. pay to said E. F. Trust Company, trustee, the said sums of $—— and $—— on or before —— day of ——.

No. 143.

Order Reversing Order of Referee Disallowing Claim

In the District Court of the United States
For the —— District of ——.

In the matter of F. H., doing business as F. H. & Son, Bankrupt. —— Division.	No. —— In Bankruptcy.

This day this cause came on for hearing on the petition of The D. M. Grocery Company for review of the decision of the Referee in Bankruptcy disallowing and expunging the claim of said The D. M. Grocery Company, the certificate of the referee as to the questions presented and summary of the evidence relating thereto, and the finding and order of the referee thereon, was argued by counsel and submitted to the court and on consideration thereof the court find that the decision of the referee in refusing to allow and in expunging the claim of said The D. M. Grocery Company was erroneous, and claim of said The D. M. Grocery Company, should have been allowed, as proved by it, as a valid claim in the sum of —— dollars. It is, therefore, ordered, adjudged and decreed that the action of the Referee in Bankruptcy in disallowing said claim be and the same is hereby reversed and this proceeding is hereby remanded with directions to the referee to allow the claim of said The D. M. Grocery Company, in the sum of —— ($——) dollars, to which finding, order, judgment and decree, B. F., Trustee in Bankruptcy of F. H., doing business as F. H.

& Son, at the time excepted, and gave notice of his intention to appeal this matter to the Circuit Court of Appeals for the —— Circuit.

No. 144.

Decree Confirming Order of Referee with Reference to Election of Trustee

[*Caption*

This matter came on to be heard upon the petition to review the findings and decision of the referee in the matter of the election of a trustee; upon consideration whereof, the court approves and confirms the findings of the referee in said behalf.

No. 145.

Order Marshalling Liens.

[*Caption.*]

This day this cause coming on to be heard upon the petitions for review filed herein by the Third National Bank, the First National Bank and E. F., asking a review of the orders of the referee herein, upon the allowance of their respective claims as preferred, and counsel for said parties having been heard, and the court being sufficiently advised, it is therefore ordered and adjudged that the finding of the referee herein be, and the same is hereby disapproved in so far as same denied to E. F., a lien upon the property of the bankrupt for her said debt, and it is now ordered and adjudged that said E. F. has a prior lien for $—— with interest thereon from the date of adjudication herein until paid upon the property of the bankrupt described in the mortgage of March 9th, 1892, superior to the Third National Bank, but inferior to the claim of the Columbia Finance & Trust Company, trustee, for the first mortgage bondholders.

It is also ordered and adjudged that the finding of the referee upon the claim of the Third National Bank is erroneous, and

is set aside to the extent that it gave the Third National Bank a lien under and by virtue of the mortgages of April 15th, 1892, February 19th, 1894, and January 12th, 1897, for the sum of —— ($——) dollars and it is now ordered and adjudged that said Third National Bank is entitled to and has a lien under and by virtue of the mortgage of April 15th, 1892, upon the property therein described, for the sum of —— ($——) dollars with interest thereon from the —— day of ——, until paid, inferior only to that of the R. Trust Company, trustee, and E. F., and that the balance of the claim of the Third National Bank against said bankrupt, to wit, —— ($——) dollars is hereby allowed as a general or unsecured claim only against said estate.

The foregoing amounts thus allowed priority to E. F. and the Third National Bank, together with the —— ($——) dollars first mortgage debt to the R. Trust Company, trustee, will make up —— ($——) dollars and leave nothing to satisfy any preference, which might otherwise be available to the First National Bank, and it is adjudged that the claim of said First National Bank, against said bankrupt's estate be and the same is allowed for the sum of —— dollars and —— cents ($——) as a general claim against the estate of the bankrupt, and that said First National Bank has no lien to secure its said debt.

It is also ordered and adjudged by the court that the finding of the referee herein upon the limit of mortgaged indebtedness that could be incurred by said bankrupt, placing said limit at —— ($——) dollars, and that all mortgages issued above this limit of —— ($——) dollars, were and are under the law of ——, void, be and the same is now confirmed, and it is adjudged that all said mortgages in excess of —— ($——) dollars, executed by said bankrupt were and are under said law of ——, void and of no effect.

No. 146.

Decree on Petition to Review Order Relative to Widow's Exemptions.

[*Caption.*]

On this —— day of ——, A. D. ——, this cause came on to be heard on the petition of E. B., widow of the bankrupt for review of an order heretofore made on the —— day of ——, A. D. ——, by A. M., referee, on her petition before said referee for the allowance of certain exemptions under the laws of the state of ——, and due notice of said hearing having been given to all parties in interest, the court finds that said petitioner, E. B., widow of said bankrupt, is entitled to special exemptions of household goods and furniture, under section 6038 of the Revised Statutes of —— and that she is entitled to the allowances mentioned under section Nos. 6040 and 6041 of the Revised Statutes of ——, and is entitled to remain in the mansion house of her husband for the period of one year, unless dower is sooner assigned her therein.

It is therefore ordered:

First. That the trustee permit the widow, E. B., to remain in the mansion house for the period of one year, unless dower is sooner assigned to her therein.

Second. That the trustee pay to her the allowances made to her under sections 6040 and 6041 of the Revised Statutes of ——, to wit: The sum of $——, provided there shall be so much in his hands after paying costs and any mortgage to which the widow was a party, out of funds arising from the sale of mortgaged premises, or any property belonging to said estate.

Third. That the trustee permit her to retain such parts of the assets of said estate as are mentioned in Section 6038 of the Revised Statutes of ——.

Fourth. That nothing be paid or turned over to H. S., executor of the estate of A. B., on account of exemptions claimed by said A. B. in the proceedings in bankruptcy.

It is further ordered that the decision and order of A. M., referee, be and is so far overruled to the extent that it is inconsistent with the above findings of the court.

No. 147.

Ancillary Order to Pay Funds of Bankrupt to a Trustee Appointed by Another District Court (1).

[*Caption.*]

Whereas, it appears that Solis V. Peiser, trading as Peiser & Co., was adjudicated a bankrupt by the District Court of the United States for the Southern District of New York on the 9th day of November, 1901, and that Theodore M. Taft, of New York, was duly appointed receiver of said bankrupt; and

Whereas, said Theodore M. Taft has presented a petition to this court asking for its assistance in enforcing the orders of the District Court of the United States for the Southern District of New York in proceedings ancillary to the said bankruptcy, and in aid thereof:

Now therefore, this 2d day of April, A. D. 1902, on hearing of the said petition, and the answer of the Union Trust Company of Philadelphia and W. J. Clark, its Treasurer, as filed thereto, it is

Ordered and decreed that the Union Trust Company of Philadelphia do pay over, within ten days from the date hereof, to said Theodore M. Taft, receiver of Solis V. Peiser, trading as Peiser & Co., the above bankrupt, the sum of $350.93, being the amount on deposit with said the Union Trust Company to the credit of said Peiser & Co. on November 9, 1901, the date of the said adjudication in bankruptcy, together with any interest on said deposit as the same is allowed by the said trust company from said date, or show cause why said payment should not be made.

(1) This order was entered in the District Court of the United States for the Eastern District of Pennsylvania and is taken from *in re* Peiser, 115 Fed. Rep. 198.

No. 148.

Order on Rule to Show Cause Against Bankrupt to Pay Money to Trustee, Insanity of Bankrupt.

District Court of the United States,
——District of ——.

A. B. Co. &c.,
vs.
E. B.
} In Bankruptcy.

This case has been heard upon the question of the adoption of the referee's recommendation to require the bankrupt E. B. to pay to the trustee herein the sum $——, money realized from the sale of the stock of merchandise and from the mortgage described in the papers, or to punish him for contempt in case he fails to so pay, the response of said bankrupt filed thereto and the suggestion filed by counsel as to the insanity of said bankrupt, evidence having been heard by the court as to the present condition of mind of said E. B., and the court being fully advised, delivered a written opinion herein, which is ordered to be filed, and pursuant to which it is considered by the court that the said E. B. is not now in such condition of mind as to make him properly subject to an order punishing him for contempt. It is therefore ordered that said E. B. be permitted to go hence without day, but the trustee of said E. B., in bankruptcy has leave again to bring the subject to the attention of the Referee in Bankruptcy, should development or change of condition in said E. B.'s mind make it in his judgment proper.

No. 149.

Bill in Equity to Recover a Preference and for an Injunction (1).

The District Court of the United States for the —— District of ——.

W. H., Trustee in Bankruptcy of
A. B. and C. D., late partners as A. B. & Co.

vs.

E. F.

To the Honorable G. R., Judge of the District Court of the United States in and for the —— District of ——.

W. H., trustee in bankruptcy of A. B. and C. D., co-partners as A. B. & Co., brings this his bill of complaint against E. F. of ——, a citizen of the state of ——, residing at —— in said state.

Your orator complains and says that the said A. B. and C. D., co-partners, doing business at ——, in the state of ——, under the style of A. B. & Co., were by the District Court of the United States in and for the —— district of ——, adjudged bankrupts on the —— day of ——, 19—, and that this plaintiff was duly appointed trustee in bankruptcy of the said A. B. and C. D., co-partners as A. B. & Co., by the said District Court on the —— day of ——, 19—, and that he duly qualified and entered upon the performance of his duties as such trustee and is still acting as such trustee.

Your orator further says that he is informed and believes that on or about the —— day of ——, 19—, said A. B. and C. D., well knowing at the time that said firm was insolvent and unable to pay its creditors in full and with intent to prefer the defendant E. F. as a creditor of the said firm of A. B. & Co., and with the further intent to defraud the other creditors of said firm and in violation of an Act of Congress to establish a uniform system of bankruptcy in the United States, did withdraw from the funds of said firm the sum of $——

and did transfer and pay the same to the said E. F. on the day aforesaid, and that he, the said E. F., at that time had reason to believe and to know that said firm was insolvent and that said payment to him was for the purpose of preferring him as a creditor of said firm.

Your orator further complains and says that he is informed and believes that said E. F. is insolvent and has no money or property in his own right and that unless restrained from so doing, will dispose of said funds and will be unable to pay over the same to this plaintiff and that said funds will be lost to the estate of the said bankrupts.

Wherefore your orator prays the court to now grant a preliminary injunction restraining and enjoining the said E. F. from transferring, paying over or in any way disposing of all or any part of said $—— until further order of this court, and that he may be decreed to hold said funds in trust for and may be required to account for and pay over the same to this plaintiff, and for such other and further relief as may be just and proper in the premises.

May it please your honors to grant unto this plaintiff a writ of subpœna to be directed to the said E. F., thereby commanding him at a certain time and under a certain penalty personally to appear before this honorable court and then and there full, true, direct and perfect answer make [*but not under oath*] to all and singular the premises and further to stand to and perform and abide such further order, direction and decree therein as to this honorable court shall seem meet.

W. H.,
Trustee in Bankruptcy.

X. & X.,
Attorneys for Plaintiff.

[*Verification.*]

(1) The District Court is given concurrent jurisdiction with any State Court for the purpose of recovering property by the trustee under Sec. 60*b* and Sec. 67*e* of the Bankrupt Act of 1898. Act of Feb. 3, 1903, Sec. 8, amending Sec. 23 of the Bankrupt Act of 1898.

The suit in this class of cases must be plenary. Louisville Trust Co. *vs.* Comingor, 184 U. S. 18; Marshall *vs.* Knox, 16 Wall. 556. It may be either a suit at law or in equity, as the case may require.

No. 150.

Petition for Removal of Trustee (1).

(Official Form No. 52.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

To the Honorable ——.

Judge of the District Court for the —— District of ——:

The petition of ——, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ——, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore —— pray that notice may be served upon said ——, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

(1) Gen. Order 13. Loveland's Bank., sec. 145.

No. 151.

Notice of Petition for Removal of Trustee (1).

(Official Form No. 53.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

To ——,

Truste of the estate of ——, bankrupt:

You are hereby notified to appear before this court, at ——, on the ——— day of ——, A. D. 18—, at —— o'clock —— m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——, one of the creditors of said bankrupt, filed in this court on the —— day of ——, A. D. 19—, in which it is alleged [*here insert the allegation of the petition*].

——,
Clerk.

(1) Gen. Order 13. Loveland's Bank., sec. 145.

No. 152.

Order for Removal of Trustee (1).

(Official Form No. 54.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

Whereas, ——, of ——, did, on the —— day of ——, A. D.

19—, present his petition to this court, praying that, for reasons therein set forth, ——, the trustee of the estate of said ——, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said —— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said —— be removed from the trust as trustee of the estate of said bankrupt, and the costs of the said petitioner incidental to said petition be paid by said ——, trustee [*or*, out of the estate of the said ——, subject to prior charges].

Witness the Honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) Gen. Order 13. Loveland's Bank., sec. 145.

No. 153.

Bankrupt's Petition for Discharge. (1).

(Official Form No. 57.)

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

To the Honorable ——,
Judge of the District Court of the United States for the District of ——:

——, of ——, in the county of ——, and state of ——, in said district, respectfully represents that on the —— day of ——, last past, he was duly adjudged bankrupt under the

Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ——, A. D. 19—.

——,
Bankrupt.

ORDER OF NOTICE THEREON.

District of ——, ss.

On this —— day of ——, A. D. 19—, on reading the foregoing petition, it is

Ordered by the court that a hearing be had upon the same on the —— day of ——, A. D. 19—, before said court, at ——, in said district, at —— o'clock in the ——noon; and that notice thereof be published in ——, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——, judge of the said court, and the seal thereof, at —— in said district, on the —— day of ——, A. D. 19—.

——,
[*Seal of the court.*] Clerk.

—— hereby depose, on oath, that the foregoing order was published in the —— on the following —— days, viz.:

On the —— day of ——, and on the —— day of ——, in the year 19—.

District of ——.

——, 19—.

Personally appeared ——, and made oath that the foregoing statement by him subscribed is true.

Before me, ——,

[*Official character.*]

I hereby certify that I have on this —— day of ——, A. D. 19—, sent by mail copies of the above order, as therein directed. ——,

Clerk.

(1) As to who may file a petition for discharge, when and where the petition is filed see Loveland's Bank., secs. 273 and 274. B. A. 1898, sec. 14 Gen. Ord. 31.

The discharge should be allowed unless it is opposed by creditors and a case made out under one of the grounds specified in the statute. Strause *vs.* Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *in re* Frank, 6 Am. B. R. 156.

Where a petition for a discharge has been refused upon the merits a second petition will not be entertained in the same proceeding. *In re* Royal, 7 Am. B. R. 636. A new petition may be filed in a second bankruptcy proceeding the effect of which may be limited. *In re* Claff, 7 Am. B. R. 128.

No. 154.

Notice to Attorney for Bankrupt with Reference to Discharge.

R. X. Esq.,
Attorney at Law.

Dear Sir:—In the matter of A. B., No. —— in bankruptcy, the petition for discharge and check for $——, advanced fees received. Enclosed herewith you will find receipt for said fees, and also notice for insertion in the newspaper designated. Please see that the notice is promptly inserted in the said newspaper, and that proof thereof, with payment receipted, and the final oath are filed with the clerk before the return day. Neither the bankrupt nor his attorney need be present on the return day. The creditors are allowed ten days beyond return day in which to file specifications. If no appearance in opposi-

tion to discharge has been entered before return day or specifications filed within the ten days, the decree of discharge will be made, and certificate thereof mailed you. Please acknowledge receipt of notice for publication.

Yours Respectfully,
B. R.,
Clerk.

No. 155.

Notice of Application for Discharge in Bankruptcy.

The District Court of the United States
For the —— District of ——.
—— Division.
No. ——.
In the matter of A. B.,
Bankrupt.

Notice is hereby given that A. B., having on the —— day of —— been duly adjudged a bankrupt in the above entitled cause, has filed his petition for a discharge as a bankrupt, and the same will be heard by said court on the —— day of ——, at 10 o'clock in the forenoon, at the United States Court room in ——, at which time and place all creditors and other persons in interest may appear and show cause, if any they have, why the prayer of said petition should not be granted.

B. R.,
Clerk of Said Court.

No. 156.

Proof of Publication.

The District Court of the United States
For The —— District of ——
—— Division.

In the matter of
A. B.,
Bankrupt.
State of ——.
} In Bankruptcy.

County of ——, ss:

T. G., of said city of ——, County of ——, State of ——, being first duly sworn, deposes and says that he is the principal clerk in the office of the —— Times Co., publishers of the Times, a daily newspaper in the said city, that a notice to creditors in the above entitled bankruptcy matter, of which the annexed printed slip taken from the said newspaper is a copy, was inserted and published therein on the —— and —— days of ——, A. D. ——.

T .G.,

Subscribed and sworn to before me this —— day of —— A. D. ——.

F. C.,
Notary Public.
—— County, ——.

[*Seal.*]

No. 157.

Specification of Grounds of Opposition to Bankrupt's Discharge (1).

(Official Form No. 58.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

——, of ——, in the county of ——, and state of ——, a

party interested in the estate of said ——, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition*]. (2)

——,
Creditor.

(1) Where creditors object to a bankrupt's discharge it is incumbent on them to enter their appearance and file specifications as to the grounds of opposition. Gen. Ord. 32, Loveland's Bank, secs. 276 to 281. *In re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 610.

The specification should be filed with the clerk and not with the judge. *In re* Sykes, 6 Am. B. R. 264.

The specifications of objection to the discharge of the bankrupt must be filed within the time prescribed by Gen. Ord. 32, and by leave of court for cause shown, or they will be dismissed. *In re* Albrecht, 104 Fed. Rep. 974; *in re* Clothier, 108 Fed. 199, 6 Am. B. R. 203.

The court may require a positive verification of the specification of objection to the bankrupt's discharge. *In re* Brown (C. C. A. 5th Cir.) 7 Am. B. R. 252, 112 Fed. Rep. 49.

The specification of objections are in the nature of a pleading. *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715. It must in order to prevent a discharge set forth one of the statutory grounds. Strause *vs.* Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *in re* Frank, 6 Am. B. R. 156. The allegations must be distinct, specific and definite, so as to advise the bankrupt of the acts charged which bring him within the inhibition of the Act so far as they relate to his discharge. *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; *in re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 613; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; *in re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

The sufficiency of a specification in opposition to a discharge may be attacked before a referee to whom the issue is referred. *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274. As to the manner of making attack, see *in re* Crispt, 9 Am. B. R. 1.

The allegations of the specification must be proved. *In re* Logan, 102 Fed. Rep. 876, 4 Am. B. R. 525. *In re* Crispt, 9 Am. B. R. 1.

A finding by a referee on the hearing of a petition for discharge in bankruptcy will not be reversed except upon clear and convincing proof of error. *In re* Covington, 6 Am. B. R. 373.

The referee has been allowed additional fees for hearing a petition on discharge. *In re* Grossman, 6 Am. B. R. 510.

Amendments to the specifications of creditors may be allowed on application to the judge and not to the referee. The allowance rests in the dis-

cretion of the judge. *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 770; *in re* Wolfensohn, 5 Am. B. R. 60; *in re* Mudd, 105 Fed. Rep. 348.

The act of February 5, 1903, adds new grounds of opposition to granting discharge to the grounds named in the act of 1898 by amending Sec. 14*b* to read as follows:

"*b*. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

No. 158.

Specifications of Grounds of Opposition to Discharge (1).

The District Court of the United States
For the —— District of ——.
In the matter of the Bankruptcy of
A. B.,
Bankrupt.

Now comes E. F., G. H. and J. K., creditors of the said bankrupt and object to the discharge of said bankrupt for the following reasons:

First. That while a bankrupt he concealed from the trustee the sum of $——, being property belonging to his estate in bankruptcy, and he concealed the further sum of $—— from the trustee, being property belonging to his said estate in bankruptcy.

Second. That under oath he stated in the schedules attached

to his petition in bankruptcy that he had no assets, whereas, and in fact, the assets consisted of $——, at least.

Third. That while under examination under oath before the referee, he falsely stated and testified that said $—— did not belong to him, but was the property of his wife, consisting of a loan to her by her brother A. G., whereas, and in fact said $—— was and constituted his property.

Fourth. That while under examination under oath before the referee herein, he made numerous statements, too numerous to be embodied in these specifications, but are more fully set forth in the transcript of the evidence in this court by the trustee in his report, such statements were knowingly false when made.

Y. & Y.,
Attorneys for Creditors.

(1) See note to No. 157.

No. 159.

Order Referring Petition for Discharge to Referee (1).

The petition of said bankrupt praying that he may be discharged from all his debts pursuant to the acts of Congress relating to bankruptcy coming on for hearing on this day pursuant to orders herein the 26th day of January, 1901, now in accordance with Section 3, No. XII, General Orders in Bankruptcy and no objections or specifications having been filed in opposition thereto, the matter of said petition is hereby referred to A. M., one of the referees in bankruptcy of this court, at the city of ——, to ascertain and report to the court the facts relating to said petition, and the rights of said petitioner to a discharge under the provision of said act.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, this —— day of ——, A. D., ——.

B. R.,
Clerk of Said Court.

(1) A reference may be made to referee after specifications have been filed to report, but the judge must make the order of discharge. Bank. Act of 1898, sec. 14*l*.

For proceedings for discharge see Loveland on Bankruptcy, chap. 26.

No. 160.

Order Referring Specifications in Opposition to Discharge to Referee.

[*Caption.*]

At the city of ——, in said district, this —— day of —— 190—, —— District of ——, ss.

And now, to wit, this —— day of —— 190— the specifications of objection to the discharge of said bankrupt filed by E. F., of ——, a party interested, are referred to A. M., referee in bankruptcy, at —— as a Special Master, to take the testimony and make report thereof to the court, and of his findings of fact together with his recommendation in favor of, or against, said discharge; said referee to be entitled to receive for his services five dollars ($5.00) for each day actually spent in hearing such reference and preparing his report; such sum to be chargeable in the first instance to the party opposing the discharge; and indemnity may be demanded by the referee before proceeding with the hearing.

No. 161.

Referee's Report on Petition for Discharge.

To the Honorable G. R., Judge of the District Court of the United States for the —— District of ——:

In accordance with an order of your honorable court whereby I was directed to ascertain and report to the court the facts relating to the petition of the said bankrupt for his discharge and the right of said petitioner for a discharge under the provisions of the bankrupt act, I do hereby report that said bank-

rupt's petition to be adjudicated bankrupt was filed on the —— day of ——, and that he was at the time of filing such petition a resident of ——, in the County of ——, in said district.

And I do further report that said bankrupt has in all things conformed to the requirements of said act and that so far as the papers on file with me and the proceedings had before me show, he has committed none of the offenses and done none of the acts prohibited in subdivision B. section 14 of said act and that in my opinion he is entitled to his discharge.

And I do further report that there are assets in said bankrupt's estate and that a trustee has been appointed, that the estate is unsettled and that my disbursements have been provided for.

Dated this —— day of ——.

A. M.,
Referee.

No. 162.

Final Oath of Bankrupt.

In the District Court of the United States,
For the —— District of ——.

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy.

—— District of ——, ss:

I, A. B., of ——, in the county of ——, and State of ——, the bankrupt above named, upon my oath, do hereby declare that, on petition filed by [*or* against] me, I was duly adjudged a bankrupt by the decree of the court made on the —— day of —— A. D. 190—, under and by virtue of an act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved the first day of July, 1898; that I have not knowingly and fraudulently, concealed, while a bankrupt, and am not now concealing from trustee, any of the property belonging to my estate in bank-

ruptcy; that I have not knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bankruptcy; that I have not knowingly and fraudulently presented under oath any false claim for proof against any estate in bankruptcy, or used any such claim in composition, either personally or by agent, proxy or attorney; and that I have not knowingly or fraudulently extorted, or attempted to extort any money or property from any person as a consideration for acting, or for forbearing to act in bankruptcy proceedings; that I have not committed any of the offenses punishable by imprisonment, as provided in said act, nor have I, with fraudulent intent to conceal my true financial condition and in contemplation of my bankruptcy, destroyed, concealed, or failed to keep books of account or record from which my true condition might be ascertained; nor have I done, suffered, or procured to be done, or been privy to any act, matter or thing specified in the said act of Congress as a ground of withholding my final discharge thereunder, or as invalidating such discharge if granted.

Subscribed and sworn to before me this —— day of —— A. D. 190—, at —— in said district.

A. B.

B. R.,

Clerk of Said Court.

(1) Oaths required by the Act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt. Act of 1898, chap. 4, sec. 20.

This oath should not be administered by an officer who is the attorney for the bankrupt.

Bank. Act of 1898. Sec. 14 B (1) and (2). Sec. 29 B (1), (2), (3), and (5).

No. 163.

Clerk's Memoranda of Bankrupt's Petition for Discharge.

In the District Court of the United States,

For the —— District of ——.

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy.

Residence of bankrupt ——.

Name and address of attorney ——.

Petition for adjudication—date of filing ——.

Voluntary or involuntary ——.

Adjudication—date of ——.

Examination of bankrupt—referee's certificate of [Rule 16 (b)] ——.

Certified list of creditors who have proved their claims [Rule 16 (b)] ——.

Final oath [Sec. 14 (b) (1) and (2); Sec. 29 (1) (2) (3) (4) and (5)] ——.

Fees of clerk on petition for discharge [Filing fees—Rule 20 (3) and (5)] ——

Application for discharge [Sec. 14 (a); Rule 14 (a) and (c) and Form 57] ——.

Hearing thereon [Rule 12 (3) G. O.]—date of ——.

Notice by clerk to creditors [Sec. 58 (a) (2) and (b) and (c) Form 57]—date ——.

(1) Names on schedules [Sec. 58 (a)] ——.

(2) Names on proofs of claims [Sec. 58 (a)] ——.

Newspaper designated [Sec. 28 (a); Sec. 58 (b)]—name of ——.

Publication—[See General Provisions, Rule 37 G. O.] ——.

Proof of publication—[N. B.—Correct name; printed notice attached; proof sworn to; bill receipted.]

Date of last publication [10 days before hearing] ——.

Specifications against discharge—date for filing [10 days from hearing] ——.

Appearance in opposition to discharge [Rule 32 G. O.]—date of ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Specifications of objection to discharge [Rule 32 G. O.—— See Form 58.] ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Referee's fees—if paid [Rule 20] ——.

Memoranda:——.

No. 164.

Discharge of Bankrupt (1).

(Official Form No. 59.)

District Court of the United States, —— District of ——.

Whereas, ——, of ——, in said district, has been duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 19—, on which day the petition for adjudication was filed —— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——, judge of said district court, and the seal thereof this —— day of ——, A. D. 19—.

[*Seal of the court.*] ——,

Clerk.

(1) The effect of a discharge is not determined by the court granting it but by subsequent proceedings in which the discharge is pleaded as a defense to an action for debt. See *in re* Marshall Paper Co. (C. C. A. 1st Cir.) 102 Fed. Rep. 872, 4 Am. B. R. 468; *in re* Black, 97 Fed. Rep. 493, 4 Am. B. R. 471 (note).

Debts not affected by a discharge—*a*. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or

municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." [Sec. 17, as amended by act of Feb. 5, 1903.]

No. 165.

Deed from Trustee to Purchaser.

KNOW ALL MEN BY THESE PRESENTS: That whereas, on the —— day of —— 19—, A. B. was duly adjudged bankrupt by the District Court of the United States for the —— District of ——, and the said A. M. was duly appointed and qualified as trustee of the estate of the said A. B. in bankruptcy, and is now acting as said trustee, and on the —— day of ——, 19—, said trustee filed a certain petition in said District Court of the United States for the —— District of ——, praying among other things, for an order of sale of certain real estate therein mentioned and hereinafter described.

And Whereas, proceedings were had on said petition in accordance with the bankruptcy laws of the United States in such case made and provided, and the petition coming on for hearing on the —— day of ——, 19—, of which hearing ten days' notice had been given by mail to creditors of said bankrupt, it was ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in his petition and hereinafter described, by auction (*or at private sale, or as may be*), keeping an accurate account of the property sold and the price received therefor, and to whom sold, and on the same day in pursuance of said order and judgment, an order of sale of said real estate therein described, was issued out of said court under the seal thereof to said A. M., trustee of the estate of A. B. in bankruptcy, as aforesaid, directed, commanding him to execute the said order, and of the same, together with his proceedings thereon, to make due return to said court.

And Whereas, said A. M., trustee of the estate of A. B., in bankruptcy, having caused said premises to be appraised, and the report of said appraisement to be filed with S. T., the referee, and having on the —— day of ——, 19—, returned said order of sale to said court as commanded with the proceedings thereon, stating in substance that in obedience to said order he duly advertised the real estate therein described for sale for —— consecutive weeks before the day of sale in the "Gazette," a newspaper printed and of general circulation in said —— County, State of ——, stating in said notice the time, place, and terms of said sale, and on the —— day of ——, 19—, he attended at the place named for the sale, and at the hour of — o'clock — M., he offered said real estate (hereinafter described) for sale, when G. H., bid to pay for the same the sum of —— ($——) dollars, which, being the highest and best bid that was offered, and being more than seventy-five percentum of the appraised

value of said premises, he then and there sold the same to said G. S. for that sum.[1]

And whereas, on the —— day of ——, 19—, the said court having examined the proceedings of the said sale, aforesaid, under said order of sale, and it appearing to the court that said sale was in all respects legally made, ordered that the same be approved and confirmed, and that said A. M., trustee, as aforesaid, should execute and deliver a proper deed to the purchaser, of the real estate so sold.

All of which will more fully appear by the records of said court, to which reference is here made.

Now, therefore, I, the said A. M., trustee of the estate of A. B., in bankruptcy, aforesaid, by virtue of said order of sale, sale, and confirmation, and of the statute in such cases made and provided, and of the powers vested in me and for and in consideration of the premises, and the sum of —— dollars ($——) paid, or secured to be paid to me by said G. H., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said G. H., his heirs and assigns forever, the following real estate, situated in the county of ——, in the state of ——, and in the —— and bounded and described as follows: [*Here set forth the description by metes and bounds.*]

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said G. H., his heirs and assigns forever, as fully and completely as the said A. M. as such trustee in bankruptcy, by virtue of said order of sale, sale, and confirmation, and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof, the said A. M., as such trustee, has hereunto set his hand, this —— day of ——, A. D., 19—.

Signed and acknowledged in presence of:

R. S.

G. T.

A. M.,

Trustee of the Estate of A. B., in Bankruptcy.

The State of———— } ss.
County of———— }

Be it remembered, that on this —— day of ——, 19—, before me, the subscriber, a notary public, in and for said county, personally came the above named A. M., as trustee of the estate of A. B., in bankruptcy, the grantor, in the forgoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such trustee for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

[SEAL.] J. R.,

Notary Public in and for the —— County of ——, State of ——.

(1) In case of a private sale omit this paragraph and state the terms and conditions of the order of sale actually complied with and proceed with the form as given.

APPELLATE PROCEEDINGS.

No. 166.

Petition for Appeal in Bankruptcy (1).

The District Court of the United States for the —— District of——.

In the Matter of L. W. doing business as L. W. & Son, Bankrupt. } No. ——
} In Bankruptcy.

Petition on appeal of B. Y., trustee in bankruptcy, of L. W., doing business as L. W. & Son, Bankrupt.

The above named B. Y., trustee in bankruptcy, considering himself aggrieved by the judgment made and entered on the —— day of ——, in the above entitled cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the —— Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said

judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the —— District.

R. S.

Attorney for B. Y., Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

A. C.

District Judge.

(1) An appeal lies from a court of bankruptcy to the Circuit Court of Appeals in three classes of cases specified in sec. 25 of the Bankruptcy Act of 1898 and in no other cases.

The petition for appeal and the allowance must be made within ten days after the entry of the judgment appealed from. Norcross *vs.* Nave & McCord Merc. Co., 101 Fed. Rep. 796, 4 Am. B. R. 317.

No. 167.

Order Granting Appeal in Bankruptcy, Severing Co-defendants and Allowing Supersedeas.

The District Court of the United States for the —— District of ——.

A. B., *et al.*, Petitioners

vs.

C. D., *et al.*, Respondents.

The defendant, D. G., having heretofore filed herein his petition for appeal and assignment of errors, and having given notice to E. F. and G. H., and they failing to appear, said appeal is allowed to petitioner, and said E. F. and G. H. may be made appellees.

Said appeal is to operate as a supersedeas of the decree of ——, but not to affect the injunction granted ——, upon the execution of a bond in the penalty of $——.

The United States Fidelity and Guaranty Company of Baltimore, Maryland, is accepted on said bond as surety, and said bond is now approved.

No. 168.

Order Allowing Cross Appeal.

[*Caption in Trial Court.*]

This day came the complainant herein by its counsel, and presented the petition for a cross-appeal and an assignment of errors accompanying the same, which petition upon consideration of the court is hereby allowed and the court allows a cross-appeal to the United States Court of Appeals for the —— Circuit upon the filing of a bond in the sum of five hundred dollars ($500.00) with good and sufficient security to be approved by the court.

No. 169.

Bond on Appeal in Bankruptcy (1).

Know all men by these presents, that we, A. B., as principal, and S. R. and L. P., as sureties, are held and firmly bound unto C. D. in the full and just sum of —— ($——) dollars, to be paid to the said C. D., his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this —— day of —— in the year of our Lord one thousand nine hundred and ——.

Whereas lately at a Circuit Court of the United States for the ———— District of ———— in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a decree was rendered against the said A. B., and the said A. B. having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said C. D., citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the —— Circuit, to be holden at the city of ——, in said circuit, on the —— day of —— next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute his appeal to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

L. S. A. B. [*Seal.*]
G. S. S. R. [*Seal.*]
L. P. [*Seal.*]

Approved by
H. S.,
U. S. Circuit Judge.

(1) The bond on appeal from a Circuit or District Court to a Circuit Court of Appeals may be allowed by the circuit or district judge. R. S. sec. 999.

An appeal to operate as a *supersedeas* must be filed in accordance with R. S. sec. 1007. Adams *vs.* Law, 16 How. 148; Kitchen *vs.* Randolph, 93 U. S. 86.

A trustee in bankruptcy is not required to give bond on appeal. Sec. *25c* of the bankruptcy law of 1898, 30 Stat. at L. 544.

No. 170.

Citation on Appeal in Bankruptcy.

The United States Circuit Court of Appeals, for the —— District.

The United States of America, —— Judicial Circuit, ss.

To The D. M. Grocery Company — Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the —— circuit, to be holden at the city of Cincinnati, in said district, on the —— day of —— next, pursuant to a petition on appeal and assignment of error filed in the clerk's office of the District Court of the United States for the —— district of ——, —— division, in the matter of F. H., doing business as F. H. & Son, to show cause, if any there be,

why the judgment rendered in said cause reversing the finding and order of the referee in bankruptcy disallowing and expunging the claim of The D. M. Grocery Company and ordering the allowance of said claim, as proved by it, before said referee, in the sum of $——, as in said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. C., Judge of said District Court, this —— day of —— in the year of our Lord ——, and of the independence of the United States of America the one hundred and ——.

A. C.,
United States District Judge.

No. 171.

Assignment of Errors to an Adjudication of Bankruptcy.

District Court of the United States, District of ——.
In the matter of A. B. and C. B.
In Bankruptcy.
No. ——.

And now on this the —— day of ——, came A. B. and C. B. by R. X. Esq. and T. B., their attorneys, and say that the judgment in said cause adjudicating them involuntary bankrupts is erroneous and against their just right, and they assign the judgment of said District Court adjudicating them bankrupts individually and as partners as manifest error.

Wherefore the said A. B. and C. B. pray that the said judgment may be reversed and said petition in involuntary bankruptcy against them be dismissed.

R. X.
T. B.
Attorneys for A. B. and C. B.

No. 172.

Assignment of Errors to an Adjudication of Bankruptcy.

The District Court of the United States, for the —— District of ——.

A. B. & Co., *et al.*
vs.
C. D. & Co.,

Your petitioner assigns the following as the errors upon which he will rely:

First. The court erred in failing to hold that the petitioners had estopped themselves from prosecuting their petition herein on account of the execution by the said C. D. & Company of the alleged deed of assignment.

Second. The court erred in adjudicating the firm of C. D. & Company bankrupt.

Third. The court erred in adjudicating the individual members of said firm, and especially your petitioner, bankrupt.

Wherefore, your petitioner prays that the court would allow an appeal herein from the said decree of ——, and would approve a bond for the stay of all proceedings pending such appeal, and your petitioner will ever pray, etc.

D. G.
X. & X.
Attorneys for D. G.

No. 173.

Assignment of Errors by a Trustee in Bankruptcy to the Allowance of a Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of L. W., doing business as L. W. & Son, Bankrupt. } In Bankruptcy.

And now on the —— day of ——, comes the said B. Y., as trustee in bankruptcy of L. W., doing business as L. W. & Son,

bankrupt, by R. X., Esq., his solicitor, and says that the decree in said cause is erroneous and against the just rights of said trustee in bankruptcy for the following reasons:

First. Because the evidence shown and set out in the agreed statement of facts certified by the referee to be correct shows that said The S. D. Grocery Company, received preferences which it did not surrender or offer to surrender at the time of or before proving its claim.

Second. Because the facts as set out in the agreed statement of facts and certified by the referee to be correct shows that said claimant, The S. D. Grocery Company, within four months next preceding the date when the petition in bankruptcy was filed, had received preferences in excess of further credits afterward given in good faith by it to said bankrupt debtor without security of any kind for property which became a part of the estate of said bankrupt debtor, and remained unpaid at the time of adjudication for bankruptcy herein, in the sum of $——.

Third. Because the evidence showed that said claimant, the S. D. Grocery Company, should not be allowed to prove its claim until it had surrendered or offered to surrender the amount of the excess of preference it has received from said bankrupt within four months prior to the filing of the petition in bankruptcy, over the amount of subsequent credits extended to said bankrupt, without security of any kind, by said claimant for property which became a part of the estate of said bankrupt.

Fourth. Because the evidence showed that the finding and order of the referee in bankruptcy disallowing and expunging the claim of said The S. D. Grocery Company was correct and legal.

Fifth. Because the finding, judgment and decree of this court reversing the action of the referee in disallowing said claim for $—— without any refunder of preferring and expunging said claim and in allowing said claim for $—— with-

out any refunder of preference on the part of said claimant is erroneous and illegal.

Sixth. Because the evidence showed that within four months prior to the time of the filing of the petition in bankruptcy claimant received, at different times, within said period, payments of money from said bankrupt in excess of subsequent sales of merchandise to said bankrupt by said claimant without security of any kind therefor.

Wherefore, the said B. Y., trustee in bankruptcy of said L. W., doing business as L. W. & Son, bankrupt, pray that said order, judgment and decree reversing the action and ruling of the referee and allowing the claim of said The S. D. Grocery Company in the sum of $——, be reversed and that the said court may be directed to enter a decree affirming the action ruling an order of the referee.

R. X.

Solicitor for B. Y., Trustee in Bankruptcy of L. W., doing business as L. W. & Son.

No. 174.

Assignment of Errors by a Creditor to Judgment Disallowing Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of A. B. & Co., *et al.*	In Bankruptcy.
vs.	Assignment of
C. D. and Son, Defendants.	Error on Appeal.

And now, on the —— day of ——, came the said E. F. Company, a creditor of the above named defendants, C. D. and Son, by Messrs. X. & X., its solicitors, and says that the judgment and decree, in said cause is erroneous and against the just rights of said creditor of said defendants for the following reasons:

First. Because the evidence shows that the claim of said creditor of said above named defendants was a provable debt against the estate of the bankrupts.

Second. Because the evidence shows that the claim of said creditor of said above named defendants should have been allowed as a valid debt against the estate of the bankrupts.

Third. Because the evidence shows that the judgment and decree should have been in favor of this creditor of the said above named defendants and against the trustee of the above named defendant.

Wherefore, the said creditor of the above named defendant prays that said judgment and decree be reversed, and that the said court may be directed to enter a decree and judgment allowing said claim of said creditor as a provable debt against the estate of the bankrupts, in accordance with the prayer of the bill.

X. & X.
Solicitors for said Creditor, The E. F. Company.

No. 175.

Assignment of Errors to an Order Disallowing Claims in Bankruptcy.

The District Court of the United States for the —— Division of the —— District of ——.

In re A. B. Hardware Company, Bankrupt. } No. ——.

In the matter of the petition of M. R., G. R., and W. R., partners as R. & R., for allowance of their claim for fees and payment of the same, as expenses, or as preferred, out of the assets of the bankrupt.

Assignment of errors by R. & R. in the above matter made a part of their petition for appeal. The said appellants come, and for error in the order and judgment of the court herein, assign as follows:

First. The court erred in holding and adjudging that the general assignment of the A. B. Hardware Company was a fraud upon the Bankrupt Act.

Second. The court erred in holding and adjudging that the services charged for by petitioners, rendered in preparing the said assignment, and in the effort to uphold and execute the same, can not and should not be paid out of the assets belonging to the estate of the bankrupt.

Third. The court erred in holding and adjudging that there was no lien under the statutes and laws of the state of ——, on assets of the bankrupt, in favor of the said R. & R., for the payment of their fees for the services set out in their petition, at the time of the filing of the petition herein for adjudication in involuntary bankruptcy, and at the time such adjudication was made.

Fourth. The court erred in holding and adjudging that the assets of the bankrupt came to the hands of the trustee upon the adjudication of bankruptcy, and his appointment as such, free and discharged of any lien in favor of petitioners for compensation for their said services, and in not holding that such assets were legally and equitably charged, with a lien for and the payment of the compensation due therefor, upon their receipt by the said trustee.

Fifth. The court erred in holding and adjudging that the referee in bankruptcy was in error in ruling that the fee of petitioners for preparing the general assignment was a provable debt against the estate of the bankrupt, and payable out of such estate, and in reversing the judgment of the referee as to the said matter.

Sixth. The court erred in dismissing the petition of petitioners, and in not granting them the relief they therein prayed for.

Wherefore the said R. & R. pray that the judgment of said District Court be reversed with diections to said court to allow their claim.

R. & R.

PETITIONS TO REVIEW ORDERS IN BANKRUPTCY IN A CIRCUIT COURT OF APPEALS.

No. 176.

Notice of Filing Petition for Review (1).

United States Circuit Court of Appeals
For the —— Circuit.

In re Petition of A. B., For Review. } In Bankruptcy.

To R. Y., attorney for the C. D. Trust Company, trustee in bankruptcy for G. H.:

You are hereby notified that on the —— day of ——, at 12 o'clock m., I will file in the clerk's office of the United States Circuit Court of Appeals for the —— Circuit, in the city of ——, a petition for review in the above entitled cause, a copy of which petition is hereto attached as a part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have such case set down for hearing.

R. X.,
Attorney for Petitioner.

I hereby accept service of the above notice this —— day of ——.

R. Y.,
Attorney for C. D. Trust Co., Trustee in Bankruptcy of the said Bankrupt's Estate.

(1) Some notice should be given the parties in the bankruptcy court who are interested in the appeal either by form of citation or notice. The petition is sometimes filed in the Court of Appeals and when docketed and printed, a copy of the printed petition and exhibits are served upon opposing counsel. The better practice, however, is to give notice in substantially the form above given.

No. 178.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy (1).

The United States Circuit Court of Appeals
For the —— Circuit.

In the Matter of A. B. and C. B., Petitioners. } Petition for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the —— Circuit.

The petition of A. B. and C. B. respectfully shows unto the court:

First That on the —— day of ——, A. D. ——, they presented the petition unto the Honorable G. S., judge of the District Court of the United States for the —— District of ——, a true copy of which petition is hereto attached and marked "Exhibit A."

Second. On the —— day of ——, A. D. ——, the said A. H., trustee in bankruptcy, and G. F., administrator of the estate of E. F., deceased, by their counsel, filed a plea and demurrer to said petition, a true copy of each of which is hereto attached and marked "Exhibit B and C." No other persons appeared in opposition thereto.

Third. On the —— day of ——, A. D. ——, the Honorable G. S. entered an order duly dismissing said petition with costs and sustaining said demurrer; said matter having been fully argued before said court.

Fourth. Your petitioners charge the fact to be that the said District Court erred in dismissing said petition and in sustaining said demurrer; and your petitioners are aggrieved thereby and therefore pray this honorable court to review and revise the decision of said court below.

Fifth. No proof was taken in connection with the determination by the Honorable G. S. and the entire proceedings

upon which said dismissal was grounded appear in the exhibits hereto attached.

Sixth. Your petitioners further show that no opinion was filed by said court in the matter.

Seventh. Your petitioners therefore pray that such order of the District Court be set aside and held for naught and that by the order of this court it be decreed that your petitioners have a right to have an issue framed and the truth of the averments contained in their said petition determined according to the rules and procedure applicable in such cases, and that your petitioners be given such other relief as shall be proper.

That an order be entered directing the manner and time of service of this petition.

A. B.,
C. B.,

R. X., Attorney for Petitioners.

A. B., one of the petitioners mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

A. B.

Sworn and subscribed to before me this —— day of ——, A. D. ——.

J. N.,
Notary Public, —— County. ——.

(1) Congress has provided two means of review by a Circuit Court of Appeals of orders and judgments of a court of bankruptcy. Sec. 25 of the Bankruptcy Act of 1898 provides for appeals in three classes of cases. Par. 24*b* of the same act provides for superintending and revising in matters of law only. An appeal is taken in the usual form, and the Court of Appeals may review both matters of fact and law on such proceedings. But on a petition to review an order of a court of bankruptcy the Circuit Courts of Appeals are confined to questions of law. This distinction has been clearly made in the opinions. See Mueller *vs.* Nugent, 184 U. S. 1; Cunningham *vs.* German Ins. Bank, 101 Fed. Rep. 977, 4 Am. B. R. 192; Courier-Journal Job Print. Co. *vs.* Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699, 4 Am. B. R. 183; *in re* Rouse, Hazard & Co., 33 C. C. A. 356, 91 Fed. Rep. 96; *in re* Richards, 37 C. C. A. 634, 96 Fed. Rep. 935; *in re* Abraham, 35 C. C. A. 592, 93 Fed. Rep. 767; *in re* Purvine, 37 C. C. A. 446, 96 Fed. Rep. 192. See also Loveland on Bankruptcy, sec. 312.

This petition should be filed in the United States Circuit Court of Appeals. *In re* Williams, 105 Fed. Rep. 906; Courier-Journal Job. Print. Co. *vs.* Schaeffer-Meyer Brew. Co., 101 Fed. Rep. 699, 4 Am. B. R. 183. As to the form of petition and proceedings on petition to review and revise matters of law in a Circuit Court of Appeals, consult Loveland on Bankruptcy, sec. 313.

The statute prescribes no time limit within which to file a petition for review in a Circuit Court of Appeals. *In re* New York Economical Printing Co., 106 Fed. Rep. 839, 5 Am. B. R. 697; *in re* Good, 99 Fed. Rep. 389, 3 Am. B. R. 605.

No answer or reply need be filed to a petition for review in a United States Circuit Court of Appeals. A question of law is presented to the court substantially as on a writ of error.

The record must contain sufficient matter upon which the court may review and revise a question of law and no other. See Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932.

No. 179.

Petition in a Circuit Court of Appeals to Review an Order in Bankruptcy Disallowing Labor Claims.

The United States Circuit Court of Appeals
For the —— Circuit.

In re A. B. & Company *et al.*, Petitioners.

And now comes E. F., for himself and eighty-eight other labor claimants, whose names, as well as the amounts due them, respectively, for labor performed by them for said A. B. & Company within three months next before the appointment of the receiver, August 27th, 1898, appear in the agreed statement of facts attached to this petition and marked "Exhibit A," and, complaining of the orders and judgment heretofore rendered against these complainants by the Hon. A. J., judge of the District Court of the United States for the —— District of ——, says:

On the 22nd day of October, A. D. 1900, this cause came on to be heard before said judge, to review the proceedings and

final order of A. M., Esq., one of the referees in bankruptcy within and for said district, which said proceedings and final order was based upon said agreed statement of facts.

All creditors and all persons in interest having consented to said agreement, and to this proceeding, and having so consented after the expiration of the time limited for other persons to come into the case, it is conceded that all are bound by the order of this court under the provisions of said stipulation.

Your petitioners contended in the court below, as they now contend in this court:

First. That upon the facts set forth in said agreed statement of facts which is attached hereto, marked "Exhibit A," and made a part of this petition, said funds passed into the hands of the said trustee charged by force of the laws of —— with an equitable lien in favor of said claimants, and each of them, as set forth in schedule B, attached to said statement of facts, and that said claimants were and are entitled to be first paid from said funds after the payment of taxes and costs of administration.

Second. That in said proceeding of the Common Pleas Court, that court acquired full and complete jurisdiction for the purpose of determining the respective rights of the parties to that suit. That the parties and subject matter were all before that court, and that no other court had jurisdiction, nor could they acquire jurisdiction to adjudicate and determine the issues there involved.

That no proceedings were ever instituted in the court of bankruptcy to stay that proceeding, and that that court had, therefore, complete jurisdiction to proceed as it did proceed to final decree, and that before the adjudication in bankruptcy.

The petitioners, therefore, contended, as they now contend, that that fund was in the custody of that court, which was

proceeding to administer upon it, and that by reason of the ruling and judgment herein complained of, they have been aggrieved and damaged to the full extent of the several amounts due them as aforesaid.

This cause thus being submitted to the court on questions of law arising upon the facts so as aforesaid agreed upon by all the parties having an interest in the estate of said bankrupt, or either of them, the court decided and held, as matter of law.

First. That section 3206*a* of the Revised Statutes of —— created no lien in favor of said labor claimants upon the funds in the hands of the receiver in the state courts, or in the hands of the trustee in bankruptcy for distribution.

Second. That section 64*b* of the Bankrupt Act does not fix or prescribe any lien in favor of the wages due these claimants.

Third. That under the facts set forth under the agreed statement of facts, said labor claimants have no interest in said funds other than as common creditors.

The court declined to pass upon and construe the effect and validity of the decree of the Court of Common Pleas of —— county, ——, in favor of said labor claimants January 13th, 1899.

The court thereupon ordered, adjudged and decreed that the orders of said referee heretofore made in this case upon the same issues, and based upon the same facts in respect to these labor claims, be affirmed, and that the petition of these claimants on their behalf be, and the same was dismissed. A copy of said order, marked "B," is attached hereto.

To all of which ruling of law and judgment of the court these labor claimants at the time excepted and still do except, and they now pray this honorable court to review said rulings, orders and judgments of the honorable District Court herein complained of, order the payment of said labor claims as set forth in said schedule "A," attached to said agreed statement

of facts from the funds now in the hands of the trustee, H. S., and for such other relief as they may be found entitled to.

Y. & Y.

Attorneys for all the within named labor claimants and Petitioner E. F.

United States of America, State of ——, County of ——, ss. District aforesaid.

E. F., being the petitioner above named, for himself and others, does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

E. F.

Sworn to and subscribed by E. F., before me, this —— day of ——, A. D. ——.

W. E.,
Notary Public,
—— County.

(1) Taken from the record *in re* Laird, 109 Fed. Rep. 550, 48 C. C. A. 538.

No. 177.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy to Compel Assignee to Pay over Moneys to Trustee.

United States Circuit Court of Appeals, Sixth Circuit.

Leonard Comingor, Petitioner. } In Bankruptcy.

The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the District Court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bank-

ruptcy and praying a subpœna against the alleged bankrupts and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same, tender an answer, although nothing was alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer. He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the District Court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the District Court to allow the tendered answer of Simonson, Whiteson and Company to be filed and directing a trial on issue made. In accordance thereto said District Court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge said Simonson, Whiteson and Company bankrupts, who again appealed, September 22nd, 1899. All of the matters herein so far referred to appear in Records Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said District Court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one,

directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the state court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the state court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof, marked Exhibit No. 2.

Whereupon on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson Circuit Court, Common Pleas Division, for an order directing the state court receiver to pay over to the receiver herein the entire fund in said state court in the action of L. Comingor, asignee, etc., *vs.* Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said state court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of $6,766.53, not then paid into the state court by Comingor, assignee, for creditors and still in his hands. A

copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said Trust Company, receiver herein, appeared before said state Circuit Court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said Circuit Court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the state court June 21st, 1900, and a copy of an injunction of the District Court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name " from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any state court and especially in action No. 19,944, entitled L. Comingor, etc., *vs.* Simonson, Whiteson, etc., pending in the Jefferson Circuit Court." A certified copy of said injunction and said notice are hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the state court took under advisement.

At the same time that the receiver in bankruptcy was applying to the state court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, *sua sponte,* ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz.: June 28th, 1900, said

referee, without notice or appearance of any one and *sua sponte* entered another show cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of $3,000.00, " recited in his report," as having been paid to his counsel and the further sum of $200.00, as shown in said report to have been paid to others counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the state court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson Circuit Court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the state Circuit Court the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the state Circuit Court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in

bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the state court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the District Court herein as already shown, preventing any action on his part in said state court, and at the same time was being pressed by said show cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the state court suit was pending and he was within that jurisdiction making his settlement. He, therefore, filed his petition for review by the District Court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said District Court, of which a copy is filed as part hereof, marked Exhibit No. 15. On the 7th day of July, 1900, said petition for review came on for hearing before the District Court, was heard, and the District Court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact

and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon the referee immediately commenced taking evidence and continued to take from time to time, during which, viz.: on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the District Court has any jurisdiction of the petitioner or of the subject matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the District Court on December 11, 1900, in which report he declines to modify his former rulings and report and recommends the dismissal of petitioner's appeal to the District Court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the District Court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 19th day of January, 1901, the District Court filed an opinion, of which a copy is filed as part hereof, marked Exhibit No. 20, sustaining the referee and dismissing the petition for review and directing proper orders to be entered to that end, which orders were entered on the 26th day of January, 1901, and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States, Saturday, January 26th, 1901.

In the matter of Sinsheimer, Levinson & Co., etc., *vs.* Simon, Whiteson & Co., D. G. Simonson, I Whiteson & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16th. 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said District Court and injured thereby and that the errors complained of consist:

First. In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

Second. In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

Third. In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

Fourth. In said court holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in said summary manner had.

Fifth. In said court holding that it had the power and juris-

diction herein to grant or issue the injunction against Leonard Comingor.

Sixth. In said court holding that said referee had the power or jurisdiction to issue said show cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

Seventh. In said court holding that the filing of said responses of Leonard Comingor gave said referee or court jurisdiction or power to proceed thereon in any manner in said matter, or in the manner had.

Eighth. In said referee and said court adjudging said responses and each of them insufficient.

Ninth. In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupts' estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

Tenth. In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

Eleventh. In the court's adjudging that said Leonard Comingor was properly before the court in said proceedings.

Twelfth. In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

Thirteenth. In the court's finding as a fact and adjudging that said Leonard Comingor was a party to this proceeding in bankruptcy.

Fourteenth. In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the state court proceeding which was done, and the receiver and trustee became a party to said suit in

the state court and withdrew all the money paid into the state court by said Leonard Comingor.

Fifteenth. In the court holding that the proceedings herein against petitioner Comingor are equivalent to a plenary proceeding against him.

Sixteenth. In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the District Court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the District Court be reviewed and revised in the matters of law and that it be adjudged that said District Court was without jurisdiction, and if that can not be done, then adjudge that the summary proceedings herein were illegal and void or if that can not be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the District Court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays further for all other necessary and proper relief herein.

R. X.,
Attorney for Petitioner.

State of Kentucky, County of Jefferson, ss.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

Leonard Comingor.

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904.

D. A. Sachs,
Notary Public in and for Jefferson County, Kentucky.

(1) Taken from the record in Louisville Trust Co. *vs.* Comingor, 184 U. S. 18.

No. 180.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy Marshalling Liens.

United States Circuit Court of Appeals
For the —— Circuit.

In the matter of
E. F., S. H., & J. K.,
vs.
The A. B. Company, Bankrupt. } In Bankruptcy.

Petition of First National Bank of —— for Review.

The petition of the First National Bank of ——, a creditor of the A. B. Company, bankrupt herein, respectfully shows to this court that on the 3rd day of April, 1899, a creditor's petition was filed against the said A. B. Company, which is a corporation, in the District Court of the United States for the district of ——, and that on the 21st day of April, 1899, the said A. B. Company was duly adjudged a bankrupt, and that on said 21st day of April the District Court of —— referred said estate to A. M., referee for said court, and that one of the purposes of said reference was for said referee to receive claim against said bankrupt's estate, allow or disallow same, and to pass upon secured and preferred claims.

Your petitioner shows that on the 7th day of June, 1899, it filed its duly verified proof of claim with said referee, setting up a claim against said bankrupt's estate for seventeen hundred ($1,700.00) dollars, said claim consisting of a note for a like amount, signed by said bankrupt and A. B., and also claiming and asserting a lien upon certain property of said bankrupt under and by virtue of a mortgage executed by said bankrupt to said A. B., J. F. and N. G. mortgagees, to secure them or any of them from loss by reason of their being liable as sureties for debts of said bankrupt or becoming liable therefor within a period of four years thereafter. The property conveyed by said mortgage is as follows:

"Lying and being in —— county, of ——, and more particularly described as follows, to wit:

[*Here describe the property mortgaged.*]

Said mortgage was dated April 15th, 1892, was duly acknowledged and recorded October 12th, 1892, and the limit of indemnity afforded the mortgagees thereby was twenty-five thousand ($25,000.00) dollars. A copy of said mortgage was filed with said proof of claim, and a copy thereof is filed herewith as a part hereof marked "Exhibit A."

Your petitioner further shows that its said debt was originally created April 10th, 1895, within the four years' limit set out in said mortgage, and it claimed and now claims to be substituted and subrogated to the rights of said mortgagee, A. B., under said mortgage and that its said debt was protected thereby and entitled to share in the indemnity thereof. Your petitioner also showed and shows that its said debt was originally for the sum of three thousand ($3,000) dollars, and had been reduced from time to time by partial payments thereon down to seventeen hundred ($1,700) dollars, and that this sum was due and unpaid, and is now due and unpaid, and the lien had not and has not been waived, released nor in any wise relinquished.

Your petitioner further shows that on the 18th day of November, 1899, said referee passed upon its said claim, and allowed it only as a general or unsecured claim against said bankrupt's estate, and refused to allow the same as secured or entitled to any lien under said mortgage dated April 15th, 1892, or the rights of the said mortgagee, A. B., therein. A copy of the order of said referee upon the claim is filed herewith as a part hereof, marked "Exhibit B."

Your petitioner shows that thereafter on the 24th day of November, 1899, it filed its petition for review with said referee, setting out the error complained of, and that the referee forthwith certify to the judge of the District Court the question presented, a summary of the evidence relative thereto and the finding and order of the referee thereon. Whereupon said

referee certified to said judge the question presented, a summary of the evidence relating thereto, the finding and the order thereon. A copy of said order of the referee is filed herewith as a part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 1st day of December, 1899, the judge of the said District Court in reviewing the findings and orders of the referee on said questions, held that said debt was only a common or unsecured claim against said bankrupt's estate and not protected nor secured by the mortgage of April 15th, 1892, but said District Court allowed as a prior and secured claim a debt of twenty-five thousand ($25,000) dollars due to the Third National Bank by said bankrupt, giving to said bank the entire indemnity afforded by said mortgage of April 15th, 1892, and adjudging to said bank a lien for the entire sum of twenty-five thousand ($25,000) dollars. A copy of the order of the said District Judge is filed herewith as a part hereof marked "Exhibit D."

Your petitioner further shows that the question of law decided by the District Court was, that under the provisions and construction of the mortgage of April 15th, 1892, your petitioner was not entitled to any share or *pro rata* in the indemnity of said mortgage, or to be substituted to the rights of the mortgagee, A. B., thereunder, but that the Third National Bank was entitled to and should receive all of said indemnity, and be adjudged a lien for the entire sum of twenty-five thousand ($25,000) dollars.

Your petitioner further shows that at the time the District Court made the order complained of herein there was only twenty-two thousand ($22,000) dollars of indebtedness of said bankrupt due said Third National Bank which was in existence at the execution of the mortgage, or was created within four years thereafter, and that the balance of said twenty-five thousand ($25,000) dollars, to wit, three thousand ($3,000) dollars, was not created until more than four years

after the execution of said mortgage, and said three thousand ($3,000) dollars was not and is not secured thereunder.

Your petitioner further shows that it is aggrieved by the orders of the said District Court, and injured thereby, and that the error complained of consists:

First. That said District Court did not allow and refused to adjudge your petitioner a lien for its said debt upon the property of said bankrupt's estate under and by virtue of the provisions of the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder, upon the property of the bankrupt described therein, and refused to subrogate your petitioner to said mortgagee's rights.

Second. That said District Court did not allow, and refused to adjudge your petitioner its *pro rata* share upon its said debt of the indemnity afforded the mortgagees in the mortgage of April 15th, 1892.

Third. That said District Court allowed and adjudged to the Third National Bank the full amount of indemnity afforded the mortgagees in the mortgage of April 15th, 1892, to secure a debt of twenty-five thousand ($25,000) dollars, when your petitioner shows that three thousand ($3,000) dollars thereof was not and is not secured by said mortgage.

Fourth. That said District Court adjudged that the entire security of said mortgage redounded to the benefit of said Third National Bank, when the debt of said bank is not specifically provided for therein, nor does said mortgage show said bank is entitled to any priority or security superior to your petitioner.

Your petitioner shows that under the provisions of the mortgage of April 15th, 1892, and under the rules of equity and the law of substitution and subrogation, and under section 64, b. 5, chapter 7, of the Bankruptcy Act of 1898, your petitioner is entitled to all the rights of said mortgagee, A. B., to the extent of its said debt, and that thereunder your petitioner has a lien upon the property in said mortgage described to secure its said debt, inferior only to that of the S. Trust Com-

pany, trustee, and Mrs. Anna Mueller, and of equal dignity to the lien of the Third National Bank, and that it was the duty of the District Court to so hold.

Your petitioner asks for an early hearing of this matter, and that the same may be presented upon the petition and exhibits filed herewith, or if your honors so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the clerk of the United States District Court, where said proceedings were had.

Wherefore, your petitioner prays that the order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner a lien for its said debt under the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder for its costs herein, and all proper and equitable relief.

R. X.,
Attorney for Petitioner.

[*Verification.*]

Taken from the record in Courier-Journal Job Printing Co. *vs.* Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699; 41 C. C. A. 614.

No. 181.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy under Sec. 67f.

The United States Circuit Court of Appeals
For the —— Circuit:

In the matter of A. B., Bankrupt, } In Bankruptcy.

Your petitioner, T. A., comes and shows to the Honorable Court, that on September 10, 1900, A. B. was adjudged a bankrupt in the District Court of the United States for the —— Division of the —— District of ——, and that on the 22nd day of the same month your petitioner was duly appointed trustee of the estate of said bankrupt, and having qualified

as such, has since been, and is now, in the discharge of the duties of said trust.

At the time of filing his petition in bankruptcy, the said A. B. was the owner of a stock of merchandise in —— county, ——, which he had acquired about two months previous, and which constituted all his available assets. In October, 1893, C. Bros. obtained judgment against him in the Supreme Court at ——, for $—— and cost of suit. An *alias* execution was issued on this judgment by the clerk of the Supreme Court on September 6, 1900, tested the first day of the preceding term, to wit, the second Monday in September, 1899, which came to the hands of the sheriff of —— county, ——, the next day, and was by him, on September 8, 1900, levied on said stock of merchandise. This with the levy of another execution, precipitated the bankruptcy of A. B., who filed his petition the same day, but a few hours later. He was insolvent when the levy was made, and had been more than four months prior thereto.

Under the orders of the bankrupt court said stock of goods was turned over to petitioner as trustee, who converted the same into cash. The proceeds were enough to pay said judgment and cost, but insufficient to pay all the creditors of said bankrupt.

The said judgment creditors asserted a prior claim to the proceeds of said stock of goods, claiming a lien thereon by virtue of the levy of said execution as of the date of the *teste* of the execution, which your petitioner denied, insisting the levy and whatever lien the creditors obtained by said levy, was avoided by the subsequent bankrupt proceedings had within four months next after the levy. The referee refused to allow the judgment creditors priority, sustaining the contention of the trustee, but his action was overruled by said district judge, who sustained the contention of the said judgment creditors, and ordered the payment of their judgment, interest and cost in full.

Your petitioner excepted to the said action and judgment

of said district judge, and the said creditors and petitioner filed in said court a condensed and agreed statements of facts and the record in the cause, and a duly certified copy of the same is filed herewith as Exhibit No. 1, with the prayer that it be made part of this petition.

Your petitioner shows that the levy and lien created by the levy of said execution, was avoided by the subsequent bankruptcy proceedings, under section 67*f* of the B. A. of 1898, making null and void all levies, judgments, attachments or other liens, obtained against an insolvent person at any time within four months prior to filing a petition in bankruptcy, and the said trustee is aggrieved by the action and judgment of said district judge in refusing to avoid the levy of said execution and discharge the lien created thereby, thus defeating the lawful application of the section referred to, and preventing a ratable distribution of the estate of said bankrupt amongst all his creditors.

The trustee therefore prays that he be allowed to file this, his petition for a review of the action of said district judge, and that said judgment be reviewed, revised and reversed, and that petitioner be allowed and directed to make a ratable distribution of the estate of said bankrupt amongst all his creditors, and he will ever so pray.

T. A., Trustee.
R. Y., Attorney.

State of ——,
County of ——, ss.

Personally appeared before me, the undersigned authority, T. A., and makes oath in due form of law, that he is the trustee in the foregoing matter, and is familiar with all the facts set out in the foregoing petition, and that the same are true to the best of his knowledge and belief.

T. A.,

Sworn to and subscribed before me, this —— day of ——.

[*Seal.*]

J. N.,
Notary Public in and for ——,
County ——.

(1) Taken from the record *in re* Darwin, Petitioner, 117 Fed. Rep. 407.

MISCELLANEOUS ENTRIES, ORDERS, ETC.

No. 182.

Stipulation Reducing Record.

The District Court of the United States, for the
—— District of ——.

A. B., Plaintiff,
vs.
C. D., Defendant.

In the above-entitled case, it is hereby stipulated by the solicitors for the parties thereto that if an appeal be taken, the clerk, in making a transcript of the record may omit therefrom the following papers and records, to wit, [*here set forth the papers and records by name which are to be omitted,*] and that an order may be entered if the same to the court shall seem proper, in accordance with this stipulation.

Dated ——. [*To be signed by all the solicitors.*]

(1) Unless a stipulation or *præcipe* is filed with the clerk, designating what parts of the record are to be included in making a transcript, it is his duty to send up the whole record in the strict sense of the word, made as directed by R. S. sec. 750. Keene *vs.* Whitaker, 13 Pet. 459; Curtis *vs.* Petitpain, 18 How. 109; West *vs.* East Coast Cedar Co., 113 Fed. Rep. 737; Meyer *vs.* Mansur & Tebbetts Imp. Co., 85 Fed. Rep. 874; 29 C. C. A. 465; R. R. Co. *vs.* Schutte, 100 U. S. 644; Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932; Nashua & Lowell Corp. *vs.* Boston & Lowell Corp., 61 Fed. Rep. 237 (244), 9 C. C. A. 468.

If the record is too meager the Appellate Court, upon proper application, settles it by a *certiorari*. Redfield *vs.* Parks, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; Hoskin *vs.* Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. If it contain unnecessary matter, the Appellate Court can rectify this in fixing the costs of the case.

In case the clerk is requested by one party to include a paper in the

transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. Hoe *vs.* Kahler, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. Smith *vs.* Craig, 100 U. S. 226.

No. 183.

Praecipe Designating Parts of Record to be Included in Transcript of Appeal or Writ of Error (1).

The District Court of the United States
For the —— District of ——.

A. B.,
vs.
C. D.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the —— Circuit, pursuant to an appeal [*or* writ of error] allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

[*Here specify by name each paper desired to be included in the transcript.*]

Respectfully,
X. & X.,
Attorneys for Appellant [*or* Plaintiff in Error.]

(1) The certificate of the clerk should show that the transcript of record was made in accordance with *præcipe* of the party removing the case, designating the papers to be included. See Meyer *vs.* Mansur & Tebbetts Imp. Co., 85 Fed. Rep. 874, 29 C. C. A. 465; Nashua & Lowell Corp. *vs.* Boston & Lowell Corp., 61 Fed. Rep. 237 (244), 9 C. C. A. 468; Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932; R. R. Co. *vs.* Schutte, 100 U. S. 644; West *vs.* East Coast Cedar Co., 113 Fed. Rep. 737.

It is proper, but not necessary, for counsel to submit *præcipe* to adverse counsel before the transcript is made. In case the clerk is requested by one party to include a paper in the transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. Hoe *vs.* Kahler, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. Smith *vs.* Craig, 100 U. S. 226.

No. 184.

Praecipe for Transcript in Bankruptcy (1).

[*Caption.*]

To Clerk:

Please make transcript of following named papers in the above entitled matter:

First. Claim of The E. F. Company.

Second. Petition of trustee to expunge said claim.

Third. Waiver of the E. F. Company as to the filing and date of hearing of said petition.

Fourth. Proceedings before referee in the claim of the E. F. Grocery Company.

Fifth. Petition of The E. F. Co. in review of referee's opinion and order expunging its claim.

Sixth. Opinion of District Judge, Hon. A. C.

Seventh. Decree filed March 28, 1902.

Eighth. Petition on appeal.

Ninth. Assignment of errors.

Tenth. Allowance of appeal.

Eleventh. Citation and service of same.

Twelfth. Motion of the E. F. Co. to correct entry of March 28th, 1902.

Thirteenth. Entry overruling same.

Fourteenth. Praecipe for transcript.

Fifteenth. Certificate.

And file said transcript with clerk of the United States Circuit Court of Appeals for the —— Circuit.

B. Y.,
Trustee in Bankruptcy.

Dated ——.

(1) As to this practice see Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932.

No. 185.

Order that Defendant Deliver to Clerk Exhibit to be Transmitted with the Transcript to the Court of Appeals (1).

[*Caption in Trial Court.*]

This matter coming on to be heard upon the motion of complainant, therefor, after hearing counsel, on motion of R. X., Esq., solicitor and of counsel for complainant, it is ordered that the defendants in this cause, produce and deliver to the clerk of this court, the original trust deed marked "Exhibit 1," which was produced and offered in evidence at the taking of proofs and hearing of said cause; and that the same be transmitted by the clerk of this court with the record of this case on appeal to the Circuit Court of Appeals, for inspection at the hearing and determination of said cause, and that the same be returned to defendants forthwith after said hearing.

(1) R. S. sec. 698. Original papers can be transmitted to Appellate Court only for inspection and not in lieu of a transcript of them. Smith *vs.* Craig, 100 U. S. 226.

No. 186.

Order to send Exhibits to a Circuit Court of Appeals with Transcript.

[*Caption.*]

On motion of Messrs. X. & X., solicitors for complainant, it is

Ordered that in addition to the transcript of the record on appeal in this suit that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, the following original exhibits in this suit to be by him safely kept and returned to this court upon the final determination of the appeal in this suit in said Court of Appeals, viz.:

[*Here name exhibits to be transmitted.*]

No. 187.

Order to Send Exhibits to Circuit Court of Appeals.

[*Caption in District Court.*

It is ordered by the court that all original exhibits produced or used at the hearing of the motion for a preliminary injunction in the District Court be forwarded to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, to be used on the hearing of said cause in said Court of Appeals.

No. 188.

Stipulation that Printed Record May be Certified as Transcript

The District Court of the United States
For the —— District of —— Division—In Equity.
The A. B. Company, Complainant,
vs.
C. D. and E. F.,
Doing Business as the C. D. Company, Defendants.

In the above entitled cause it is stipulated that the foregoing printed volume may be, by the clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon the appeal in this cause.

Dated ——.

X. & X.,
Solicitors for Complainant.
R. Y.,
Solicitor for Defendants.

No. 189.

Stipulation to use Printed Records on a Former Writ of Error.

[*Caption.*]

It is agreed by counsel for both sides that this case was heard on being remanded to the record on which it was heard in this court on the former appeal by the A. B. Company, with the addition of certain letters now shown in the transcript as written by Harrison & Dortch, agents of said company, to the said company and its special agent, Kimball, from December 6th, 1896, to January 5th, or 6th, 1897; and it has heretofore been agreed, and is agreed, that the printed record in this court may be used upon this appeal, up to the action of the court in taking the case from the jury on the completion of the hearing, and that the said letters, the said action of the court, and the exceptions filed to such action only need to be printed upon this appeal; the record in this case on this appeal is the same as the record on the former appeal, with the exception of said letters introduced as evidence below, the said action of the court, and the exceptions made thereto by the plaintiffs below.

R. X.,
Attorney for Appellant.
R. Y.,
For Appellees.

No. 190.

Order Extending Time Within Which to File Record in Appellate Court (1).

[*Caption.*]

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is extended until the —— day of ——.

(1) This order should be filed in trial court and sent to Appellate Court

No. 191.

Appearance of U. S. in Circuit Court of Appeals Without Citation.

United States Circuit Court of Appeals
For the —— Circuit.

A. B., *et al.*, Appellants,
vs.
The United States of America, Appellee. } No. ——.

The United States come into court and say that there is no error either in the record or proceedings, or in the giving of the judgment aforesaid, and pray that the said Circuit Court of Appeals may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

H. C.,
United States Attorney
For the United States, Appellees.

No. 192.

Motion to Dispense with Printing Record (1).

[*Caption.*]

Now comes the appellant [*or* plaintiff in error] and moves the court for leave to prosecute his appeal [*or* writ of error] in this court without printing the record in accordance with the rules of this court.

R. X.,
Attorney for Appellant.

(1) It has been the practice in the Circuit Courts of Appeals to permit a writ of error to be prosecuted *in forma pauperis*, as provided by the Act of Congress of July 20, 1892, 27 Stat. at L. 252; Volk *vs.* Sturtevant Co., 99 Fed. Rep. 532, 39 C. C. A. 647; Wickelman *vs.* A. B. Dick Co., 85 Fed. Rep. 851, 29 C. C. A. 436; Reed *vs.* Pennsylvania Co., 111 Fed. Rep. 714, 49 C. C. A. 572. But see *in re* Presto, 93 Fed. Rep. 522, 35 C. C. A. 394 The Supreme Court in Gallaway *vs.* Fort Worth Bank, 186 U. S. 177, held that

a writ of error could not be prosecuted, without giving bond as required by R. S. sec. 1000, under the Act of Congress of July 20, 1892, *supra*. The effect of this ruling is that the security for costs and deposit for costs in the Appellate Court are not affected by the Act of July 20, 1892. Whether printing the record may be dispensed with is still left to the discretion of the Appellate Court, because the printing is done under a rule of court and not under an act of Congress. It is clear, however, that a poor person cannot claim it as a matter of right under the statute above referred to.

No. 193.

Order to Dispense with Printing Record (1).

[*Caption.*]

Upon motion of the appellant [*or* plaintiff in error] it is hereby ordered that the printing of the record in this court be dispensed with and no deposit made therefor.

(1) See Form No. 192.

No. 194.

Order Granting Leave to use Printed Records in Making up Record in an Appellate Court.

[*Caption.*]

Upon the application of the appellant [*or* plaintiff in error] it is hereby ordered that the clerk of this court may use the records printed in the court below in making the record in this court upon the payment of the usual supervision fee.

No. 195.

Stipulation to Omit Parts of Record in Printing.

The United States Circuit Court of Appeals for the —— District.

A. B., Appellant,
vs.
C. D., Appellee.
} No. ——.

In the above cause it is mutually agreed between the parties signing this stipulation that the transcript of the record sent

up by the clerk of the Circuit Court of the United States for the western division of the western district of Tennessee, at Memphis, shall be printed as sent up, except that the following portions thereof may be omitted:

The pages referred to are the manuscript pages of the record:

First. Subpœna in Chancery, p. 53.

Second. Marshal's service of same, p. 54.

Third. Order of continuance, p. 72.

Fourth. Order of continuance, p. 78.

Fifth. Notice of taking depositions, p. 80.

Sixth. Order of continuance, p. 82.

Seventh. Order showing plaintiff's motion to remand, p. 234.

Eighth. Opinion of Hammond, Judge, pp. 235-238.

Ninth. Order of court denying motion to remand, p. 239.

Tenth. Order setting demurrer for hearing, p. 342.

Eleventh. Order setting demurrer for hearing, p. 343.

Twelfth. Order setting demurrer for hearing, p. 344.

Thirteenth. Order setting demurrer for hearing, p. 345.

Fourteenth. Order setting demurrer for hearing, p. 346.

Fifteenth. Oder of continuance, p. 457.

Sixteenth. Notice for taking depositions, p. 478.

Seventeenth. Order of continuance, p. 480.

Eighteenth. Transcript of Record in National Revere Bank *vs.* Potter and others, pp. 481-499.

Nineteenth. Subpœna to answer Cross Bill, p. 546.

Twentieth. Marshal's return of service, p. 547.

Twenty-first. Exhibit "A" to Vogel's deposition, debts due to Hill Shoe Company, pp. 671-693.

Twenty-second. Exhibit "B" to Vogel's deposition, debts due by Hill Shoe Company, and dividends paid, pp. 694-703.

Twenty-third. Exhibit "B" to C. W. Edmonds' deposition being assignment of Mary T. Hill to Edmonds, provided page of the record where the assignment is previously copied is referred to in this connection. Record, pp. 756-760.

Twenty-fourth. Petition of National City Bank of New York, pp. 1035-1036.

Twenty-fifth. Deposition of W. A. Wheatley, pp. 1094-1103.

Twenty-sixth. Deposition of S. L. Moore, pp. 1126-1127.

Twenty-seventh. Order of continuance, p. 1143.

Twenty-eighth. Order of continaunce, p. 1309.

Twenty-ninth. This stipulation.

But the appellees reserve the right to insist hereafter, if material or necessary, that many parts of the record are designated to be printed by the appellants, and agreed to by them for that reason, which are not required for the purpose of the appeal.

Dated ——.

X. & X.
For Appellants.
Y. & Y.
For Appellees.

No. 196.

Writ of Certiorari for Diminution of Record.[1]

United States Circuit Court of Appeals, for the ——Circuit.
United States of America, —— Judicial Circuit, ss.:
The President of the United States of America to the Honorable Judge of the District Court of the United States for the —— District of ——:

Whereas, there is now pending before us a suit in which S. M., receiver of the A. B. Railway Company, and the Merchantile Trust Company are appellants, and C. D., guardian of E. F., and R. H., guardian of G. H., are appellees, which suit was removed into this court by virtue of an appeal from the District Court of the United States for the —— district of ——; and, whereas, it has been suggested to this court that there is a diminution of the record in said cause because the transcript of record in this court does not contain certain record [*here name the papers claimed to be omitted from the transcript*], which were introduced in evidence as alleged.

We being willing that said omission or defect, if any, may be corrected, herewith return such transcript and do command that under your seal, distinctly and openly you send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said District Court of the United States to the United States Circuit Court of Appeals for the —— circuit, together with this writ forthwith.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this —— day of ——, in the year of our Lord one thousand nine hundred and ——, and of the independence of the United States the one hundred and twenty-

[*Seal.*] F. L.,
Clerk of the United States Circuit Court
of Appeals for the —— Circuit.

(1) The Supreme Court is authorized by sec. 716 to issue writs of *certiorari*, (*ex parte* Vallandingham, 1 Wall. 243, 249,) to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court. Luxton vs. North River Bridge Co., 147 U. S. 337; U. S. *vs.* Young, 94 U. S. 258; *ex parte* Gordon, 1 Black 503; Beach Mod. Eq. Prac., sec. 963. See also *ex parte* Hitz, 111 U. S. 766. The Court of Appeals act did not affect this power. Am. Construc. Co. *vs.* Jacksonville Ry. Co., 148 U. S. 380; Sup. Ct. Rule 14.

The Circuit Courts of Appeals are vested by the act creating them with power to grant writs of *certiorari*. Act of March 3, 1891, sec. 12, 26 Stat. at L. 826; Rule 18, C. C. A.; Merrill *vs.* Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849; Blanks *vs.* Klein, 1 C. C. A. 254, 49 Fed. Rep. 1; Randolph *vs.* Allen,

19 C. C. A. 353, 73 Fed. Rep. 23; Burnham *vs.* Ry. Co., 30 C. C. A. 594, 87 Fed. Rep. 168; Dow *vs.* U. S. 27, C. C. A. 42, 81 Fed. Rep. 1004.

The application for writ of *certiorari* to supply an omission or cure a defect in a record should be made to the court in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of *certiorari* to issue. The petition should be signed and verified. If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court below, commanding it to return a true and complete record, including the omitted or defective parts, if any there be. The order also regularly contains a direction to the clerk of the Appellate Court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The Appellate Court will not undertake to make a record in the inferior court.

The writ of *certiorari* is regularly issued under the hand and seal of the clerk of the Appellate Court, and is transmitted to the clerk of the court below, together with the transcript and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is to be returned under the seal of the court. It is not necessary to have the return made by the judge. Stewart *vs.* Ingle, 9 Wheat. 526. It is regularly made by the clerk.

A writ of *certiorari* for diminution of the record will not be granted if the application is not made at the first term as required by Supreme Court Rule 14 and Rule 18, C. C. A. See Chappell *vs.* U. S., 160 U. S. 499.

No. 197.

Return to Writ of Certiorari for Diminution of Record.

United States of America, —— District of ——.

In pursuance of the command of the within writ of *certiorari*, I, B. R., clerk of the District Court of the United States, within and for the —— district of —— and the —— division thereof, do herewith transmit, under the seal of said court, a full and complete copy of the records referred to in the

testimony taken before the master appointed in the cause of the Mercantile Trust Company against the C. & D. Railway Company, in the matter of the intervening petitions of E. F., guardian of G. H., and R. S., guardian of F. S., against said railway company, and inadvertently omitted from the record of said cause now pending on appeal in the Circuit Court of Appeals for the —— circuit, and which by the command of said writ were ordered to be returned.

In testimony whereof, I have affixed my signature as clerk of said court and the seal thereof, at ——, in said district, this —— day of ——, Anno Domini ——, and in the —— year of the independence of the United States of America.

[*Seal.*] B. R.,
Clerk of the District Court of the United States for the —— District of ——.

No. 198.

Final Decree or Judgment on Mandate (1).

The District Court of the United States
For the —— District of ——.

A. B.

vs.

C. D.

On reading and filing the mandate of the United States Circuit Court of Appeals for the —— circuit, in this cause, bearing date the —— day of ——, A. D. ——, in obedience to said mandate and in cognizance with the opinion of the said United States Circuit Court of Appeals herein, it is hereby ordered, adjudged and decreed that [*here set out the proper judgment or decree according to the law and facts of the case.*]

CERTIORARI.

No. 199.

Petition for Writ of Certiorari in Bankruptcy.

In the Supreme Court of the United States.
October Term, A. D. 1900.
Arthur E. Mueller, Trustee in Bankruptcy
of Edward B. Nugent, Bankrupt, Petitioner,
vs.
William T. Nugent, Respondent.

Petition for Writ of *Certiorari,* to the United States Circuit Court of Appeals for the Sixth Circuit, Requiring it to Certify to the Supreme Court of the United States, for its Revision and Determination, the Petition for Review in Bankruptcy taken by said W. T. Nugent against Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, in the Matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank *vs.* Edward B. Nugent, Bankrupt, in Bankruptcy, Lately Depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of section 25*d* of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one decided by this court in Bardes *vs.* Bank, 178 U. S., page 524. Upon its determination by this court depends to a large extent the usefulness of said act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to $14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of Bardes *vs.* Bank, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the court

to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the judge, showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the judge the depositions read on the hearing of the case, and same were before the judge.

The judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in court, he was called to the bar to receive sentence; whereupon, at the request of said W. T. Nugent by his counsel, the judge deferred passing sentence for two days. At the expiration of said two days said respondent, by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. In his opinion filed, the judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

"The court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.95, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee." (R., pp. 30-31.)

In refusing to permit said amended response to be filed, the court entered the following order:

"Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court

not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under section 24*b* of the act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the moneys alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the printed

opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determine."

32. "In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

" Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the case. (R., p. 56.)

Second. With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or before the referee or judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to wit:

"He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

Third. The Supreme Court, in Bardes *vs.* Bank, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and *claiming the property "as his own,"* and which transfer is *alleged to have been fraudulent as against creditors.* Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting

no adverse title to the property; and, further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by Bardes *vs.* Bank, *supra.*

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of *certiorari* is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is reversed or materially modified, the power of the Bankruptcy Court under section 2 (6), (7) and (13) of the act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in Bardes' case, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same state to recover assets, the title of which is in dispute; but the question involved is

this: Can the District Court by rule compel an agent or custodian for the bankrupt or for the court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not section 2 with its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of Bardes *vs.* Bank, *supra,* is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the Bardes case. In fact, this court, in stating the question decided in the Bardes case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adverse holding was the foundation upon which this court based that opinion.

After diligent search petitioner has been unable to find any

definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that court only the power to review matters of law. (*In re* Purvine, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in Cunningham *vs.* German Insurance Bank, 103 Fed., 932, and has further decided that only such matters as were acted upon by the court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

Fourth. This court, in the case of White *vs.* Schloerb, 178 U. S., 542, decided that a judge of the Bankruptcy Court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the White *vs.* Schloerb case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for

the benefit of the bankrupt, and hence for the court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re* Rosser, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis,* and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on Marshall *vs.* Knox, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no

adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (*In re* Brooks, 91 Fed., 518; *in re* Raymond W. Kenney, 95 Fed., 427; *in re* Moore, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with White *vs.* Schloerb, 178 U. S., 542.

In re Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain "funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts district, basing his opinion upon the case of Bardes *vs.* Bank refused to grant the injunction, and commenting on the cases of Bardes *vs.* Bank and White *vs.* Schloerb, closes his opinion with the following language:

"It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the act itself, required by section 8, sub-section 4, Article I., of the constitution of the United States) as to the grave and important question, to wit: The right of the court of bankruptcy to summarily order in property which is admittedly assets of

a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent for review, No. 920," to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that court in bankruptcy.

And your petitioner will ever pray.

William W. Watts,
John Richard Watts,
Counsel for Petitioner.

State of Kentucky, }
Jefferson County, } Sct.

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes. William W. Watts.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

E. B. Kerr,
[*Seal.*] Notary Public within and for County of Jefferson, State of Kentucky.

(1)Taken from the record in Nugent *vs.* U. S., 184 U. S. 1. See Loveland on Bankruptcy, sections 307 and 308.

...THE...

United States Bankruptcy Law

OF

1898

AS AMENDED FEBRUARY 5, 1903.

PRINTED FROM THE OFFICIAL COPY.

THE

UNITED STATES BANKRUPTCY LAW,

1898.

As Amended February 5, 1903, at Stat. at L. 797.

(Sections amended are inclosed in brackets [], amendments and new sections are printed in *italics*.)

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER I.

DEFINITIONS.

Section 1. Meaning of words and phrases. *a* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) **"A person against whom a petition has been filed."** "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) **"Adjudication."** "Adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) **"Appellate courts."** "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) **"Bankrupt."** "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who

has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) **"Clerk."** "Clerk" shall mean the clerk of a court of bankruptcy;

(6) **"Corporations."** "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) **"Court."** "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) **"Courts of bankruptcy."** "Courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) **"Creditor."** "Creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) **"Date of bankruptcy"; "bankruptcy," etc.** "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) **"Debt."** "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) **"Discharge."** "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) **"Document."** "Document" shall include any book, deed, or instrument in writing;

(14) **"Holiday."** "Holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) **When deemed "insolvent."** A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his

creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "**Judge.**" "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "**Oath.**" "Oath" shall include affirmation;

(18) "**Officer.**" "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(19) "**Persons.**" "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;

(20) "**Petition.**" "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "**Referee.**" "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "**Conceal.**" "Conceal" shall include secrete, falsify, and mutilate;

(23) "**Secured creditor.**" "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "**States.**" "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "**Transfer.**" "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "**Trustee.**" "Trustee" shall include all of the trustees of an estate;

(27) **"Wage-earner."** "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) **Words in masculine gender.** Words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) **Importing plural.** Words importing the plural number may be applied to and mean only a single person or thing;

(30) **Importing singular.** Words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

Creation of Courts of Bankruptcy and their Jurisdiction.

Section 2. **U. S. district courts; supreme court, D. C.; Territorial courts; jurisdiction.** That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) **To adjudge bankrupt.** Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) **Allow and disallow claims, etc.** Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) **Appoint receivers, etc.** Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) **Try and punish bankrupts, etc.** Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) **To permit temporary transaction of business.** [Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;]

(5) *Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services;*

(6) **To substitute additional persons in proceedings, etc.** Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) **To collect and distribute assets.** Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) **To close estates.** Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) **To confirm or reject compositions.** Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) **To confirm, etc., referee's findings.** Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) **Determine exemptions.** Determine all claims of bankrupts to their exemptions;

(12) **Discharge bankrupts, etc.** Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) **Enforce orders.** Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) **Extradite bankrupts.** Extradite bankrupts from their respective districts to other districts;

(15) **Make orders.** Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) **Punish for contempt.** Punish persons for contempts committed before referees;

(17) **Appoint trustees.** Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) **Tax costs.** Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

(19) **Transfer cases.** Transfer cases to other courts of bankruptcy.

Unspecified powers. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Section 3. **Acts of bankruptcy; of what to consist.** *a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his cred-

itors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(4) made a general assignment for the benefit of his creditors;] *or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a received or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;*

or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Petition to be filed within four months. *b* A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after

(1) **From when to date.** The date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

Defense of solvency. *c* It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed,

Burden of proof. And under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

Person denying insolvency; to testify. *d* Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be

his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency,

Burden of proof, etc. And in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Petitioner to give bond. *c* Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment,

Liability for costs, etc. In case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

Allowance of costs, etc. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property.

Counsel fees, etc., to be fixed by court. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Section 4. Who may become voluntary bankrupt. *a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

Who may become involuntary bankrupt. [*b* Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.]

b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States.

Section 5. Partners; partnership. *a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

Administration of estate. *b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

Jurisdiction over one partner sufficient. *c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

Trustee's duty. *d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

Expenses. *e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

Payment of partnership debts. *f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.

Surplus of individual property. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts.

Surplus of partnership property. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

Claims of partnership against individual estates, etc. *g* The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Administration of estate where all partners are not bankrupt. *h* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Section 6. **Exemptions of bankrupts.** *a* This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Section 7. **Duties of bankrupts.** *a* The bankrupt shall

(1) **Attend meetings.** Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) **Comply with orders.** Comply with all lawful orders of the court;

(3) **Examine proofs of claims.** Examine the correctness of all proofs of claims filed against his estate;

(4) **Execute papers.** Execute and deliver such papers as shall be ordered by the court;

(5) **Execute transfers.** Execute to his trustee transfers of all his property in foreign countries;

(6) **Inform trustee.** Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) **Disclose false claims.** In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) **Prepare schedule of property.** Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) **Submit to examination.** When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Bankrupt, when not compelled to attend meeting; examine claims. *Provided, however*, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown,

Expenses for attending meetings. And the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Section 8. Death or insanity of bankrupts; not to abate proceedings. *a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane:

Widow entitled to dower, etc. *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Section 9. **Protection and detention of bankrupts; exemption from arrest.** *a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Detention for purposes of examination. *b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination.

May be kept in custody ten days, etc. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 10. **Extradition of bankrupts.** *a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Section 11. **Suits by and against bankrupts; stay until adjudication.** *a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition;

Further stay. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

Appearance of trustee. *b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

Commenced prior to adjudication. *c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

Time for bringing suits by or against trustees. *d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Section 12. Compositions, when confirmed; when may be offered. *a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

Application for confirming. *b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

Date, etc., for hearing. *c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

Conditions of confirmance. *d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

Distribution of consideration. *c* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Section 13. Compositions, when set aside; upon practice of fraud. *a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Section 14. Discharges, when granted; application for. *a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

Hearing of application. [*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.]

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has (1) *committed an offense punishable by imprisonment as herein provided; or* (2) *with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or* (3) *obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or* (4) *at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his prop-*

erty with intent to hinder, delay, or defraud his creditors; or (5) *in voluntary proceedings been granted a discharge in bankruptcy within six years; or* (6) *in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.*

Confirmation discharges from debts. *c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Section 15. Discharges, when revoked. *a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Section 16. Co-debtors of bankrupts; liability not affected by bankrupt's discharge, etc. *a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

[**Section 17. Debts not effected by a discharge.** *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) **U. S. and State taxes.** Are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) **Judgments in actions for frauds, etc.** Are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;

(3) **Claims not scheduled, etc.** Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) **Created by fraud, etc.** Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.]

Section 17. **Debts not affected by a discharge**—*a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as* (1) *are due as a tax levied by the United States, the state, county, district, or municipality in which he resides;* (2) *are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;* (3) *have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or* (4) *were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.*

CHAPTER IV.

Courts and Procedure Therein.

Section 18. **Process, pleadings, and adjudications; service of petition, involuntary bankruptcy.** [*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall

Returnable in fifteen days. Be returnable within fifteen days, unless the judge shall for cause fix a longer time;

By publication. But in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.]

a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall

otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

Pleading within ten days. [*b* The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.]

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

Verification. *c* All pleadings setting up matters of fact shall be verified under oath.

Court to determine issues when facts controverted. *d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Decision where pleadings not filed. *e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

If judge absent, case to be referred to referee. *f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on filing voluntary petition. *g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.

Absence of judge. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Section 19. **Jury trials; person against whom involuntary petition filed, entitled.** *a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein other-

wise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed.

Right waived. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

Attendance of jury, etc. *b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Laws as to jury trials applicable. *c* The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Section 20. **Oaths, affirmations; by whom administered.** *a* Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations. *b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Section 21. **Evidence; compulsory attendance of witnesses.** [*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.]

a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the

acts, conduct, or property of a bankrupt whose estate is in process of administration under this act; provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Depositions, laws governing. *b* The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

Notice of taking. *c* Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Certified copies of proceedings evidence. *d* Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

Of order approving trustees' bond. *e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

Of order confirming composition, etc. *f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Evidence of revesting title in bankrupts. *g* A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Section 22. Reference of cases after adjudication. *a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited au-

thority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Transfer of case to different referee. *b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Section 23. **Jurisdiction of the United States and State courts.** *a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by trustees, where brought. [*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.]

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.

Concurrent jurisdiction of circuit courts and courts of bankruptcy. *c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Section 24. **Jurisdiction of appellate courts.** *a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

Appeals from courts not in organized circuits and in District of Columbia. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any

organized circuit of the United States and from the supreme court of the District of Columbia.

Jurisdiction of circuit court of appeals. *b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Section 25. Appeals and writs of error; when taken. *a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

To be within ten days; hearing. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Appeal to U. S. Supreme Court. *b* From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. **Where amount exceeds $2,000, etc.** Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. **Where question certified by Supreme Court Justice.** Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

Trustees not to give bond. *c* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

Certification to Supreme Court by courts. *d* Controversies

may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Section 26. **Arbitration of controversies; trustees may submit to.** *a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

Selection of arbitrators. *b* Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Findings of arbitrators. *c* The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Section 27. **Compromises.** *a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Section 28. **Designation of newspapers to publish notices.** *a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Section 29. **Offenses; penalty for misappropriating property,** etc. *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

Concealing property. *b* A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction

of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) **False oath or account, etc.** Made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) **Presenting false claim.** Presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) **Receiving property from bankrupt.** Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) **Extorting money for forbearing to act, etc.** Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

Acting as referee when interested. *c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or

(2) **Purchasing property, etc.** Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) **Refused to permit inspection of accounts.** Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do.

Prosecutions to be in one year. *d* A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Section 30. **Rules, forms, and orders; United States Supreme Court to make.** *a* All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Section 31. **Computation of time.** *a* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy,

the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Section 32. **Transfer of cases in different courts.** *a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

Officers, their Duties and Compensation.

Section 33. **Creation of two offices, referee and trustee.** *a* The offices of referee and trustee are hereby created.

Section 34. **Appointment, removal, and districts of referees.** *a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and

(2) **Designation of districts.** Designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Section 35. **Qualifications of referees.** *a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Section 36. Oath of office of referees. *a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Section 37. Number of referees. *a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Section 38. Jurisdiction of referees. *a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) **To consider petitions.** Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) **Administer oaths, examine witnesses, etc.** Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) **Take possession and release property, etc.** Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) **Perform certain duties of bankruptcy courts.** Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) **Authorize employment of stenographers.** Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Section 39. Duties of referees. *a* Referees shall

(1) **Declare dividends.** Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) **Examine schedules, etc.** Examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) **Furnish information, etc.** Furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;

(4) **Give notices.** Give notices to creditors as herein provided;

(5) **Prepare records, etc.** Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) **Prepare schedules, etc.** Prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) **Preserve records, etc.** Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) **Transmit papers to clerks, etc.** Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) **Preserve evidence, etc.** Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) **Obtain papers, etc.** Whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

Referees not to act if interested. *b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Section 40. Compensation of referees. [*a* Referees shall receive as full compensation for their services, payable after they are

rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.]

a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

On transfer from one to another. *b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

Where reference revoked. *c* In the event of the reference of a case being revoked before it is concluded, and when the case is especially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Section 41. Contempts before referees. *a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

When witness not required to attend. *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

Contempt proceedings; penalty. *b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Section 42. **Records of referees; manner of keeping.** *a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

Books to be certified and transmitted to court. *c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Section 43. **Referee's absence or disability; filling vacancy.** *a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Section 44. **Appointment of trustees.** *a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Section 45. **Qualifications of trustees.** *a* Trustees may be (1) individuals who are respectively competent to perform the duties

of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Section 46. Death or removal of trustees; suits not to abate, etc. *a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Section 47. Duties of trustees. *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) **Collect money, etc.** Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;

(3) **Deposit money, etc.** Deposit all money received by them in one of the designated depositories;

(4) **Disburse money; how.** Disburse money only by check or draft on the depositories in which it has been deposited;

(5) **Furnish information.** Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) **Keep accounts.** Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) **Detailed statements to creditors.** Lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) **Make final reports.** Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) **Pay dividends.** Pay dividends within ten days after they are declared by the referees;

(10) **Report condition of estates.** Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts,

within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) **Exemptions.** Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

Concurrence of two out of three necessary. *b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

File adjudication in recorder's office. *c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.*

Section 48. Compensation of trustees; fee. [*a* Trustees shall receive as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt.

Commissions. And from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.]

a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five

hundred dollars or less, four per centum on moneys in excess of five hundred dollars, and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

Apportionment where more than one. *b* In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

Withholding of. *c* The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

Section 49. Accounts and papers of trustees. *a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Section 50. Bonds of referees and trustees. *a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

Of trustees. *b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

Of new trustee, etc.; amount may be increased. *c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office

of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

Surety's property, value. *d* The court shall require evidence as to the actual value of the property of sureties.

Two necessary. *e* There shall be at least two sureties upon each bond.

Excess of property. *f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

Corporations may be. *g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of bonds. *h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability. *i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

Joint. *j* Joint trustees may give joint or several bonds.

Failure to give creates vacancy. *k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

Suits upon referees'. *l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

Suits upon trustees'. *m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Section 51. Duties of clerks. *a* Clerks shall respectively

(1) To account. Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) Collect fees, etc. Collect the fees of the clerk, referee,

and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) **Deliver papers to referee, etc.** Deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) **Pay referee.** And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Section 52. Compensation of clerks and marshals. *a* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

Of marshals. *b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Section 53. Duty of Attorney-General to report annually. *a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Section 54. Statistics of bankruptcy proceedings. *a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Section 55. **Meetings of creditors.** *a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

Presiding officer, duties. *b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

Creditors' duty. *c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

Subsequent meetings of. *d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

Call of meeting by court. *e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

Final meeting. *f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Section 56. Voters at meetings of creditors. *a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

Holders of secured claims not entitled, etc. *b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Section 57. Proof and allowance of claims; of what to consist. *a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

When founded upon a writing. *b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

After proved, may be filed. *c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

Allowance of claims, etc. *d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc. *e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or prior-

ities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Claims, hearing objections. *f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Preferred claims. [*g* The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.]

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

Value of securities held by secured creditors, etc. *h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Claims secured by individual undertaking. *i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Penalty, forfeiture, debts due as, allowance. *j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Reconsideration of claims. *k* Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

Recovery of dividend. *l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a divi-

dend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

Claims of one bankrupt against another. *m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

Time for proving claims. *n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment:

Of infants, etc. *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Section 58. Notices to creditors; unless waived, etc. *a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

Of first meeting. *b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting.

Other notices. Other notices may be published as the court shall direct.

By referee. *c* All notices shall be given by the referee, unless otherwise ordered by the judge.

Section 59. Petition, who may file as voluntary bankrupt. *a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

Involuntary. *b* Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

To be in duplicate. *c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Notice to creditors not joined in petition. *d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard;

Hearing of case, etc.; when dismissed. If upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

Creditors, computing number of. *e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

Appearance of. *f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Notice of dismissal. *g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

Section 60. Preferred creditors. [*a* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any

one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.]

a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

Preference, when given; voidable. [*b* If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.]

b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Preferred creditor giving further credit; set off of new credit. *c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

Payments to attorneys, etc.; re-examination of. *d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Section 61. Depositories for money. *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees,

Bond. And shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Section 62. Expenses of administering estates; report and approval. *a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Section 63. Debts which may be proved. *a* Debts of the bankrupt may be proved and allowed against his estate which are

(1) **Fixed liability.** A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) **Costs of suit due, etc.** Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) **Costs incurred before filing petition.** Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) **On open account.** Founded upon an open account, or upon a contract express or implied; and

(5) **Judgments, etc.** Founded upon provable debts reduced to judgments after the filing of the petition and before the consid-

eration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

Allowances of unliquidated claims. *b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Section 64. Debts which have priority; taxes. *a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

Order of payment. *b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) **Cost of preserving estate.** The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) **Filing fees.** [The filing fees paid by creditors in involuntary cases;]

(2) *The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.*

(3) **Cost of administration, etc.** The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) **Wages of workmen, etc.** Wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and

(5) **Owing to person entitled to priority, etc.** Debts owing to any person who by the laws of the States or the United States is entitled to priority.

Payment of claims accruing after composition set aside or discharge revoked. *c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Section 65. Dividends, declaration and payment on allowed claims. *a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Declaration of first. [*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims.

Subsequent. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.]

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order; provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared.

Creditors receiving, not affected by proof of subsequent claims, etc. *c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

Preference of certain creditors. *d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

Limit to claimant's right to collect. *e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Section 66. Unclaimed dividends; after six months paid into court. *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

After one year, distributed. *b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt:

Of minors. *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Section 67. Liens; unrecorded claims not. *a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

Trustee subrogated to rights of creditor. *b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien, judgment, etc.; created within four months, to be dissolved. *c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) **If defendant were insolvent.** It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) **Knowledge of.** The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) **Through fraud.** That such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved,

Trustee subrogated, etc. But the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened

Liens given in good faith, etc. *d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

Conveyances, etc., subsequent to act and within four months of petition; to defraud, etc., void. *e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and

within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration,

Property remains part of assets. And all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings or otherwise for the benefit of the creditors.

Conveyances, etc., within four months of petition; void under state laws; void under this act. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Liens, etc., created through legal proceedings; void, etc. *f* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same,

Property passes to trustee. And shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attach-

ment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid.

Court may order conveyances; purchaser for value. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Section 68. Set-offs and counterclaims; allowed. *a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

Not allowed. *b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Section 69. When property may be seized; possession of property. *a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders.

Bond of indemnity. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained.

Released on giving bond. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the

trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Section 70. Title to property. *a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification,

Vested in trustee. Shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) **Documents.** Documents relating to his property;

(2) **Patents, etc.** Interests in patents, patent rights, copyrights, and trade-marks;

(3) **Certain powers.** Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

(4) **Transferred in fraud.** Property transferred by him in fraud of his creditors;

(5) **Which might have been transferred, etc.** Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Policy of insurance. *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) **Rights of action upon contracts.** Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

Appraisal of property. *b* All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court.

Sale for not less than seventy-five per centum of appraised

value. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

Trustee to convey title. *c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

Vesting title on; setting composition aside. *d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

May avoid certain transfers, etc. *e* The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

Recovery of property. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbeforefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

Title revested on confirming composition. *f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

The Time When This Act Shall Go Into Effect.

Force and effect; petition for voluntary bankruptcy; involuntary. *a* This Act shall go into full force and effect upon its passage: *Provided, however*, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

Cases pending under State laws. *b* Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Section 71. Clerks to keep indexes and make searches, etc. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts; provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.*

Section 72. No additional fees to referees or trustees. *That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.*

Section 19.* *That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*

* This is section 19 of the amendatory act of February 5, 1903, 32 Stat. at L., 797.

INDEX TO ACT OF 1898.

References to Sections.

Abatement—
Bankruptcy proceedings, of, death or insanity of bankrupt does not cause . . . . . §8

Absence—
Judge's, in, case sent to referee . . . . . §18
Referee's, effect, ... §26

Acceptance—
Composition, of, by majority of creditors in writing . . . . . §12

Accounts—
Books of, destruction, concealment, etc., prevents discharge . . . . §14
Debts founded upon open, allowed . . . . . §63
Notice to creditors of filing final . . . . . §58
Partnership, insolvent, kept by trustee . . . . . §5
Penalty for making false . . . . . §29
Referee's punishment for refusing inspection of . . . . . §29
Trustees to keep . . . . . §47
file final, when, ... §47
punishment for refusing inspection of . . . . . §29

Act—
When to take effect . . . . . §70

Action (*see also* SUITS)—
Bankrupt, by and against . . . . . §11
Bonds of referees and trustees, on . . . . . §50
time of bringing . . . . . §50
Trustee, by, in what courts . . . . . §23
death or removal not to abate . . . . . §46
time of bringing by or against . . . . . §11

Acts of bankruptcy—
Consist of what . . . . . §3

Adjudication—
Court to make, when . . . . . §18
Definition . . . . . §1
Reference after . . . . . §22

Administration of estates (*see also* ESTATES)—
Expenses of . . . . . §62
Administration of oaths, etc. . . . . . §20

Admission—
Of insolvency, effect of . . . . . §3

Affidavit
Arrest of bankrupt for examination for . . . . . §9
Voluntary bankrupt, of, of inability to pay fees . . . . . §51

References to Sections.

Agent—
"Creditor" includes, under Act . . . . . §1
Penalty for use in composition false claims, as or by . . . . . §29
"Persons" include, of corporation . . . . . §1

Affirmation—
False, punishment for making . . . . . §20
When may be taken instead of oath . . . . . §20
Who may take . . . . . §20

Alaska—
"States" include . . . . . §1
United States Courts in district of, made courts of bankruptcy, . . . §2
jurisdiction of . . . . . §2

Allowance—
Claims, of, against bankrupt's estate . . . . . §57
preferred claims, of . . . . . §57
secured creditors, of . . . . . §57
unliquidated . . . . . §63
Debts, subject of . . . . . §63
Widow and children, to, fixed by state laws . . . . . §8

Amendment—
Rules, forms and orders, etc., by U. S. Supreme Court, of . . . . . §30
Schedules of, by referee if defective . . . . . §39

Amount—
Appeal to U. S. Supreme Court . . . . . §25
Bonds of referee and trustee . . . . . §50
Claims of creditors who file involuntary petition . . . . . §59
Debts corporation owes to be adjudged bankrupt . . . . . §4

Answer—
Bankrupt or creditor to make, when . . . . . §18
Creditor may file to petition, when . . . . . §59

Appeal—
Courts exercising jurisdiction on . . . . . §24
Trustee not required to give bond on . . . . . §25
U. S. Circuit Court of Appeals, to . . . . . §25
from what judgments . . . . . §25
time of taking . . . . . §25
U. S. Supreme Court, to . . . . . §25
when amount exceeds $2,000 . . . . . §25
where question certified by supreme court justice . . . . . §25

Appearance—
Of creditors after filing petition . . . . . §59

Appellate Courts—
Definition of . . . . . §1
Jurisdiction of . . . . . §24
U. S. Circuit Court of Appeals . . . . . §§24, 25
U. S. Supreme Court . . . . . §25

Appointment—
Arbitrators, by court, when . . . . . §26
Referees . . . . . §34
in case of absence or disability . . . . . §43
Trustees, by creditors . . . . . §44
by court, when . . . . . §44

Apportionment—
Referee's, compensation, of . . . . . §40
Trustee's, compensation, of . . . . . §48

Appraisal—
Bankrupt's property, by three appraisers . . . . . §70
can not be sold for less than 75% of . . . . . §70

References to Sections.

Approval—
Compromises, of, by court . . . . . §27
Expenses of administering bankrupt estates . . . . . §62
Sale, of property subject to . . . . . §70
Trustee may prosecute suits already commenced, with, of court . . . §11

Arbitrators—
Findings, of, force and effect . . . . . §26
Selection of . . . . . §26
Trustees may submit controversy to . . . . . §26

Arrest—
Bankrupt, of, about to leave district to avoid examination . . . . . §9
exemption from, of bankrupt on civil process, etc., ... §9
except in what cases . . . . . §9

Assets—
Courts of bankruptcy to collect and distribute . . . . . §2

Assignment—
General, an act of bankruptcy . . . . . §3
Subsequent to act, etc., within four months, to defraud, etc., void . . . . . §67

Attachment—
Against insolvent within four months, etc., void . . . . . §67
Title of bona fide purchaser protected . . . . . §67

Attendance—
Bankrupt exempt from arrest, attending court of bankruptcy . . . . §9
Compulsory, of bankrupt and witnesses before referee or court . . . §21
Jury, of . . . . . §19

Attorney—
"Creditor" to include, under Act . . . . . §1
Fees of, included in costs of administration, have priority . . . . . §64
allowance of, on dismissing petition when property seized . . . . §3
Payment or transfer to, by insolvent for services, etc., re-examined . . . . . §60
Penalty for using false claim in composition, as or by . . . . . §29
Referee can not practice as, in bankruptcy proceedings . . . . . §39

Attorney General—
Duty to lay statistical tables before Congress, etc., ... §63
Officers to furnish statistical information to . . . . . §54

Bail—
Of bankrupt about to depart . . . . . §9

Banking institutions—
As depositories for moneys, courts to designate . . . . . §61
Bonds subject to courts' approval . . . . . §61

Bankrupt—
Act of bankruptcy, by, consists of what . . . . . §3
admitting inability to pay debts . . . . . §3
general assignment, making . . . . . §3
permitting preferences . . . . . §3
transferring, etc., property to defraud, etc. . . . . §3
while insolvent, to prefer creditors . . . . . §3
Answer to be made when . . . . . §18
Bail, to secure release from custody, etc. . . . . §9
Bond to secure release of property seized . . . . . §67
Claims against, allowance of . . . . . §57
disclose false to trustee . . . . . §7
false, penalty for presenting . . . . . §29
one bankrupt against another . . . . . §57
proof, etc., of . . . . . §57

References to Sections.

Bankrupt—*Continued.*
Compositions . . . . . §12
application for confirming . . . . . §12
accepted must be in writing by majority, etc. . . . . §12
consideration to be paid and costs deposited, etc. . . . . §12
date and place of hearing . . . . . §12
confirmation of, discharges from debts . . . . . §14
conditions of confirmation . . . . . §12
distribution of consideration . . . . . §12
set aside for fraud, may be . . . . . §13
when may be offered by . . . . . §12
must be examined and file schedule . . . . . §12
Co-debtors' liability not affected by discharge . . . . . §16
Compulsory attendance before court, referee, etc . . . . . §21
Concealing property, penalty for . . . . . §29
Corporations can not be adjudged voluntary . . . . . §4
can be adjudged involuntary when . . . . . §4
Creditors, number, etc., to file petition against . . . . . §59
meetings of . . . . . §55
to attend first . . . . . §7
when not required to attend . . . . . §7
expenses of attending paid when . . . . . §7
Death of, does not abate proceedings . . . . . §8
Debts which may be proved . . . . . §63
which have priority . . . . . §64
not affected by discharge . . . . . §17
Definition of . . . . . §1
Detention for examination . . . . . §8
may be kept in custody ten days . . . . . §10
released on giving bail . . . . . §10
Discharge, application for . . . . . §14
releases from what debts . . . . . §17
when not granted . . . . . §14
when revoked . . . . . §15
Domicile of, claiming exemptions . . . . . §6
Duties of . . . . . §7
claims, to examine . . . . . §7
disclose false . . . . . §7
examination, to submit to . . . . . §7
inform trustee of attempt to evade act . . . . . §7
papers, to execute . . . . . §7
schedules, to prepare . . . . . §7
Embezzlement of property of, penalty for . . . . . §29
Estates . . . . . et seq. §61
Exemption from arrest, etc. . . . . §9
Exemptions of, under State laws . . . . . §6
Expenses paid of attending meetings when . . . . . §7
Extradition of . . . . . §10
False claim against estate, penalty for presenting . . . . . §29
False oath against estate, penalty for making . . . . . §29
Farmers can not be adjudged involuntary . . . . . §4
Fees, to pay
clerk's . . . . . §52
referee's . . . . . §40
trustee's . . . . . §48
voluntary, not required to pay, when . . . . . §51
Insanity does not abate proceedings . . . . . §8
Involuntary, who may be adjudged . . . . . §4
who can not be adjudged . . . . . §4
Lists of creditors, to make . . . . . §7
Meetings of creditors, to attend first . . . . . §7
Misappropriating property of, penalty . . . . . §29

References to Sections.

Bankrupt—*Continued.*
Partnership may be adjudged . . . . . §5
administration of estate . . . . . §5
where all not bankrupts . . . . . §5
jurisdiction over one partner sufficient . . . . . §5
payment of debts . . . . . §5
Petition to be filed in four months . . . . . §3
bond, to be accompanied by, to take property . . . . . §3
liability for costs . . . . . §3
counsel fees, etc., fixing of . . . . . §3
defense of solvency . . . . . §3
burden of proof . . . . . §3
involuntary, who may file . . . . . §59
service of, manner of . . . . . §18
voluntary, who may file . . . . . §59
Preferred creditors . . . . . §60
Property may be seized, when . . . . . §69
bond of indemnity . . . . . §69
bond to release . . . . . §69
Protection of . . . . . §9
Schedule of property, to prepare . . . . . §7
make oath to, and file . . . . . §7
voluntary, to file with petition . . . . . §7
what to contain . . . . . §7
Secured creditors . . . . . §§56, 57
Service of petition . . . . . §18
Seizure of property . . . . . §69
Suits by and against . . . . . §11
appearance of trustee . . . . . §11
stay until adjudication, etc. . . . . §11
further stay . . . . . §11
time for bringing, by or against trustee . . . . . §11
trustee permitted to prosecute suits commenced . . . . . §11
Time when act takes effect . . . . . §70
Title of property revested in, on confirmation of composition . . . §70
Voluntary, who may be adjudged . . . . . §4
Widow and children, rights of . . . . . §8

Bankruptcy—
Acts of, of what to consist . . . . . §3
"Bankruptcy" . . . . . §1
Bankrupts . . . . . §3
Courts of . . . . . §2
"Courts of Bankruptcy" include what courts . . . . . §1
Creditors . . . . . §55
"Date of bankruptcy," etc. . . . . §1
Definitions . . . . . §1
Estates . . . . . §61
Jurisdiction of courts of . . . . . §2
Officers, their duties and compensation . . . . . §33
Procedure in courts . . . . . §18

Banks—
Bond, to give . . . . . §61
filed in clerk's office . . . . . §50
sued on, how . . . . . §50
Depositories for money, court to designate . . . . . §61

Board of directors—
Courts of bankruptcy have power to punish . . . . . §2
"Persons" include members of . . . . . §1

Bona fide purchaser—
Title of, obtained by lien, etc., not affected . . . . . §67

References to Sections.

Bond—
Appeal, trustee not required to give . . . §25
Banks of, as depositories for money . . . §61
filed in clerk's office . . . §50
sued on, how . . . §50
Bankrupt, of, to recover possession of property . . . §69
condition of . . . §69
Error, on, trustee not required to give . . . §25
Filed, to be in clerk's office . . . §50
Indemnify bankrupt, to, on seizing his property . . . §69
condition of . . . §69
Joint trustees, of . . . §50
Petitioner to give, to hold property, etc. . . . §3
condition of . . . §3
sureties of . . . §3
Referees' . . . §50
amount and condition of . . . §50
failure to give, creates vacancy . . . §50
Release of property, by bankrupt to secure . . . §69
Suits on, how brought . . . §50
referees' and trustees', time of bringing . . . §50
Sureties, corporations may be . . . §50
two necessary . . . §50
value of property . . . §50
Trustees' . . . §50
amount and condition . . . §50
failure to give, creates vacancy . . . §50
joint or several . . . §50
liability . . . §50
not required to give, on appeal or for error . . . §25
title, certified copy of order approving, evidence of . . . §21

Books—
Account, of, destruction of, etc., prevents discharge . . . §14
Insolvent's duty to appear in court with . . . §3
Referees to keep separate, for each case . . . §42
to certify and file, with papers in court . . . §42

Burden of proof—
Of solvency in bankruptcy proceedings . . . §3

Certification—
Contempt, of facts constituting, by referee . . . §41
Judge's absence, etc., by clerk authorizing referee to act . . . §38
Referees' record, of . . . §42
U. S. Circuit Court, to, of case in district court, when . . . §19
U. S. Supreme Court, to, from U. S. Circuit Court of Appeals . . . §25

Certified copies—
Composition, of order confirming, evidence of revesting title . . . §21
Referee, of proceedings before, as evidence . . . §21
papers when issued by clerk or referee . . . §21
to transmit to clerk, by mail when . . . §39
Trustees' bond, of order approving, evidence of title . . . §21

Children—
Of deceased bankrupt, rights of . . . §8

Circuit Courts of Appeals—
Appellate jurisdiction over courts of bankruptcy . . . §24
Appeals to, from judgments . . . §25
adjudging or refusing to adjudge bankrupt . . . §25
allowing, etc., debts of $500 or over . . . §25
discharge granting or denying . . . §25
when appeal to be taken . . . §25

References to Sections.

Circuit Courts of Appeals—*Continued.*
Appeals to United States Supreme Court from decisions of . . . . §25
where amount is over $2,500 . . . . §25
where question is certified by Supreme Court Justice . . . . §25
Concurrent jurisdiction of, with court of bankruptcy . . . . §23
Trustees not required to give bond on appeal or error . . . . §25

Claims—
Allowance of . . . . §57
Amount necessary for filing involuntary petition . . . . §59
Bankrupt, to examine . . . . §7
Bankrupts, of, against each other . . . . §57
Debts which may be proved . . . . §63
which have priority . . . . §64
Discharge releases from what . . . . §17
does not release from what . . . . §17
Dividends payable on, allowed . . . . §65
False, penalty for presenting, etc. . . . . §29
or using in composition . . . . §29
Filed after being proved in court or before referee . . . . §57
Hearing objections to . . . . §57
Infants and insane, rights of . . . . §57
Instrument of writing, founded upon, to be filed with proof of . . . . §57
statement of loss filed under oath with . . . . §57
Jurisdiction of courts of bankruptcy as to . . . . §2
Payment of, after composition set aside, etc. . . . . §64
Penalty or forfeiture, debt due as how far allowed . . . . §57
Preferred creditors, of, not allowed unless, etc. . . . . §57
Priority, debts which have . . . . §64
not counted in computing number of creditors, unless, etc. . . §56
Proof of . . . . §57
when founded upon writing . . . . §57
time for proving . . . . §57
Reconsidered, may be reallowed or rejected . . . . §57
Referee, filed before if case referred . . . . §56
Secured creditors, of . . . . §§56, 57
allowed for what sums . . . . §57
individual undertaking, secured by . . . . §57
not counted unless, etc. . . . . §56
not entitled to vote at creditors' meetings . . . . §56
value of securities held by, how determined . . . . §57
Time for proving . . . . §57
Unliquidated may be liquidated, etc. . . . . §63
Unscheduled, discharge no release from . . . . §17
unless creditors had notice, etc. . . . . §17
Withdrawn from files, may be when . . . . §57

Clerk—
Certificate by, as to Judge's absence, etc., authorizing referee to act . . . . §38
Compensation of . . . . §52
Definition of . . . . §1
Duties of . . . . §§ 51 and 57
Fees . . . . §52
account for . . . . §51
collect, of clerk, referee, trustee . . . . §51
except on affidavit of voluntary bankrupt of inability to pay . . §51
pay to referee and trustee, when . . . . §51
"Officer" includes . . . . §1
Petition, copy of, to be filed for . . . . §59
Referee to call and receive papers from when . . . . §39
transmit papers to . . . . §39
certified copies of, by mail . . . . §39
Schedule, copy of, to be furnished by bankrupt . . . . §7

References to Sections.

Clerks—
Wages, debts having priority . . . . . §64

Co-debtor—
Liability of, not affected by bankrupt's discharge . . . . . §16

Commencement of proceedings—
Definition . . . . . §1

Commissioner of deeds—
Referee, may be . . . . . §35

Commissions—
Referees' . . . . . §40
apportionment . . . . . §40
Trustees' . . . . . §48
apportionment . . . . . §48

Commitment—
Contempt, for, before referee . . . . . §41
Referee can not exercise power of . . . . . §38

Compensation—
Clerks' . . . . . §52
Marshals' . . . . . §52
Referees' . . . . . §40
when reference revoked . . . . . §40
when case transferred . . . . . §40
Stenographers' . . . . . §38
Trustees' . . . . . §48
apportionment of . . . . . §48
withholding of . . . . . §48

Compositions—
Application for confirmation to be filed when . . . . . §12
accepted in writing by majority of creditors, etc. . . . . §12
consideration to be paid and costs deposited . . . . . §12
date and place of hearing . . . . . §12
Certified copy of order confirming evidence of title . . . . . §21
Confirmation of, a discharge from debts . . . . . §14
conditions of . . . . . §12
distribution of consideration . . . . . §12
Courts of bankruptcy to confirm or reject . . . . . §2
False claims, penalty for using in . . . . . §29
Notice to creditors of hearing, etc. . . . . §58
Offer of, when may be made . . . . . §12
Payment of claims accruing after, set aside . . . . . §64
Set aside, may be when . . . . . §13
upon proof of fraud . . . . . §13
Title revested in bankrupt on confirmation of . . . . . §70

Compromise—
Notice to creditors of proposed . . . . . §58
Trustees may, with approval of court, controversies . . . . . §27

Computation of time—
In bankruptcy proceedings, or under Act . . . . . §31

Computing number of creditors—
To join in involuntary petition . . . . . §59

Concealing—
Books of account, records of bankrupt, prevents discharge . . . . §14
Definition of "Conceal" . . . . . §1
Property of bankrupt with intent to defraud, etc., effect . . . . . §3
Punishment for, property by bankrupt . . . . . §29
document by trustee . . . . . §29

References to Sections.

Confirmation of composition (*see also* COMPOSITION)—
Conditions of . . . . . §12
Discharge from debts, a . . . . . §14

Consent—
Arbitrators chosen by . . . . . §26
Case certified for trial to Circuit Court, by . . . . . §19
Petition not to be dismissed by, until notice . . . . . §59

Consolidation—
Of cases in bankruptcy . . . . . §32

Construction—
Powers of court not enumerated . . . . . §2
Words and phrases . . . . . §1

Contract—
Debts founded upon may be proved and allowed . . . . . §63
Trustee vested with title to rights arising upon . . . . . §70

Contempt—
Arrest of bankrupt for . . . . . §9
Court of bankruptcy to punish for . . . . . §2
Referee before, what constitutes . . . . . §41
certifies facts to judge . . . . . §41
judge hears evidence, punishes or commits . . . . . §41

Consular officers—
Oaths, etc., may administer . . . . . §20

Controversies—
Arbitration of . . . . . §26
Certified to Circuit Court . . . . . §20
to Supreme Court . . . . . §25
Compromise by trustees of . . . . . §27
Jurisdiction of appellate courts of, in bankruptcy proceedings . . . . §24

Conveyances—
Bankrupt to execute to trustee of foreign property . . . . . §7
Subsequent to act within four months to defraud, etc., void . . . . §67
Trustee to execute, to purchaser . . . . . §70
Within four months while insolvent, void by State laws, void under Act . . . . . §67

Copy—
Bankrupt to prepare, make oath to and file in triplicate . . . . . §7
claim for exemptions, of . . . . . §7
lists of creditors, etc., of . . . . . §7
schedule of property, of . . . . . §7
Claims allowed, withdrawn may be, on leaving . . . . . §57
Order approving trustee's bond, of, certified, evidence of title . . . §21
confirming or setting aside composition, of jurisdiction, etc. . . . §21
Papers of, certified to be transmitted to clerk by referee when . . §39
Petitions in duplicate for clerk and bankrupt . . . . . §59
Referee, certified, of proceedings before, evidence . . . . . §21
Schedule, of, bankrupt to furnish clerk, referee and trustee . . . . §7

Corporation—
Bankrupt, when to be judged involuntary . . . . . §4
can not be adjudged voluntary . . . . . §4
Debts owing by, to be adjudged involuntary . . . . . §4
Definition of . . . . . §1
"Persons" include . . . . . §1
Punishment of agents, etc., of, by court of bankruptcy . . . . . §2
Sureties on bonds of trustees and referees, may be . . . . . §50
Trustees, may act as . . . . . §45

References to Sections.

Costs—
Administration, of, prior debts . . . §64
Allowed against involuntary bankrupt, plaintiff . . . §63
incurred before filing petition . . . §63
on dismissing petition when . . . §3
Include witnesses' fees, mileage and attorney's fees, . . . §64
Judgments for, courts of bankruptcy to render . . . §2
Penalty on recovery of . . . §57
Preserving estate, of, prior debts . . . §64
Taxation of, by courts of bankruptcy . . . §2

Counselor at law (*see also* ATTORNEY)—
Fees of, included in cost of administration . . . §64
allowance on dismissing petition when . . . §3
payable by obligors of bond . . . §3
Payments, transfers to, by insolvent, when re-examined . . . §60

Counter claims—
Allowance of, between bankrupt and creditor . . . §68
not between bankrupt and debtor when . . . §68

"Court"—
Definition of . . . §1
Referee, may include . . . §1

Courts—
Appeals and writs of error . . . §25
to U. S. Circuit Court of Appeals . . . §25
to U. S. Supreme Court . . . §25
Arbitration of controversies . . . §26
Creation of, of bankruptcy . . . §2
Depositions, laws governing . . . §21
Evidence . . . §21
Jurisdiction of . . . §23
of appellate . . . §24
Jury trials . . . §19
Newspapers, designation of, for notices . . . §28
Oaths and affirmations, administration of . . . §20
Process, pleadings . . . §18
Rules, forms, etc., U. S. Supreme Court to prescribe . . . §30
Suits by trustees . . . §23

Courts of bankruptcy—
Adjudge person, etc., bankrupt . . . §2
Appeal to U. S. Circuit Court of Appeals . . . §25
to U. S. Supreme Court . . . §25
Arbitrator, appoint, when . . . §26
Assets, collect and distribute . . . §2
Banking institutions, designate as depositories . . . §61
Business of bankrupt, permit temporary transaction of . . . §2
Claims, allow and reject . . . §2
Confirm or reject compositions . . . §2
Contempt, punish for . . . §2
Creation of . . . §2
Costs, tax . . . §2
Definition of . . . §1
Discharge bankrupts . . . §2
District, of bankruptcy . . . §2
District of Columbia, Supreme Court of . . . §2
Exemptions, determine . . . §2
Extradite bankrupts . . . §2
Jurisdiction of . . . §§2, 23
appellate . . . §24
Supreme Court of United States . . . §25
U. S. Circuit Court of Appeals . . . §24, 25
U. S. Circuit Courts . . . §23
concurrent with courts of bankruptcy . . . §23

References to Sections.

Courts of bankruptcy—*Continued.*
Marshals, appoint when . . . §2
Meetings of creditors when to call . . . §55
Newspapers to publish notices, designate . . . §28
Orders, make and enforce . . . §2
Powers unspecified . . . §2
Punish bankrupts . . . §2
Receivers appoint . . . §2
Referees, appoint and remove . . . §34
confirm, etc., records and findings . . . §2
Reference after adjudication . . . §22
Substitute additional persons or parties . . . §2
Transfer cases, etc. . . . §2
Try bankrupts . . . §2
Trustees when to appoint . . . §44
United States, of . . . §2

Credit—
Set-off of new, by preferred creditor . . . §60

Creditors—
Answer to petition to make when . . . §18
Appearance of . . . §18
Claims, allowance of . . . §57
filing after proof . . . §57
hearing objections . . . §57
lost or destroyed, how proved . . . §57
of one bankrupt against another . . . §57
penalty, due as how far allowed . . . §57
preferred, not allowed unless, etc. . . . §57
proof of . . . §57
when founded on instrument of writing . . . §57
reconsideration of . . . §57
rejected, dividend may be recovered . . . §57
secured, of, allowed for what . . . §57
claims not counted unless, etc. . . . §56
not entitled to vote at meetings . . . §56
value of securities, how determined . . . §57
secured by individual undertaking, how proved . . . §57
subrogation to extent of creditors' rights . . . §57
time for proving . . . §57
of infants, etc. . . . §57
withdrawn, on leaving copy . . . §56
writing when founded upon, how proved . . . §57
Computing number of, to file petition . . . §59
employees not counted . . . §59
relatives not counted . . . §59
Debts due as penalty, how far allowed . . . §57
Definition of . . . §1
Dividends paid first to certain resident . . . §65
limit to right to collect . . . §65
payment on allowed claims . . . §65
recovery of, when claim rejected . . . §57
Include agents, attorneys, proxies . . . §1
Involuntary petition, number, etc., necessary to file . . . §59
amount of claims . . . §59
notice to those not joined, etc. . . . §59
Lists of, bankrupt to make . . . §7
referee to examine . . . §39
to prepare and file when . . . §39

References to Sections.

Creditors—*Continued.*
Meetings, first held when and where . . . . . §55
bankrupt to attend first . . . . . §7
call of, by court, when . . . . . §55
final . . . . . §55
notice of . . . . . §58
place of . . . . . §55
presiding officer, duties of . . . . . §55
subsequent . . . . . §55
voters at . . . . . §56
Notice to, of compromise of controversy . . . . . §58
dismissal of proceedings . . . . . §58
of petition . . . . . §59
dividends, of declaration and time of payment . . . . . §58
examinations of bankrupt . . . . . §58
final account, of filing . . . . . §58
hearing, on application for confirmation, etc. . . . . §58
meetings, of . . . . . §58
referee to give . . . . . §58
sales of property . . . . . §58
time of . . . . . §58
waiver of . . . . . §58
Number necessary to join in petition . . . . . §59
employees and relatives not counted . . . . . §59
necessary for court to call meeting . . . . . §55
at designated place . . . . . §55
Penalty, debts due as how far allowed . . . . . §57
Petition, filed in duplicate . . . . . §59
number necessary to join in . . . . . §59
Preferred, who are . . . . . §60
claims not allowed unless, etc. . . . . §57
Priority, entitled to can not vote, etc. . . . . §56
Proof of claims of . . . . . §57
Proxy, included under . . . . . §1
Referee to give notices to . . . . . §58
Relatives not counted in petition when . . . . . §59
Secured, defined . . . . . §1
claims allowed for what sums . . . . . §57
value of securities held by, how determined . . . . . §57
Set-offs between bankrupt and . . . . . §68
Time for proving claims . . . . . §57

Criminal proceeding—
Testimony of bankrupt can not be offered against him in . . . . . §7

Crimes and offenses—
Concealing property while bankrupt . . . . . §29
Contempt before referee . . . . . §41
Courts of bankruptcy to punish for . . . . . §2
Embezzlement by trustee . . . . . §29
Extorting money, etc. . . . . §29
False claims, presenting under oath . . . . . §29
using in composition . . . . . §29
False oath or account, making . . . . . §29
Indictment or information, limitation of . . . . . §29
Misappropriation of property . . . . . §29
Receiving property from bankrupt with intent to defraud, etc. . . . §29
Referee acting when interested . . . . . §29
purchasing property of bankrupt . . . . . §29
refusing to permit inspection of accounts, etc. . . . . §29
Trustee refusing to permit inspection of accounts . . . . . §29
misappropriating, etc., property . . . . . §29
secreting or destroying document . . . . . §29

References to Sections.

Damages—
Allowance of, on dismissing petition, for seizure of property . . . §3

"Date of bankruptcy"—
Definition of . . . §1

Days—
Computation of time by . . . §31

Death—
Bankrupt's, does not abate proceedings . . . §8
Trustee's, does not abate suits . . . §46
Widow's and children's rights . . . §8

Debts—
Allowable against estate . . . §63
account or contract, founded on . . . §63
costs taxable against involuntary bankrupt, plaintiff . . . §63
costs of suits incurred before filing petition . . . §63
fixed liability, as shown by judgment, etc. . . . §63
provable, founded on, reduced to judgment after filing petition . . . §63
unliquidated claims . . . §63
Any person owing may become voluntary bankrupt . . . §4
Claims, proof and allowance of (*see* CLAIMS) . . . §57
Contract, founded on, allowed . . . §63
Coporation owing $1000 or over may be adjudged bankrupt . . . §4
Definition of . . . §1
Discharge does not release from what . . . §17
Fixed liability, having, may be allowed . . . §63
Judgments may be allowed . . . §63
Payment of, having priority . . . §64
accruing after composition set aside, etc. . . . §64
Penalty or forfeiture, owing as how far allowed . . . §57
Priority, having . . . §64
costs of administration, etc. . . . §64
fees, attorneys' . . . §64
filing, by creditor . . . §64
witnesses', including mileage . . . §64
order of payment . . . §64
owing to person entitled to priority . . . §64
taxes . . . §64
wages of workmen, etc., when . . . §64
Proved, what may be . . . §63
Provable, discharge releases from . . . §17
reduced to judgment have priority . . . §63
Released from, by discharge, except . . . §17
claims not scheduled . . . §17
defalcation as officer created by . . . §17
embezzlement, for . . . §17
false pretenses, etc., judgment in action for . . . §17
fiduciary capacity, created while acting in, . . . §17
fraud, created by . . . §17
judgments in actions for fraud . . . §17
false pretenses, etc., obtaining property by . . . §17
willful injury to person or property . . . §17
misappropriation, etc. . . . §17
taxes . . . §17
Set-offs allowed between bankrupt and creditor . . . §67
Taxes payable in advance of dividends . . . §64
trustee credited with, on filing receipt, etc. . . . §64

Decision—
When pleadings not filed . . . §18

References to Sections.

Defense—
Solvency a complete . . . . . §3
Trustee may be ordered to make . . . . . §11

Definitions—
"A person against whom a petition has been filed" . . . . . §1
"Adjudication" . . . . . §1
"Appellate courts" . . . . . §1
"Bankrupt" . . . . . §1
"Bankruptcy" . . . . . §1
"Clerk" . . . . . §1
"Commmencement of proceedings" . . . . . §1
"Conceal" . . . . . §1
"Corporations" . . . . . §1
"Court" . . . . . §1
"Courts of bankruptcy" . . . . . §1
'Creditor" . . . . . §1
'Date of bankruptcy" . . . . . §1
Debt . . . . . §1
"Discharge" . . . . . §1
"Document" . . . . . §1
"Holiday" . . . . . §1
Insolvent, when person deemed . . . . . §1
"Judge" . . . . . §1
"Oath" . . . . . §1
"Officer" . . . . . §1
"Persons" . . . . . §1
"Petition" . . . . . §1
"Referee" . . . . . §1
"Secured creditor" . . . . . §1
"States" . . . . . §1
"Time of bankruptcy" . . . . . §1
"Transfer" . . . . . §1
Trustee . . . . . §1
"Wage earner" . . . . . §1
Words importing masculine gender . . . . . §1
plural number . . . . . §1
singular number . . . . . §1

Departure—
Of bankrupt as cause for detention . . . . . §9

Deposition—
Notice of taking, to be filed with referee . . . . . §21
when to be served on claimant . . . . . §21
when to be served on bankrupt . . . . . §21
United States laws to govern right to take . . . . . §21

Depositories—
Bond to give . . . . . §61
filed in clerk's office . . . . . §50
Designation by courts of banks as, for bankrupt's money . . . . . §61

Detention—
Bankrupt, of, for examination . . . . . §9
length of . . . . . §9
Property of, on petitioner giving bond . . . . . §3

Disability—
Infant's, etc., rights . . . . . §57
Referee's, effect of . . . . . §43

Discharge—
Application for . . . . . §14
hearing of . . . . . §14
time of filing . . . . . §14
Books of account, concealing, etc., prevents . . . . . §14

References to Sections.

Discharge—*Continued.*
Co-debtor's liability not affected by . . . §16
Composition, confirmation of operates as . . . §16
Debts not affected by . . . §17
claims not scheduled . . . §17
fraud, embezzlement, etc., created by . . . §17
judgments in actions for fraud, etc. . . . §17
Definition of . . . §1
Fraud, may be revoked for . . . §15
Granted when . . . §14
when not granted . . . §14
Guarantor's liability not affected by . . . §16
Offense punishable by imprisonment prevents . . . §14
Payment of claims accruing after revocation of . . . §64
Records, destroying, etc., by fraud, prevents . . . §14
Releases from what debts . . . §17
Revoked when obtained by fraud . . . §15
application, when to be filed . . . §15
payment of claims after . . . §64
title vested in trustee . . . §70
Surety's liability not affected by . . . §16

Dismissal—
Cost, fees, etc., allowed respondent on, of petition when . . . §3
Notice to creditors of, of proceedings . . . §58
of petition . . . §59
Petition of, by referee, . . . §38
by petitioners . . . §59

Diplomatic officers of United States—
Oaths, etc., may administer . . . §20

Disobedience—
Of referee's orders, punishment for . . . §41

Distribution—
Consideration, of, on confirmation of composition . . . §12
Court of bankruptcy to make . . . §2
Dividends, of unclaimed . . . §66

Districts—
Referee's, designation of limits of, by court . . . §34

District Courts of United States—
Courts of bankruptcy . . . §2
Jurisdiction of . . . §2

District of Columbia—
"States" to include . . . §1
Supreme court of, a court of bankruptcy . . . §2

Dividends—
Commissions of referees on sums to be paid as . . . §40
Creditors receiving not affected by proof of subsequent claims . . . §65
residing within United States entitled to preference . . . §65
Declaration and payment on allowed claims . . . §65
first, declaration of . . . §65
subsequent . . . §65
Limit to right to collect . . . §65
Notice to creditors of declaration and time of payment . . . §58
Payment of when . . . §47
Recovery of, when claims rejected . . . §57
Referees to declare . . . §39
commissions on sums to be paid as . . . §40
deliver to trustees, sheets . . . §39
Trustee to pay when . . . §47
Unclaimed after six months, disposition of . . . §66
after one year . . . §66
of minors . . . §66

References to Sections.

Document—
Definition of . . . §1
Destroying or secreting, penalty for . . . §29
Referee may require production of . . . §38
Trustee vested with title to . . . §70

Domicile—
Bankrupt, of, claiming exemptions . . . §6

Dower—
Widow entitled to, as fixed by state laws . . . §8

Duplicate—
Petitions to be filed in . . . §59

Duties—
Attorney General's . . . §53
Bankrupt's . . . §7
Clerk's . . . §51
Creditors', at meetings . . . §55
Referee's . . . §39
Trustee's . . . §47

Embezzlement—
Debts created by, not released by discharge . . . §17
Penalty for . . . §29

Employees—
Creditors, as, not counted in petition . . . §59

Equity—
Appeals taken as in cases in . . . §25
Process served as suit in . . . §18
Records of referees kept as in cases in . . . §42

Estates—
Claims, allowance and proof of . . . §57
Debts which may be proved . . . §63
which have priority . . . §64
which can not be released . . . §17
Depositories for money . . . §61
Dividends, declaration and payment, etc. . . . §65
unclaimed after six months, paid into court . . . §66
after one year distributed . . . §66
rights of minors . . . §66
Liens . . . §67
created within four months, dissolved when . . . §67
subsequent to Act, within four months, to defraud, etc., void . . . §67
within four months, void by state law, void . . . §67
Property of bankrupt, when may be seized . . . §69
when released . . . §69
Set-offs and counter claims allowed . . . §68
Title vested in trustee . . . §70
revested in bankrupt on confirming composition . . . §70
Trustee to convey title . . . §70

Evidence—
Certified copies of proceedings before referee as . . . §21
order approving trustee's bond, of title . . . §21
confirming or setting aside composition, of jurisdiction, etc. . . . §21
confirming composition, of revesting title . . . §21
papers issued by clerk or referee, as . . . §21
Claims, proof of . . . §57
instrument of writing to be filed with . . . §57
when lost or destroyed . . . §57
Compulsory attendance of witnesses . . . §21
Criminal proceedings, testimony of bankrupt can not be offered in, against him . . . §7

References to Sections.

Evidence—*Continued.*
Depositions, laws governing . . . . . §21
notice of taking . . . . . §21
Referee to preserve when . . . . . §39
Surety's property, of value of . . . . . §50
Title of bankrupt . . . . . §21
of trustee . . . . . §21

Examination—
Bankrupt to submit to . . . . . §7
compulsory attendance for . . . . . §21
creditors to have notice . . . . . §58
proofs of claims, of, make . . . . . §7
Detention of bankrupt about to depart, for . . . . . §9
Expenses of, of administering estates . . . . . §62
of bankrupt attending, when . . . . . §7
Notice to creditors of, of bankrupt . . . . . §58
Referee may make, of witnesses . . . . . §38
Schedule, of, by referee . . . . . §39
Stenographers employed for, of bankrupt, etc. . . . . §39
Witnesses in contempt for refusing, etc. . . . . §40

Exemptions—
Claim for, bankrupt to prepare copies of, make oath to, and file in triplicate, etc. . . . . §7
Court of bankruptcy to determine claims for . . . . . §2
State laws to prescribe . . . . . §6
Trustees to set apart, etc. . . . . §47

Expenses—
Administering bankrupt's estate, of . . . . . §62
Bankrupt, of, paid attending examination, when . . . . . §7
Dismissal of petition, on . . . . . §3
Partnership bankrupt, of, how paid . . . . . §5

Extortion—
Punishment for . . . . . §29

Extradition—
Jurisdiction of courts of bankruptcy in . . . . . §2
Manner of . . . . . §10

False account—
Penalty for making . . . . . §29

False claims—
Bankrupt to disclose proof of, to trustee . . . . . §7
Penalty for presenting under oath . . . . . §29
using in composition . . . . . §29

False pretenses—
Judgments in actions for obtaining property by, not affected by discharge . . . . . §17

False representations—
Judgment in actions for obtaining property by, not affected by discharge . . . . . §17

Farmers—
Involuntary bankrupts, can not be adjudged . . . . . §4

Fees—
Attorney's, included in costs of administration . . . . . §64
one paid irrespective of number . . . . . §64
on dismissal of petition when property seized . . . . . §3
Clerk's . . . . . §52
Filing fees by creditors in involuntary cases . . . . . §64
Marshal's . . . . . §52
Priority in payment of certain . . . . . §64

References to Sections.

Fees—*Continued.*
Referee's . . . . . §40
when reference revoked . . . . . §40
when case transferred . . . . . §40
Stenographer's . . . . . §38
Trustee's . . . . . §48
apportionment of . . . . . §48
Voluntary bankrupt not required to pay, when . . . . . §51
Witnesses included in costs of administration . . . . . §64
first paid or tendered when . . . . . §41

Fiduciary capacity—
Debt created while acting in, not affected by discharge . . . . . §17

Filing—
Arbitrators' findings . . . . . §26
Bonds, referees', trustees' and designated depositories . . . . . §50
Claims for exemptions by bankrupt . . . . . §39
Claims before referee or in court . . . . . §57
Discharge, application for . . . . . §14
application to revoke . . . . . §15
Information, time of . . . . . §29
Jury, of application for . . . . . §19
List of creditors by bankrupt . . . . . §7
by referee when . . . . . §39
Notice to take depositions with referee . . . . . §21
Schedule of property, of, by bankrupt . . . . . §7
by referee when . . . . . §39

Finding—
Arbitrators', effect, etc., of . . . . . §26
Referees', transmitted with records to judges when . . . . . §39

Fines—(*see also* CRIMES AND OFFENSES)—
Orders of court enforced by . . . . . §2
Referee, of, acting when interested . . . . . §29
purchasing property of estate . . . . . §29
refusing inspection of accounts . . . . . §29
Trustee refusing inspection of accounts, etc. . . . . §29

Foreign country—
Bankrupt to transfer property in, to trustee . . . . . §7

Forfeiture—
Debts due as, how far allowed . . . . . §59
Referee, by, of office, acting in case when interested . . . . . §29
purchasing property while, etc. . . . . §29
refusing inspection of accounts . . . . . §29
Trustee, by, of office, refusing inspection of accounts . . . . . §29

Forms of procedure—
United States Supreme Court to prescribe, for courts of bankruptcy . . . . . §30

Fraud—
Books of account concealed, etc., by, prevents discharge . . . . . §14
Composition after confirmation set aside for . . . . . §13
Concealing of property by, punishment . . . . . §29
Debts created by, not affected by discharge . . . . . §17
Discharge revoked when obtained by . . . . . §15
Judgment in actions for, not affected by discharge . . . . . §17
Lien sought and permitted, in, of bankrupt Act, dissolved, etc. . . . §67
Trustee vested with title to property transferred in . . . . . §67

General assignment—
Effect of, an act of bankruptcy . . . . . §3

Gender—
Words importing masculine, etc., include, etc. . . . . §1

References to Sections.

Good faith—
Liens given in, etc., not affected by Act, etc., ... §67

Guarantor—
Liability of, not affected by bankrupt's discharge . . . . . §16

Hearing—
Appeal to Circuit Court, of . . . . . §25
Bankrupt to attend, on application for discharge . . . . . §7
Claims, of objections to allowance of . . . . . §57
Confirmation of composition, application for . . . . . §12
notice to creditors . . . . . §58
Contempts, for, summary . . . . . §41
Discharge, of application for . . . . . §14
notice to creditors . . . . . §58
Insolvency, on question of . . . . . §3
Petition, voluntary, of . . . . . §18

Holiday—
Definition of . . . . . §1
Time, in computing . . . . . §31

Imprisonment—
Bankrupt subject to, for what offenses . . . . . §29
Bankrupt in custody of marshal for examination not to be subjected to . . . . . §9
Courts of bankruptcy to enforce orders by . . . . . §2
Discharge prevented by offense punishable by . . . . . §14
Offenses punishable by . . . . . §29
Referee can not exercise power of . . . . . §38
Trustee subject to, for what offenses . . . . . §29

Incumbrances—(*see also* LIENS)—
Subsequent to act, etc., within four months, to defraud, etc., void . . . . . §67
Within four months, void under State laws, void under Act . . . . §67

Indemnity—
Bond of, by petitioner, on seizure of bankrupt's property . . . . §69

Indian Territory—
"States" include . . . . . §1
United States Courts in, made courts of bankruptcy . . . . . §2

Indictments—
Limitation of time as to finding . . . . . §29

Infants—
Claims against bankrupts, time for proving . . . . . §57
Unclaimed dividends, time for claiming . . . . . §66

Information—
Limitation of time as to filing . . . . . §29

Injuries—
Discharge does not release judgments in actions for willful, to person or property . . . . . §17

Insane person—
Claims against bankrupts, time for proving . . . . . §57

Insolvency—
Admission of, in writing, an act of bankruptcy . . . . . §3
Person denying to testify, etc. . . . . §3
Question of, triable by jury . . . . . §19
State laws, proceedings under, not affected by Act, etc. . . . . §70

References to Sections.

Insolvent —
Definition of . . . . . §1
Filing of petition against, when . . . . . §3
Jury trial, entitled to . . . . . §19
Liens created while, to be dissolved, etc. . . . . §67
State laws relating to, not affected by bankrupt Act . . . . . §70
When person deemed . . . . . §1

Inspection—
Penalty against referee and trustee refusing, of accounts . . . . . §29
Trustee's accounts and papers open to . . . . . §49

Instrument of writing —
Debts evidenced by, allowed, etc. . . . . §63
Filed with proof of claim . . . . . §57
Lost or destroyed, statements, etc., to be filed with claim under oath . . . . . §57

Insurance policy—
Bankrupt may pay cash surrender value to trustee and retain . . . §70
otherwise policy to pass to trustee . . . . . §70

Interest—
Judgments as debts proved and allowed, include . . . . . §63
Penalty, on recovery of . . . . . §57
Referees, of, in case disqualifies . . . . . §39
Trustees to account for and pay . . . . . §47

Intent—
Conveying property, etc., with fraudulent, etc., effect . . . . . §3
Destroying books of account with fraudulent effect . . . . . §14
Receiving property from bankrupt with, to defeat Act, effect . . . . §29

Involuntary bankrupt—
Who may be adjudged . . . . . §4
Who may not be adjudged . . . . . §4

Involuntary petition—
Bankrupt entitled to jury trial, on hearing of . . . . . §19

Issues—
Court to determine, when facts controverted . . . . . §18

Joint trustees —
Bonds of . . . . . §50
Suits, may prosecute or defend, in case of death . . . . . §46

Judge—
Absence of, in, clerk to send case to referee . . . . . §18
Definition of . . . . . §1
Referee may exercise certain powers of, on issuance of certificate by clerk, etc. . . . . §38
powers subject to review by . . . . . §38
transfer of cases by, from one referee to another . . . . . §22

Judgments—
Debts reduced to, allowed . . . . . §63
Discharge does not release from what . . . . . §17
Fraud, in actions for, not affected by discharge . . . . . §17
Lien, created by, within four months, etc., when dissolved, ... §67
Preference, when deemed to create . . . . . §60

Jurisdiction—
Appellate courts, of . . . . . §24
Certified copy of order confirming composition, etc., evidence of . . §12
Circuit Courts of U. S. of, of suits between trustees and adverse claimants . . . . . §23
of Appeal of U. S. to superintend and revise proceedings of courts of bankruptcy . . . . . §24

References to Sections.

Jurisdiction—*Continued.*
Concurrent, between circuit courts and courts of bankruptcy of offenses . . . §23
Courts of bankruptcy, of . . . §2
Partnership, of courts of bankruptcy, over one member sufficient . . . §4
Referee's . . . §§22, . . . 38
State courts, of, of suits by trustees . . . §23

Jury—
Application for, when to be filed . . . §19
Circuit court, case certified for trial by, to . . . §19
Insolvent entitled to trial by . . . §19
Issues, court to determine without, when . . . §18
Offenses, for, right to trial by . . . §19
Special, summoned if one not in attendance . . . §19
United States laws as to trials, applicable . . . §19
Waiver of right . . . §19

Justice of the peace—
Referee, may be . . . §35

Laches—
Discharge, in filing application to revoke . . . §15

Levies—
Obtained against insolvent within four months, etc., void . . . §67

Liability—
Debts which are a fixed, allowed, etc. . . . §63
Discharge does not affect co-debtors', guarantors', or surety's . . . §16
Petitioner's bond, on, to hold property . . . §3
Trustees, of . . . §50

Lien—
Created by suit within four months of filing petition, to be dissolved by adjudication in bankruptcy . . . §67
if defendant was insolvent . . . §67
believed to be insolvent . . . §67
permitted in fraud of Bankrupt Act . . . §67
trustee subrogated to rights of holder . . . §67
Conveyance, incumbrance, etc., by bankrupt after Act and within four months, etc., to defraud, etc., void . . . §67
except as to purchasers in good faith for consideration . . . §67
property assets, and passes to trustee . . . §67
void under State law, void under Bankrupt Act . . . §67
property passes to trustee to be recovered for creditors . . . §67
Given or accepted in good faith for consideration not affected, etc. . . . §67
Obtained through legal proceedings against insolvent within four months, etc., void . . . §67
property passes to trustee as part of estate . . . §67
unless court otherwise orders . . . §67
court may order conveyance . . . §67
bona fide purchaser for value protected . . . §67
Trustee subrogated to rights of creditor . . . §67
Unrecorded claims not . . . §67

Limitation—
Actions, of, on bonds of referees and trustees . . . §50
by or against trustees . . . §11
Claims, time for proving . . . §57
rights of infants, etc. . . . §57
Indictment, of finding, for offenses . . . §29
Information, of filing, etc. . . . §29
Prosecution, of, for offenses . . . §29

References to Sections.

Lists of creditors—
Bankrupt to prepare and file, in triplicate . . . . . §7
Referee to examine . . . . . §39
to prepare and file, when . . . . . §39
When filed with answer . . . . . §59

Mail
Notice of creditors' meetings by . . . . . §58
Referee to transmit certified copies of papers by, to clerk when . . . §39

Marshaling assets—
Insolvent partnership, of . . . . . §5

Marshals—
Courts of bankruptcy to appoint . . . . . §2
Custody of bankrupt in, for examination . . . . . §9
Fees of . . . . . §52
"Officer" to include . . . . . §1
Warrant issued to, to seize property when . . . . . §69

Masculine gender—
Words importing, how construed . . . . . §1

Master in chancery—
Referee, may be . . . . . §35

Meaning—(*See* DEFINITION)—
Words and phrases, of . . . . . §1

Meetings of creditors—
Bankrupt to attend first . . . . . §7
when not compelled to attend . . . . . §7
expenses of attending, paid when . . . . . §7
Court to call, when . . . . . §55
Final, when ordered . . . . . §55
First, time and place of . . . . . §55
Notice of, ten days by mail . . . . . §58
Presiding officer of first . . . . . §55
Secured claims, holders of, not entitled to vote . . . . . §56
Subsequent, time and place . . . . . §55
Trustees to lay detailed statements before final . . . . . §47
Voters at . . . . . §55

Mileage—
Witnesses before referees, of, when to be first paid or tendered . . . §41

Minors—(*See also* INFANTS)—
Unclaimed dividends, time for claiming . . . . . §66

Misappropriation—
Debts created by, not affected by discharge . . . . . §17

Moneys—
Depositories designated for . . . . . §61
Trustee to collect, deposit, etc. . . . . §47
to disburse how . . . . . §47

National bank—
Involuntary bankrupt, can not be adjudged . . . . . §4

Newspapers—
Designation of, by court for publication of notices, etc. . . . . §28
when additional paper may be designated . . . . . §28

References to Sections.

Notice—
Composition, certified copy of order confirming, imparts, when . . §21
Creditors, to . . §58
compromise, proposed . . §58
declaration and time of payment of dividends . . §58
dismissals, proposed . . §58
examinations of bankrupt . . §58
filing final accounts of trustee . . §58
hearings on application to confirm, etc., or discharge . . §58
meetings . . §58
publication of first meeting . . §58
sales, proposed . . §58
ten days by mail . . §58
waiver of notice . . §58
Depositions, of taking to be filed with referee . . §21
Discharge does not release from unscheduled claims unless creditor had . . §17
Newspapers to publish, court to designate . . §28
Petition not be dismissed without . . §59
Publication, by, when personal service can not be made . . §18
of first meeting of creditors . . §58
Referee to give, to creditors . . §39
Trustee's bond, certified copy of order approving, recorded imparts . . §21

Number—
Arbitrators, of . . §26
Creditors, of, who may file involuntary petition . . 34, §59
employees can not be counted . . §59
nor relatives within third degree . . §59
Referees, of, to be appointed . . §37
Trustees, of . . §44
Words importing singular and plural . . §2

Oath—
Administered by whom . . §20
Bankrupt to make to schedule of property, list of creditors, and claims for exemptions, filed, etc. . . §7
Claim founded on lost writing, proof of under . . §57
presenting false, under, penalty . . §29
Definition of . . §1
Pleadings verified under . . §18
Referee, of . . §36
Witness in contempt for refusal to take . . §41

Offenses (*see also* CRIMES AND OFFENSES)—
Concealing property . . §29
Contempt before referee . . §41
Embezzlement . . §29
Extorting money . . §29
False oath or account, making . . §29
False claim, presenting under . . §29
using in composition . . §29
Indictment or information, time of finding, etc. . . §29
Jury trial, accused entitled to . . §19
Jurisdiction of U. S. Circuit Courts . . §23
Receiving property from bankrupt to defeat Act . . §29
Referee, acting when interested . . §29
purchasing property of bankrupt . . §29
refusing to permit inspection of accounts . . §29
Trustee refusing, etc., inspection of accounts . . §29
United States laws applicable as to jury trials for . . §19

Offer
Composition, of, when made . . §12

References to Sections.

Office—
Referee can not hold any other, except, etc. . . . . §35
must have, in, or be resident of district . . . . . §35
term of . . . . . §34
Trustee must have, in, or be resident of district . . . . . §45

Officers—
Attorney General . . . . . §53
Clerk . . . . . §51
Definition of . . . . . §1
Marshal . . . . . §2
Oaths, authorized to administer . . . . . §20
"Persons" include . . . . . §1
Receiver . . . . . §2
Referee . . . . . §34
Trustee . . . . . §44

Orders—
Bankrupt to comply with lawful . . . . . §7
Certified copies of, as evidence . . . . . §21
approving trustee's bond . . . . . §21
confirming, etc., composition . . . . . §21
Court of bankruptcy, to enforce . . . . . §2
Precedure, as to, U. S. Supreme Court to prescribe . . . . . §30
Transferring cases in bankruptcy . . . . . §32

Papers—
Bankrupt to execute and deliver . . . . . §7
Certified copies of, before referee as evidence . . . . . §21
Penalty for refusing inspection of, by referee and trustee . . . . . §29
Referees to receive from clerks . . . . . §39
secure return of . . . . . §39
transmit to clerks . . . . . §39
Trustees, of, open to inspection . . . . . §49

Parties—
Additional, courts may substitute in bankruptcy proceedings . . . . §2
Evidence to be preserved by referee on application of . . . . . §39
Referee to furnish information to . . . . . §39

Partnership—
Adminstration of estate of . . . . . §5
when all are not bankrupt . . . . . §5
Bankrupt, may be adjudged when . . . . . §5
Claims of, against individual estates, etc. . . . . §5
"Corporations" include what . . . . . §1
Creditors of, appoint trustee . . . . . §5
Expenses, payment of . . . . . §5
Jurisdiction over one partner sufficient . . . . . §5
Payment of debts of . . . . . §5
Surplus of, property . . . . . §5
Transfer of cases against different members of . . . . . §32
Trustee's duty . . . . . §5
Words importing masculine gender include . . . . . §1

Payment—
Attorneys, to, in contemplation of insolvency, re-examination of, . . . §60
Debts, of, which have priority . . . . . §64
order of . . . . . §64
Dividends, of, on allowed claims . . . . . §65
notice to creditors of . . . . . §58
unclaimed dividends . . . . . §66

Patents—
Trustee invested with title to . . . . . §70

References to Sections.

Penalties—(*see also* OFFENSES)—
Concealing property . . . §29
Debts due as, how far allowed . . . §57
Document, for secreting or destroying . . . §29
Embezzlement . . . §29
Extorting money, etc. . . . §29
False oath, making . . . §29
False claims, presenting . . . §29
Receiving property from bankrupt, to defeat Act . . . §29
Trustees not liable for, etc. . . . §50

Personal Property
Not to be sold for less than 75% of appraised value . . . §70

Persons—
"A person against whom a petition has been filed" . . . §1
Definition of . . . §1
Involuntary bankrupts, who may be adjudged . . . §4
Voluntary bankrupts, who may be adjudged . . . §4

Petition—
Answer to, when . . . §18
Definition of . . . §1
Duplicate, to be filed in . . . §59
Filed within four months after act of bankruptcy . . . §3
when time expires . . . §3
Hearing of . . . §18
Involuntary bankrupt, against, who may file . . . §59
Notice to creditors not joined in . . . §59
Referee to consider, etc. . . . §38
Service of . . . §18
Voluntary bankrupt, who may file, as . . . §59

Petitioner—
Bond, by, on taking property . . . §3

Place—
Creditors' meetings, of . . . §55
when bankrupt required to attend . . . §7

Pleadings and practice—
Appeals . . . §25
Appellate courts' jurisdiction . . . §24
Arbitration of controversies . . . §26
Compromises . . . §27
Decision where pleadings not filed . . . §18
Evidence . . . §21
certified copies of proceedings, etc. . . . §21
compulsory attendance of witnesses . . . §21
depositions, laws governing . . . §21
Forms to be prescribed by Supreme Court . . . §30
Involuntary bankruptcy, petition for . . . §18
adjudication when to be made . . . §18
appearance and pleading, time of . . . §18
determination of issues . . . §18
jury trial, application for . . . §19
when to be filed . . . §19
waiver of right . . . §19
petition for, number of creditors to file . . . §59
service of petition . . . §18
subpœna, service . . . §18
return of . . . §18
verification . . . §18
Issues, court to determine when facts controverted . . . §18
Jurisdiction of United States Courts . . . §2
Jury trial, application for . . . §19

References to Sections.

Pleadings and practice—*Continued.*
United States laws applicable to . . . §19
Notices, how published . . . §18
Oaths and affirmations . . . §20
Reference of cases after adjudication . . . §22
Rules and orders, etc., to be prescribed by Supreme Court . . . §30
Service of petition with subpœna as process, etc. . . . §18
Suits by trustees where brought . . . §23
Time, computation of . . . §31
pleading to petition . . . §18
Transfer of cases . . . §32
Verification of pleadings . . . §18
Voluntary petition, hearing on filing . . . §18

Plural number—
Construction of words in . . . §1

Policy of insurance—
Bankrupt's, how retained . . . §70

Possession—
Bankrupt's property, of, pending hearing, etc. . . . §3
petitioner to give bond . . . §3
when bankrupt is neglecting property, etc. . . . §69
petitioner to give bond of indemnity . . . §69
bankrupt to give bond to release . . . §69

Preference—
Creditors, of, residing within United States . . . §65
Insolvent permitting, effect . . . §3
transferring property while insolvent to give . . . §3
What deemed a . . . §60

Preferred creditors—
Claims of, not allowed unless, etc. . . . §57
Set off of further credit by . . . §60
When preference voidable . . . §60
Who are . . . §60

Procedure—
United States Supreme Court to prescribe rules, etc. . . . §30

Process—
Bankrupt exempt from arrest upon civil . . . §8
Service of, as in equity cases, etc. . . . §18

Proof—
Burden of, of solvency . . . §3
Claims, of, of what to consist . . . §57
founded upon instrument of writing . . . §57
when instrument lost . . . §57
time of . . . §57
rights of infants, insane persons, etc. . . . §57
Partnership of, against individual estates . . . §5

Property—(*See also* ESTATES)—
Concealing, embezzling, etc., penalty for . . . §29
Conveying with intent to defraud, etc., effect . . . §3
Judgments in actions for willful injuries to, not released, etc. . . . §17
Possession of, of bankrupt, when taken . . . §§3, 67
Referee purchasing when interested, penalty . . . §29
to take possession and release when . . . §38
Sold, can not be, for less than 75% of appraised value . . . §70
Title to, vests in trustee when . . . §70
revests in bankrupt when . . . §70
Trustee to convey . . . §70
Value of surety's . . . §50

References to Sections.

Prosecution—
Limitation of . . . . . §29

Protection—
Of bankrupt from arrest . . . . . §9

Proxy—
"Creditor" includes . . . . . §1
Penalty for using false claim in composition, as or by . . . . . §29

Publication—
Newspapers for, etc., courts to designate . . . . . §28
Notice to defendant by, when . . . . . §18

Punishment—
Bankrupts, of, by courts of bankruptcy . . . . . §29
Concealing, embezzling property, etc., by trustee . . . . . §29
Contempt, for, manner of . . . . . §41
Offenses, for, period and enumeration . . . . . §29
Referees, for acting while interested in case . . . . . §29
purchasing property, etc. . . . . §29
Trustees and referees, for refusing inspection of accounts . . . . . §29

Purchaser—
Bona fide, for value, etc., title by levy, lien, etc., not impaired . . . §67
Penalty against referee as . . . . . §29

Real property—
Not to be sold for less than 75% of appraised value . . . . . §70

Receiver—
Courts of bankruptcy to appoint . . . . . §2
"Officer" to include . . . . . §1

Re-consideration—
Of allowed claims, recovery of dividends on . . . . . §57

Record—
Bankrupt's destruction of, prevents discharge . . . . . §14
Notice imparted by, of order confirming composition . . . . . §21
approving trustee's bond . . . . . §21
Referees to keep, how . . . . . §42
to constitute records in each case . . . . . §42
to make up and send to judge with findings, when . . . . . §39

Recovery—
Dividends, of, on reconsidered claims . . . . . §57
Property, of, etc., transferred to attorney, when . . . . . §60

Re-examination—
Of payments, etc., made to attorneys, when . . . . . §60

Referee—
Accounts, penalty for refusing inspection of . . . . . §29
Absence or disability of . . . . . §43
Adjudication, reference after . . . . . §22
Administration of oaths by . . . . . §§20, 38
Appointment of . . . . . §34
Attendance of witnesses before . . . . . §41
Attorney in bankrupt cases, can not act as . . . . . §39
Bond of . . . . . §50
amount of . . . . . §50
failure to give, creates a vacancy . . . . . §50
filed of record in clerk's office . . . . . §50
sureties on . . . . . §50
value of property . . . . . §50
suits on, how and when brought . . . . . §50
Books containing record, etc., to keep . . . . . §42
certify and transmit to court . . . . . §42
Certified copies of proceedings before, evidence . . . . . §21

References to Sections.

Referee—*Continued.*
Claim for exemptions, bankrupt to file copy of, for . . . . . §8
Claims filed before, when case referred . . . . . §57
Clerk to collect fees . . . . . §51
except when . . . . . §51
pay when . . . . . §51
Commissioner of deeds may be . . . . . §35
Commissions on dividends . . . . . §§ 40 and 72
Commitment, can not exercise power of . . . . . §38
Compensation of . . . . . §40
when case transferred . . . . . §40
when reference revoked . . . . . §40
Contempt before . . . . . §41
proceedings to punish for . . . . . §41
Counselor at law can not act as, in bankruptcy cases . . . . . §39
"Court" may include . . . . . §1
Creditors' lists, to make and file, when . . . . . §39
Definition of . . . . . §1
Depositions, notice to take, filed with . . . . . §21
Disability, effect of . . . . . §43
Districts of, court to designate . . . . . §34
Dividends, to declare . . . . . §39
Duties of . . . . . §39
Evidence, to preserve, when . . . . . §39
to make up record embodying, etc. . . . . §39
Fees of . . . . . §40
apportionment of . . . . . §40
clerk to collect . . . . . §51
Fined, for what offenses . . . . . §29
Findings, to transmit, etc., to judges when . . . . . §39
Forfeit office, when . . . . . §29
Information to furnish, when . . . . . §39
Interested, penalty for acting, when . . . . . §39
"Judge" does not include . . . . . §1
Jurisdiction of . . . . . §38
administer oaths . . . . . §38
consider petitions . . . . . §38
examine witnesses . . . . . §38
perform certain duties, etc. . . . . §38
stenographers, employ . . . . . §38
take possession of and release property . . . . . §38
Justice of the peace, may be . . . . . §35
Limitation of action on bond . . . . . §50
Lists of creditors, bankrupt to file copy, for . . . . . §7
when to prepare and file . . . . . §39
Master in chancery, may be . . . . . §39
Meetings of creditors, presides at first . . . . . §55
Notices to creditors, given by . . . . . §39
to take depositions, filed with . . . . . §21
Number of . . . . . §37
Oath of office by . . . . . §36
to administer . . . . . §36
not in court . . . . . §§20, 38
Offenses . . . . . §29
acting when interested . . . . . §29
purchasing property while . . . . . §29
refusing inspection of accounts, etc. . . . . §29
Office, can not hold, except . . . . . §35
must be in district, unless resident of . . . . . §35
term of . . . . . §34
"Officer" includes . . . . . §1
Papers to receive from clerks when . . . . . §39
penalty for refusing inspection of . . . . . §29
to transmit to clerk, when . . . . . §39

References to Sections.

Referee—*Continued.*
Parties in interest, to furnish information to . . . . . §39
Payment of fees to, by clerk . . . . . §51
Petition, to consider, etc. . . . . §38
dismiss, etc. . . . . §38
Possession of bankrupt's property, to take, when . . . . . §38
Punishment for contempt before . . . . . §41
for offenses by . . . . . §29
Purchaser, can not be, of bankrupt's property, when . . . . . §39
Qualifications . . . . . §35
Records, to keep and transmit to clerks . . . . . §39
to make up and send to judges . . . . . §39
penalty for refusing inspection of . . . . . §29
Reference of cases after adjudication . . . . . §22
Related to judges of courts, etc., can not be . . . . . §35
Release property of bankrupt, when . . . . . §38
Remove, court may . . . . . §34
Resident of, must be, or hold office in district . . . . . §35
Review, powers subject to . . . . . §38
Schedule, to examine, and amend . . . . . §39
copy of, to be filed for . . . . . §7
to prepare and file, if bankrupt neglects, etc. . . . . §39
Stenographer, to employ . . . . . §38
Term of . . . . . §34
Time of bringing suit on bond . . . . . §50
Transfer of cases to . . . . . §40
apportionment of fees . . . . . §40
Vacancy, filling . . . . . §43
failure to give bond creates . . . . . §50
Witnesses attendance before . . . . . §41
examination of . . . . . §41
when not required to attend . . . . . §41

Reference—
Absence of judge, etc., in . . . . . §18
After adjudication . . . . . §22

Relative—
Creditor, of bankrupt, can not be counted in petition, etc. . . . . §59
Referee, not to be, of judges of United States courts, etc. . . . . §35

Release—
Bankrupt's property of, on giving bond . . . . . §69
Referee, by, of property, when . . . . . §38

Removal—
Property of bankrupt of, with intent to defraud, etc., effect . . . . . §3
Referee, of . . . . . §34
Trustee, of, effect . . . . . §46
on hearing and notice . . . . . §2

Report—
Officers, by, of expenses of administering estates . . . . . §62
examined and approved, etc., by court . . . . . §62
Trustee, by, of condition of estate, when . . . . . §47
final, when . . . . . §47

Representations—
Judgment in action for false, not released by discharge . . . . . §17

Residence—
Banking institutions, depositories, etc., convenient to trustees . . . §61
Departure of bankrupt from, cause for detention . . . . . §9
Dower fixed by the laws of bankrupt's . . . . . §8
Expenses of bankrupt, attending examination from . . . . . §7
List of creditors filed by bankrupt to show . . . . . §7
Persons adjudged bankrupt, of . . . . . §2

References to Sections.

Residence—*Continued.*
Referee's, in district, etc. . . . §35
Sureties', on bond, when property taken . . . §3
Taxes of, bankrupt not released by discharge . . . §17
Trustee's, in district, etc. . . . §45

Respondent—
Costs, counsel fees, etc., allowed on dismissal of petition . . . §3

Return—
Subpœna, of within fifteen days . . . §18

Revesting—
Of title in bankrupt when . . . §70

Revocation—
Discharge of bankrupt, of when may be made . . . §15
Title vested in trustee, on, of discharge . . . §70

Rules—
Supreme Court of U. S. to prescribe, in bankruptcy proceedings . . . §30
may amend from time to time . . . §30

Sale—
Appraised value, for not less than 75 percent of . . . §70
Approval of court, subject to . . . §70
Notice to creditors, ten days by mail . . . §58
Real and personal property, of . . . §70
Trustee to convey title on . . . §70

Schedule—
Bankrupt to make oath to and file, when . . . §7
Composition can not be offered before filing . . . §12
Copies in triplicate to be filed by bankrupt . . . §7
Discharge does not release from unscheduled claims . . . §17
unless creditors had notice . . . §17
Referee to examine and amend . . . §39
prepare and file when . . . §39
Voluntary bankrupt to file, with petition . . . §7
What to contain . . . §7

Secured creditor—
Allowance of claims, for what sums . . . §57
Claims secured by individual undertaking . . . §57
subrogation of obligor discharging . . . §57
Definition of . . . §1
Meetings of creditors, not entitled to vote at . . . §56
claims not counted, etc., unless, etc. . . . §56
Value of securities held by, determined how . . . §57
amount of value credited on claims . . . §57

Seizure—
Bankrupt's property, of, to prevent deterioration, etc. . . . §69
bond to indemnify bankrupt . . . §69
to secure release . . . §69

Servant—
Wages due, etc., have priority . . . §64

Service—
Notice to take depositions, of . . . §21
upon bankrupt, when . . . §21
upon claimant, when . . . §21
Petition, of, with subpœna for involuntary bankrupt . . . §18
manner of . . . §18
Subpœna of, etc. . . . §18
manner of . . . §21
return of . . . §18

References to Sections.

Set-off—
Allowed between creditor and bankrupt, when . . . . . §68
not between debtor and bankrupt, when . . . . . §68
Preferred creditor, by, giving further credit, etc. . . . . §60

Sickness—
Judge, of, referee's powers when exercised . . . . . §38

Singular number—
Construction of words importing . . . . . §1

Solicitor—(*See also* ATTORNEYS)—
Payments, etc., to, by insolvent for services to be rendered, re-examined, etc. . . . . §60

Solvency—
Burden of proof of . . . . . §3
Defense, a complete, etc. . . . . §3

Statements—
Trustee to lay detailed, before final meeting of creditors . . . . . §47

States—
Arrest under process of courts of, exemption of bankrupt from . . . §9
Banks of, can not be adjudged involuntary bankrupts . . . . §3
Debts owing to, as penalties, etc., how far allowed . . . . . §57
Definition of . . . . . §1
Dower of widow, fixed by laws of . . . . . §8
Exemptions under laws of . . . . . §6
Include Territories, Indian Territory, Alaska, District of Columbia . . . . . §1
Jurisdiction of courts of . . . . . §23
Liens, etc., void under laws of, void under bankrupt Act . . . . . §67
Proceedings commenced under insolvency laws of, not affected . . . §70
Taxes of, no discharge from . . . . . §17
Trustees may bring suits in what courts of . . . . . §23

Statistics—
Attorney General to lay tables of, annually before Congress . . . . §53
Officers to furnish, to Attorney General on request . . . . . §53

Stay—
Of action pending against bankrupt at time of filing petition . . . . §11

Stenographer—
Fees of . . . . . §38
Referee to authorize employment of . . . . . §38

Subpœna—
Service of with petition . . . . . §18

Successor—
Duties imposed upon officer include . . . . . §1
Title to property vests in trustee and . . . . . §70
Trustee, of, may prosecute or defend suits . . . . . §46

Subrogation—
Claims secured by individual undertaking, of person discharging . . . . . §57
Trustee, of, to rights of creditor or holder of lien . . . . . §67

Suits—
Bankrupt, by and against . . . . . §11
appearance of trustee . . . . . §11
commenced by, prior to adjudication . . . . . §11
stay of . . . . . §11
Bond on, to take bankrupt's property, etc. . . . . §3
to indemnify bankrupt on seizure of property . . . . . §69
to release property . . . . . §69

References to Sections.

Suits—*Continued.*
Bonds of referees and trustees, on . . . . . §50
in name of United States, etc., ... §50
limitation of action on . . . . . §50
Lien created pursuant to, etc., when dissolved . . . . . §67
Referee, on bond of . . . . . §50
Trustee, on bond of . . . . . §50
by, brought in what courts . . . . . §23
death or removal not to abate . . . . . §46
time of bringing, by or against . . . . . §11
on bond of . . . . . §50

Sunday—
In computation of time . . . . . §31

Supreme Court of District of Columbia—
Appeals from . . . . . §24
A court of bankruptcy . . . . . §2
Jurisdiction of . . . . . §2

Supreme Court of United States—
Appellate jurisdiction of . . . . . §24
Appeals to, from Circuit Court of Appeals . . . . . §25
when amount exceeds $2,000 . . . . . §25
when question certified by Supreme Court Justice . . . . . §25
Rules, forms and orders for courts of bankruptcy, etc., to prescribe . . . . . §30

Sureties—
Bonds of referee and trustee, on . . . . . §50
corporations may be . . . . . §50
two necessary on each . . . . . §50
value of property . . . . . §50
Liability of, not affected by bankrupt's discharge . . . . . §16

Taxation of costs—
By courts of bankruptcy . . . . . §2

Taxes—
Discharge of bankrupt not to affect . . . . . §17
Priority in payment of . . . . . §64

Term—
Referee's office . . . . . §34

Territories—
District Courts of, made courts of bankruptcy . . . . . §2
Jurisdiction of . . . . . §2
appellate, of Supreme Courts . . . . . §24
States include . . . . . §1

Testimony—
Bankrupt to give, as to estate . . . . . §7
Criminal proceeding, in, can not be offered against bankrupt . . . . §7
Person denying insolvency to give . . . . . §3

Time—
Accounts, by trustee, of filing . . . . . §47
Actions, of bringing by and against trustees . . . . . §11
on bonds of referees and trustees . . . . . §50
Appeals, of taking to Circuit Court of Appeals . . . . . §25
Bankrupt Act, of taking effect . . . . . §70
Bonds of referees and trustees, of giving . . . . . §50
of bringing suits on . . . . . §50
Claims, of proving . . . . . §57
hearing objections to . . . . . §57
Composition, of filing application to set aside . . . . . §13
Computation of, in bankruptcy proceedings, etc. . . . . §31
Creditors' meetings, of . . . . . §55

References to Sections.

Time—*Continued.*
Discharge, of filing application to revoke . . . . . §15
Dividends, of declaring . . . . . §65
of paying . . . . . §47
unclaimed dividends . . . . . §66
Involuntary petition, to file under Act . . . . . §70
Jury trial, of filing application for . . . . . §19
Notice to creditors, of giving . . . . . §58
Petition against insolvent, of filing . . . . . §3
Pleading to petition, of . . . . . §18
Publication of notices to creditors . . . . . §50
when personal service can not be had . . . . . §18
Subpœna, of return of . . . . . §18
"Time of bankruptcy" . . . . . §1
Trustees, when to give bond . . . . . §50
accounts, to file final . . . . . §47
limitation of actions by and against . . . . . §11
on bond . . . . . §50
report, to make final . . . . . §47
Voluntary petiton, to file under Act . . . . . §70

Title—
Revests in bankrupt when . . . . . §70
certified copy of order confirming composition, evidence of . . . . §21
Trustee to convey . . . . . §70
certified copy of order approving bond, evidence of . . . . . §21
Vests in trustee and successor . . . . . §70
when composition set aside, etc. . . . . §70

Transfer—
Act of bankruptcy, when . . . . . §3
Attorneys, to, re-examination, etc., when . . . . . §60
Bankrupt to execute, to trustee of foreign property . . . . . §7
Cases, of, by court of bankruptcy . . . . . §2
when petition filed against member of partnership . . . . . §32
Definition of . . . . . §1
Preference, when given by . . . . . §60
Subsequent to Act, within four months, etc., void . . . . . §67
Within four months, void under State laws, void under Act . . . §67

Trial—
By courts of bankruptcy, of bankrupts . . . . . §2
By jury, in involuntary bankruptcy cases . . . . . §19

Trustee
Accounts, etc., open to inspection . . . . . §49
to keep . . . . . §47
file final, when . . . . . §25
Appeal bond, not required to give . . . . . §25
Appointment . . . . . §2
creditors to make when . . . . . §44
court to make when . . . . . §44
Arbitration, trustee to submit to, etc. . . . . §26
Bankrupt, to inform, of attempt to evade Act . . . . . §7
Banks as depositories, etc., to deposit money in . . . . . §47
Bonds of . . . . . §50
amount . . . . . §50
creditors to fix . . . . . §50
court to fix, when . . . . . §50
appeal, not required to give . . . . . §25
evidence of title, certified copy of order approving, etc. . . . . §21
failure to give, effect . . . . . §50
filed where . . . . . §50
joint or several, etc. . . . . §50
liability on . . . . . §50
suits on . . . . . §50

References to Sections.

Trustee—*Continued.*
sureties approved by court . . . . . §50
corporations may be . . . . . §50
number of . . . . . §50
value of property, etc. . . . . §50
court to require evidence . . . . . §50
time of giving . . . . . §50
Commissions of . . . . . §48
Compensation of . . . . . §48
apportionment of . . . . . §48
withholding . . . . . §48
Compromise controversies, may, when . . . . . §27
Concurrence of two necessary . . . . . §47
Condition of estate, to report when . . . . . §47
Convey title . . . . . §70
Corporations authorized to act as . . . . . §45
Created by Act . . . . . §33
Creditors to appoint, when . . . . . §44
Creditors' meetings, to make detailed statements, at final . . . . . §47
Court to appoint, when . . . . . §44
Death or removal, effect . . . . . §46
Depositories, deposit money in . . . . . §47
disburse by check, etc., on . . . . . §47
Dividends to pay, when . . . . . §47
Document, punishment for secreting, destroying, etc. . . . . §29
Duties of . . . . . §47
Embezzlement by . . . . . §29
Error, not required to give bond on . . . . . §25
Estates to close up, etc. . . . . §47
Exemptions to set apart . . . . . §47
File order of adjudication with recorder . . . . . §46
Final accounts to file, when . . . . . §47
reports to make . . . . . §47
Forfeitures incurred by bankrupt, etc., not liable for . . . . . §50
Information to furnish . . . . . §47
Inspection of papers, etc., penalty for refusing . . . . . §29
Interest to pay . . . . . §47
Joint, may prosecute or defend suits . . . . . §45
Liability of . . . . . §50
Lien, subrogated to rights of holder of . . . . . §67
Meetings of creditors, make statements before final . . . . . §47
Money, deposit in designated depository . . . . . §47
disburse by check, etc., on . . . . . §47
Number of . . . . . §44
Offenses by . . . . . §29
Office of, where . . . . . §45
"Officer" includes . . . . . §1
Partnership creditors to appoint . . . . . §4
Payments to attorneys, etc., re-examined by, when . . . . . §60
Penalty incurred by bankrupt, not liable personally for . . . . . §50
Property of bankrupt, to collect, etc. . . . . §47
Punishment for offenses, etc. . . . . §29
Qualifications of . . . . . §45
Recovery of property by . . . . . §70
Removal of, effect . . . . . §46
on hearing and notice . . . . . §2
Reports, to make . . . . . §47
final, when . . . . . §47
Residents of, must be, or have office in district . . . . . §45
Schedule, copy of, to be filed for . . . . . §7
Subrogation to rights of lienholder . . . . . §67
Successor may prosecute or defend suits . . . . . §46
Suits by, in what courts to be brought . . . . . §23
limitation of, by or against . . . . . §11
on bond . . . . . §50

References to Sections.

Trustee—*Continued.*
Taxes, credited with, on receipt filed, for payment of . . . §64
Title to property vested in . . . §70
on setting composition aside, etc. . . . §70
to convey . . . §70
Transfer by, penalty for unlawful . . . §29
Vacancy, appointment in case of . . . §44
by failure to give bond . . . §50
Validity of act requires concurrence of two . . . §47

Unclaimed dividends—
Disposition of . . . §66

Unincorporated company—
May be adjudged involuntary bankrupt . . . §4

United States—
Jury trials, laws of, applicable to . . . §19
Penalties, owing, allowance of . . . §57
Taxes, of, discharge not to affect . . . §17

United States Courts—(*See also* COURTS, COURTS OF BANKRUPTCY)—
Appeals and writs of error when taken in . . . §25
Courts of bankruptcy . . . §2
Jurisdiction of . . . §2
of appellate courts . . . §24
circuit court of appeals . . . §24

United States Circuit Court of Appeals—
Appeals to . . . §25
Jurisdiction . . . §24
appellate . . . §25
concurrent, etc. . . . §23

United States Supreme Court—
Appeals, etc., to . . . §25
Jurisdiction . . . §24
appellate . . . §25

Vacancy—
Referee's office, in . . . §43
Trustee's or referee's office, in, by failure to give bond . . . §50

Value—
Sale of property for not less than 75 percent of . . . §70
Securities, of, held by secured creditor how determined . . . §57
Surety's property, of, evidence required . . . §50

Venue—
Transfer of cases, to other courts of bankruptcy . . . §2
Trustee's suits, of . . . §23

Verification—
Of pleadings, when required . . . §18

Voluntary bankrupt—
Corporation can not be adjudged . . . §4
Who may be adjudged . . . §4
Who may file petition . . . §59

Voluntary petition—
Who may file . . . §59

Voters—
At creditors' meetings . . . §56
holders of secured claims can not be, etc. . . . §56

Wage-earner—
Definition of . . . §1
Involuntary bankrupt, can not be adjudged . . . §4

References to Sections.

Wages—
Priority in payment of . . . . . §64

Waiver—
Of right to jury trial . . . . . §19

Warrant—
Departure of bankrupt, on, when to issue . . . . . §9
Seizure of bankrupt property, on, to prevent deterioration . . . . §69

Widow—
Dower of, fixed by laws of State, etc. . . . . §8

Witnesses—
Attendance before referee . . . . . §41
Compulsory attendance for examination . . . . . §21
Contempt for refusal to appear, etc. . . . . §41
Fees and mileage of, to be first paid or tendered, when . . . . . §41

Women—
"Persons" to include . . . . . §1

Words—(*see* DEFINITION)—
Meaning of . . . . . §1

Workmen—
Wages of, priority in payment . . . . . §64

Writing—
Debts evidenced by, allowed and proved . . . . . §67
Filed to be, with proof of claim . . . . . §57

Writ of Error—
Trustees not required to give bond when suing out . . . . . §25

THE ACT OF 1867.

The Bankruptcy Law of 1867.[1]

CHAPTER ONE.

COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

Scope of the jurisdiction of courts of bankruptcy. SEC. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement

[1] The text is taken from the Revised Statutes of the United States, edition of 1878. The original act of 1867 was passed March 2, 1867 (14 Stat. at L. 517) and the principal amendment to this act was passed June 22, 1874 (18 Stat. at L. 178). Contemporaneously with the passage of the amendatory act of June 22, 1874, amending by specific reference the bankrupt act of 1867, congress enacted a complete substitute for the act, as Title sixty-one of the statutes, and repealed the act in common with other general and permanent acts. The amendatory act has been incorporated in the revised edition of the statutes of 1878 and will therefore be included in the text. (See preface to edition of 1878). The effect of passing the amendment and the revised statutes on the same day caused some confusion in construing them. See In re Oregon Bul. Printing & Pub. Co. No. 10558 Fed. Cas., S. C. 13 N. B. R. 199; In re Townsend 2 Fed. Rep. 559; Brown *v.* White 16 Fed. Rep. 200. A list of all the amendatory acts may be found on Page 12 *ante*.

This statute was repealed by the act of June 7, 1878, to take effect Sept. 1, 1878, 20 Stat. at L. 99.

of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Authority of district courts and judges. SEC. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

Sessions of the district courts. SEC. 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

Power of district courts to compel obedience. SEC. 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Powers of circuit judge during absence, sickness, or disability of district judge. SEC. 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Powers of the supreme court for the District of Columbia. SEC. 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that District.

Powers of the supreme courts for the Territories. SEC. 4978. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme courts of the several Territories when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

Jurisdiction of actions between assignees and persons claiming adverse interests. SEC. 4978. The several circuit courts shall have within each district concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming

an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

Appeals to circuit court. SEC. 4980. Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

How taken. SEC. 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

How entered. SEC. 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

Waiver of appeal. SEC. 4983. If the appellant, in writing, waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

Appeal from decision rejecting claim. SEC. 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to a creditor.

Costs. SEC. 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they are to be allowed out of the estate.

Power of general superintendence conferred on circuit court. SEC. 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

Superintendence by supreme courts of Territories. SEC. 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

Power of district judge in a district not within any organized circuit. SEC. 4988. In districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

Appeal and writ of error to Supreme Court. SEC. 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit court to the Supreme Court, unless the matter in dispute in such case exceeds two thousand dollars.

Supreme Court may prescribe rules. SEC. 4990. The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders, for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed, except such as are established by this Title or by law, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

What constitutes commencement of proceedings. SEC. 4991. The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

Records of bankruptcy proceedings. SEC. 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

Registers in bankruptcy. SEC. 4993. Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy, when any vacancy occurs in such office, to assist him in the performance of his duties, under this Title, unless he shall deem the continuance of the particular office unnecessary.

Who are eligible. SEC. 4994. No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

Qualification. SEC. 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title, "PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS," and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Restrictions upon registers. SEC. 4996. No register shall be counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of those courts as courts of bankruptcy, nor shall he be interested in the fees or emoluments arising from any such trusts.

Removal of registers. SEC. 4997. Registers are subject to removal from office by the judge of the district court.

Powers of registers. SEC. 4998. Every register in bankruptcy has power:

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

Limitations upon powers of registers. SEC. 4999. No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

Registers to keep memoranda of proceedings. SEC. 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

Registers to attend at place directed by judge. SEC. 5001. The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any proceedings under this Title.

Power to summon witnesses. SEC. 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

Mode of taking evidence. SEC. 5003. Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Depositions and acts to be reduced to writing. SEC. 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

Witnesses must attend. SEC. 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the time and place designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna.

Contempt before register. SEC. 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

Registers may act for each other. SEC. 5007. Any register may act in the place of any other register appointed by and for the same district court.

Payment of fees of registers. SEC. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

Contested issues to be decided by judge. SEC. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

Certificates of matters to be decided by judge. SEC. 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

Appeal from judge's decision upon questions submitted. SEC. 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case

that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

Penalties against officers. SEC. 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

Meaning of terms and computation of time. SEC. 5013. In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger," shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal," shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, Christmas Day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

CHAPTER TWO.

VOLUNTARY BANKRUPTCY.

Petition and schedules. SEC. 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of res-

idence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

Schedule of debts. SEC. 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Inventory of property. SEC. 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

Oath to petition and schedule. SEC. 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

Oath of allegiance. SEC. 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

Warrant to marshal. SEC. 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

Amendment of schedule. SEC. 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

Acts of bankruptcy. SEC. 5021. Any person residing within the

jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

First. Who departs from the State, district, or Territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

Second. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

Third. Who conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or,

Fourth. Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

Fifth. Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or,

Sixth. Who has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

Seventh. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property, to defeat or delay the operation of this act; or,

Eighth. Who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee, may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

Prior acts of bankruptcy. SEC. 5022. Any act of bankruptcy com-

mitted since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

Who may file petition. SEC. 5023. An adjudication of bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

Proceedings after filing the petition. SEC. 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

Service of order to show cause. SEC. 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

Proceedings on return day. SEC. 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writ-

ing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Costs at trial. SEC. 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

Warrant. SEC. 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

Distribution of property of debtor. SEC. 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those [*hereinbefore*] [hereinafter] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

Schedule and inventory. SEC. 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, postpaid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

Proceedings when debtor is absent. SEC. 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

CHAPTER FOUR.

PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

Contents of notice to creditors. SEC. 5032. The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Marshal's return. SEC. 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

Choice of assignee. SEC. 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of the register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Who are disqualified. SEC. 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

Bond of assignee. SEC. 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

Assignee liable for contempt. SEC. 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully re-

quired by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Resignation of the trust. SEC. 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

Removal of assignee. SEC. 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

Effect of resignation or removal. SEC. 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

Filling vacancies. SEC. 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

Vesting estate in remaining assignee. SEC. 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Former assignee to execute instruments. SEC. 5043. Any former assignee, his executors and administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

Assignment. SEC. 5044. As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor,

and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

Exemptions. SEC. 5045. There shall be exempted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws in each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

What property vests in assignee. SEC. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

Right of action of assignee. SEC. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own

name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

No abatement by death or removal. SEC. 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

Copy of assignment conclusive evidence of title. SEC. 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

Bankrupt's books of account. SEC. 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

Debtor must execute instruments. SEC. 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Chattel mortgages. SEC. 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

Trust property. SEC. 5053. No property held by the bankrupt in trust shall pass by the assignment.

Notice of appointment of assignee and record of assignment. SEC. 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three consecutive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the

bankrupt ought by law to be recorded. [And the record of such assignment, or of a duly certified copy thereof, shall be evidence thereof in all courts.]

Assignee to demand and receive all assigned estate. SEC. 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

Notice prior to suit against assignee. SEC. 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

Time of commencing suits. SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

Assignee's accounts of money received. SEC. 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

Assignee to keep money and goods separate. SEC. 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

Temporary investment of money. SEC. 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not to exceed the legal rate, as the bank may contract with the assignee to pay thereon.

Arbitration. SEC. 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

Assignee to sell property. SEC. 5062. The assignee shall sell all

such unincumbered estate, real and personal, which comes into his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors.

Sale of disputed property. SEC. 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Sale of uncollectable assets. SEC. 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

Sale of perishable property. SEC. 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

Discharge of liens. SEC. 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

Provable debts. SEC. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken,

converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved againt the estate.

Contingent debts. SEC. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Liability of bankrupt as surety. SEC. 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

Sureties for bankrupt. SEC. 5079. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

Debts falling due at stated periods. SEC. 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

No other debts provable. SEC. 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

Set-offs. SEC. 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

Distinct liabilities. SEC. 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or

other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Secured debts. SEC. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

Proof of debt. SEC. 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court, within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

Creditor's oath. SEC. 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or

receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Oath, by whom made. SEC. 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Oath, before whom taken; proof sent to register. SEC. 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

Proof to be sent to assignee. SEC. 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Examination by court into proof of claims. SEC. 5081. The court may, on application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake.

Withdrawal of papers. SEC. 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against

whose estate it has been proved, and the date and amount of any dividend declared thereon.

Postponement of proof. SEC. 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of the opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Surrender of preferences. SEC. 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

Allowance and list of debts. SEC. 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

Examination of bankrupt. SEC. 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

Examination of witness. SEC. 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

Examination of bankrupt's wife. SEC. 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

Examination of imprisoned or disabled bankrupt. SEC. 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the

court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

No abatement upon death of debtor. SEC. 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Distribution of bankrupt's estate. SEC. 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

Second meeting of creditors. SEC. 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

Third meeting of creditors. SEC. 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor after-

ward come to the hands of the assignee in the case of the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

Notice of meetings. SEC. 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

Creditor may act by attorney. SEC. 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

Settlement of assignee's account. SEC. 5096. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

Dividend not to be disturbed. SEC. 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Omission of assignee to call meetings. SEC. 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second or third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if meeting had been duly held.

Compensation of assignee. SEC. 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

Commissioners. SEC. 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per

centum on the excess of over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

Debts entitled to priority. SEC. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of the proceedings in bankruptcy.

Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Notice of dividend to each creditor. SEC. 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

Settlement of bankrupt estates by trustees. Composition with creditors. SEC. 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and

such creditors as desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have the power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

CHAPTER FIVE.

PROTECTION AND DISCHARGE OF BANKRUPTS.

Bankrupt subject to orders of court. SEC. 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

Waiver of suit by proof of debt. SEC. 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

Stay of suits. SEC. 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

Exemption from arrest. SEC. 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

Application for discharge. SEC. 5108. (*At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt*

may apply to the court for a discharge from his debts.) (At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.)

Notice to creditors. SEC. 5109. Upon application for a discharge being made the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

Grounds for opposing discharge. SEC. 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preferences contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or

has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false and fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

Specification of grounds of opposition. SEC. 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

Assets equal to fifty per cent. required. SEC. 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

Final oath of bankrupt. SEC. 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

Discharge of bankrupt. SEC. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive

a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

Form of certificate of discharge. SEC. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, district of

Whereas has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "BANKRUPTCY," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of , .

(Seal.) , Judge.

Second bankruptcy. SEC. 5116. No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

Certain debts not released. SEC. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Liability of other persons not released. SEC. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

Effect of discharge. SEC. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The

certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

Application to annul discharge. SEC. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditors before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

CHAPTER SIX.

PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

Bankruptcy of partnerships. SEC. 5121. Where two or more persons who are partners in trade are adjudged bankrupts, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any

balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

Of corporations and joint-stock companies. SEC. 5122. The provisions of this Title shall apply to all moneyed business or commercial corporations and joint-stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof.

Authority of State courts in proceedings against corporations, &c. SEC. 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the

courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

CHAPTER SEVEN.

FEES AND COSTS.

Fees. SEC. 5124. In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this [*act*,] [Title,] one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Traveling and incidental expenses. SEC. 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of

the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

Marshal's fees. SEC. 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

Justices of Supreme Court may change tariff of fees. SEC. 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services or the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

CHAPTER EIGHT.

PROHIBITED AND FRAUDULENT TRANSFERS.

Preferences by insolvent. SEC. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

Fraudulent transfers of property. SEC. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [*act*] [Title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

Presumptive evidence of fraud. SEC. 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is prescribed in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud.

Fraudulent agreements. SEC. 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for a discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

Penalties against fraudulent bankrupt. SEC. 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, trans-

fer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, wilfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

TABLE OF CASES

TABLE OF CASES.

References are to pages.

Abbe, *In re* (2 N. B. R. 75), 265, 270, 571, 751.
Abbott v. Hicks (5 Bing., N. C., 578), 315, 316.
Abendroth v. Van Dolsen (131 U. S., 66), 777, 783.
Ableman v. Booth (21 How. 506), 837.
Ablowich, *In re* (99 Fed. Rep. 81), 658, 750.
Abraham, *In re* (93 Fed. Rep. 767), 139, 241, 812, 814.
Abraham v. Plestoro (3 Wend., N. Y., 538), 377.
Abrahams, *In re* (5 Law Rep. 328), 201.
Abraham Steers Co., *In re* (112 Fed. Rep. 406), 332, 333. 587, 588, 811.
Abram, *In re* (103 Fed. Rep. 272), 135, 138, 354.
Adams, *In re* (3 Ben. 7), 612.
Adams, *In re* (29 Fed. Rep. 843), 263, 785.
Adams, *In re* (104 Fed. Rep. 72), 657, 659.
Adams v. Collier (122 U. S. 382), 384, 575.
Adams v. Low (16 How. 148), 830.
Adams v. Meyers (1 Saw. 306), 373.
Adams v. Nat. Bank (2 Fed. Rep. 174), 599.
Adams v. Terrell (4 Fed. Rep. 802), 143, 247.
Adams Sartorial Co., *In re* (101 Fed. Rep. 215), 132, 133.
Adler, *In re* (2 Woods 571), 357.
Adler, *In re* (103 Fed. Rep. 444), 818.
Adler v. Jones (109 Fed. Rep. 967), 686, 687, 688.
Akins v. Stradley (51 Ia. 414), 75.
Alabama & C. R. Co. v. Jones (7 N. B. R. 145), 182, 813.
Alabama & C. R. Co. v. Jones (5 N. B. R. 97), 815.
Albany Exch. Bank v. Johnson (5 Law Rep. 313), 10, 247.
Albrecht, *In re* (104 Fed. Rep. 974), 742.
Alcott v. Avery (1 Barb. Ch., N. Y., 347), 784.
Alden Electric Co., *In re* (123 Fed Rep. 415), 820, 821, 836, 837, 838.
Alder v. Keighly (15 M. & W. 325), 611.
Alderdice v. State Bank (1 Hughes 47), 388, 590.
Alderson, *In re* (98 Fed. Rep. 588), 290, 724, 765.
Aldred v. Constable (4 Ad. & El. N. S. 674), 571.
Alexander, *In re* (1 Low. 470), 163.
Alexander, *In re* (102 Fed. Rep. 464), 575.
Alexander, *In re* (Chase 295), 810, 812.
Alexander v. Galt (9 Fed. Rep. 149), 573, 581.
Alexander v. McCullough (32 Leg. Int. 336), 367.
Alexander v. Union Surety & Guaranty Co. (11 Am. B. R. 32), 361.
Allen, *In re* (13 Blatch. 271), 667.
Allen, *In re* (96 Fed. Rep. 512), 285, 301, 725, 729.
Allen v. Ferguson (18 Wall. 1), 780, 781.
Allen v. Hartley (4 Doug. 20), 152, 249.
Allen v. Massey (17 Wall. 351), 382, 393.
Allen v. Montgomery (48 Miss. 101), 382, 383, 606.
Allen v. Thompson (10 Fed. Rep. 116), 176, 785.
Allen v. Whittemore (8 Ben. 485), 367.
Alling v. Egan (11 Rob., La., 244), 765.
Alloway v. Steere (10 Q. B. D. 22), 314.
Alsagar v. Currie (12 M. & W. 751), 311.
Alsberg, *In re* (16 N. B. R. 116), 639, 644, 645.
Alston v. Robinett (37 Tex. 56), 785.
Altenberg v. Grant (83 Fed. Rep. 980), 821, 831, 832, 837.

References are to pages.

Altman, *In re* (95 Fed. Rep. 263), 250.
Am. Bell. Tel. Co. v. Pan Electric Tel. Co. (28 Fed. Rep. 625), 210.
American Brewing Co., *In re* (112 Fed. Rep. 752), 234, 237.
American Construction Co. v. Jacksonville Ry. Co. (148 U. S. 380), 798, 800, 802, 803.
American Construction Co. v. Railroad Co. (52 Fed. Rep. 937), 671, 672.
American File Co. v. Garrett (110 U. S. 295), 372, 405, 406, 417.
Ames, *Ex parte* (1 Low. 561), 395, 402, 593.
Ames v. Moir (138 U. S. 311) 769, 770, 775.
Amory v. Lawrence (3 Clif. 523), 372.
Amory & Leeds, *In re* (No. 336*a* Fed. Cas.), 788.
Amoskeag Mfg. Co. v. Barnes (49 N. H. 312), 774.
Amsinck v. Bean (22 Wall. 403), 243, 245, 413.
Amy v. Watertown (130 U. S. 320), 361.
Anderson, *In re* (23 Fed. Rep. 482), 79, 207, 221, 321.
Anderson, *In re* (103 Fed. Rep. 854), 139.
Anderson, *In re* (110 Fed. Rep. 131), 481, 482.
Anderson, *Ex parte* (4 Q. B. D. 606), 290.
Anderson, *Ex parte* (14 Q. B. D. 606), 292.
Anderson v. Anderson (65 Ga. 518), 293.
Anderson v. Hampton (1 B. & Ald. 308), 637.
Anderson v. Miller (15 Smedes & M., Miss., 286), 414.
Andrews v. Nat. Foundry & Pipe Works (77 Fed. Rep. 774), 805.
Anderson v. Wheeler (25 Conn. 603), 759.
Andrae Co., *In re* (117 Fed. Rep. 561), 600.
Andrews v. Graves (1 Dill. 108), 389.
Andrews v. Thum (64 Fed. Rep. 149), 837.
Andrews v. Thum (72 Fed. Rep. 290), 842.
Andrews Bros. Co. v. Youngstown Coke Co. (86 Fed. Rep. 585), 147.
Angier, *In re* (4 N. B. R. 619), 376, 396, 438.
Anibal v. Heacock (2 Fed. Rep. 169), 386, 573.
Ankeny (100 Fed. Rep. 614), 294, 324, 345.
Anon (1 Atk. 262), 763.
Anon (13 Ves. 590), 145.
Anon (1 N. B. R. 122), 180, 280, 349.
Anon (1 N. B. R. 216), 178, 198, 276.
Anonymous (No. 466 Fed. Cas.), 160.
Ansell v. Robson (2 Cromp. & J. 610), 397, 399, 400.
Anson, *In re* (101 Fed. Rep. 698) 727.
Anson, Bangs & Co. v. Blue Ridge R. R. Co. (23 How. 1), 828.
Antigo Screen Door Co., *In re* (123 Fed Rep. 249), 100.
Appel, *In re* (103 Fed Rep. 931), 201, 209.
Apperson v. Stewart (27 Ark. 619), 779.
Apple v. Crawford (105 Pa. St. 300), 108.
Appold, *In re* (1 N. B. R. 621), 285, 398.
Archenbrown (12 N. B. R. 17), 148.
Archer v. Duval (1 Fla. 219), 361.
Arlington v. Arlington (10 Am. B. R. 103), 290.
Armour Packing Co. v. Brown (Minn., 79 N. W. Rep. 522), 31.
Armstrong v. Chemical Nat. Bank (41 Fed. Rep. 234), 590.
Arnett, *In re* (112 Fed. Rep. 770), 352, 667.
Arnold v. Leonard (20 Miss. 258), 713.
Arnold v. Maynard (2 Story 349), 751.
Arnstein, *In re* (101 Fed. Rep. 706), 305, 396, 397, 401.
Arrington, *In re* (113 Fed. Rep. 498), 687.
Ashby v. Steere (2 Woodb. & M. 347), 571, 751.
Ashcroft v. Walworth (1 Holmes 152), 378.
Ashley v. Kell (2 Stra. 1207), 415.
Ashuelot Sav. Bank v. Frost (19 Fed. Rep. 237), 591.
Ashworth, *Ex parte* (18 L. R. Eq. 705), 240.
Aspinall v. Pickford (3 B. & P. 44*n*), 600.

References are to pages.

Aspinwall, *In re* (7 Ben. 433), 627, 628.
Asten, *In re* (8 Ben. 350), 693.
Atkins v. Wilcox (105 Fed. Rep. 595), 305, 306, 340, 397.
Atkinson, *In re* (7 N. B. R. 143), 374.
Atkinson v. Brindell (2 Bing., N. C., 225), 571, 751.
Atkinson v. Elliott (7 T. R. 378), 311.
Atkinson v. Farmers' Bank, (Crabbe 529), 10, 751.
Atkinson v. Fortinberry (15 Miss. 302), 782.
Atkinson v. Purdy (Crabbe 551), 106.
Atlantic Co. v. Dittman (9 Fed. Rep. 317), 622, 669.
Audubon v. Shufeldt (181 U. S. 575), 93, 284, 290, 318, 765, 795.
Auffm'ordt v. Raisin (102 U. S. 620), 584, 592.
Augenstein, *In re* (2 MacArthur, D. C., 322), 787.
Auriol v. Mills (4 T. R. 60), 401.
Ayers, *In re* (123 U. S. 456), 673.

B.

Baber, *In re* (119 Fed. Rep. 520), 354.
Babbitt v. Burgess (2 Dill. 169), 205.
Babbitt v. Kelley (9 Am. B. R. 335), 580, 582.
Babbitt v. Walbrun (6 N. B. R. 359), 104.
Bachman v. Packard (2 Saw. 264), 105.
Backhouse v. Jett (1 Brock 500), 419.
Bacon v. Hart (1 Black 39), 832.
Badger v. Gilmore (33 N. H. 361), 779.
Badham v. Mee (7 Bing. 695), 380.
Baer v. Grell (6 Am. B. R. 428), 762.
Baerncopf, *In re* (117 Fed. Rep. 975), 743, 744, 752.
Bagnall v. Ableman (4 Wis. 184), 649, 653.
Bagnall v. Villar (12 Ch. Div. 812), 402.
Bailey, *In re* (1 Woolw. 422), 649.
Bailey v. Finch (7 L. R. Q. B. 34), 314.
Baily v. Weir (21 Wall. 342), 361.
Baird, *In re* (8 Am. B. R. 649), 74.
Baird, *In re* (112 Fed. Rep. 960), 354.
Bainten v. Ward (7 Ves. 503), 381.
Baker, *In re* (96 Fed. Rep. 954), 284, 291, 765.
Baker, *In re* (104 Fed. Rep. 287), 813, 815.
Baker-Ricketson Co., *In re* (97 Fed. Rep. 489), 160, 168, 170.
Balance v. Forsyth (21 How. 389), 823.
Baldwin, *In re* (119 Fed. Rep. 796), 743.
Baldwin v. Bank of Newberry (1 Wall. 234), 23, 759.
Baldwin v. Hale (1 Wall. 228), 19, 20, 22, 23, 759.
Baldwin v. Rosseau (1 N. Y. Leg. Obs. 391), 10, 163.
Balfour v. Wheeler (18 Fed. Rep. 893), 570.
Ball, *In re* (118 Fed. Rep. 672), 88, 92.
Ball, *In re* (123 Fed. Rep. 164), 323, 331, 596.
Ballantine v. Golding (Cook's Bk. Law 419), 757.
Ballin v. Ferst (55 Ga. 546), 256.
Bank v. Cooper (20 Wall. 171), 105, 810, 813.
Bank v. Franciscus (10 Mo. 27), 784.
Bank v. Hatch (57 N. H. 460), 637.
Bank v. Herbert (8 Cranch 36), 599, 602.
Bank v. Massey (192 U. S. 138), 312.
Bank v. Onion (16 Vt. 470), 784.
Bank v. Sherman (101 U. S. 403), 70, 361, 366, 584.
Bank of Augusta v. Earl (13 Pet. 585), 425.
Bank of Commerce v. Elliott (6 Am. B. R. 409), 564, 569.
Bank of Commerce v. Russell (2 Dill. 215), 413.
Bank of Holdridge v. Johnson (10 Am. B. R. 208), 595.
Bank of Leavenworth v. Hunt (11 Wall. 391), 393, 595.
Bank of Madison, *In re* (5 Bliss. 515), 413.
Banks v. Manchester (128 U. S. 244), 230.
Banks v. Orsden (2 Wall. 57), 395.
Banning v. Bleakley (27 La. Ann. 257), 772.
Banque-Franco-Egyptienne v. Brown (24 Fed. Rep. 106), 35, 783.

References are to pages.

Barber, *In re* (97 Fed. Rep. 547), 126, 363.
Barbour v. Colt (118 Fed. Rep. 272), 835.
Barbour v. Priest (103 U. S. 293), 570, 609.
Bard, *In re* (108 Fed. Rep. 208), 623, 630.
Barden, *In re* (101 Fed. Rep. 553), 183, 252, 254.
Bardes v. Hawarden Bank (178 U. S. 524), 72, 75, 80, 84, 85, 607.
Bardes v. Hawarden Bank (175 U. S. 526), 790, 791.
Barker, *In re* (111 Fed. Rep. 501), 126, 127.
Barkley v. Barkley (184 Ill. 375), 765.
Barman, *In re* (14 N. B. R. 125), 592.
Barned's Banking Co., *In re* (10 L. R. Ch. App. 198), 339.
Barnes, *In re* (18 Fed. Rep. 158), 725.
Barnes v. Rettew (No. 1019 Fed. Cas.), 391.
Barnes v. United States (12 N. B. R. 526), 293.
Barnett, *In re* (3 Pitts. Rep. 559), 402.
Barnett, *In re* (No. 1024 Fed. Cas.), 415, 416.
Barnett v. Pool (23 Tex. 517), 367, 376, 395, 634.
Barrett, *In re* (2 Hughes 444), 349.
Barrett v. United States (169 U. S. 218), 57.
Barron v. Benedict (44 Vt. 518), 779.
Barron v. Newberry (1 Biss. 149), 395, 710.
Barrow, *In re* (1 N. B. R. 481), 370.
Barrow, *In re* (98 Fed. Rep. 582), 402, 416.
Barstow v. Hansen (2 Hun., N. Y., Supr., 333), 784.
Bartenbach, *In re* (11 N. B. R. 61), 289, 300, 438, 439.
Bartholomew v. Bean (18 Wall. 635), 387, 580, 586.
Bartholomew v. West (2 Dill. 290), 434, 436.
Bartlett v. Peck (5 La. Ann. 669), 781.
Bartlett v. United States (106 Fed. Rep. 884), 661, 665.
Barton v. Pettit (7 Cranch 288), 798.
Barton v. Tower (5 Law Rep. 214), 10.
Bartusch, *In re* (97 Fed. Rep. 761), 89, 770, 772.
Bashinski v. Talbott (119 Fed. Rep. 337), 428, 436, 461, 810.
Bassett, *In re* (8 Fed. Rep. 266), 148.
Batchelder v. Low (43 Vt. 662), 785.
Bates, *In re* (27 Fed. Rep. 604), 788.
Bates, *In re* (100 Fed. Rep. 263), 256.
Bates v. Tappan (99 Mass. 376), 564, 755, 756.
Bates Machine Co., *In re* (91 Fed. Rep. 625), 170, 219.
Batt v. Proctor (45 Fed. Rep. 515), 209.
Baudouine, *In re* (96 Fed. Rep. 536), 395.
Baum, *In re* (1 Ben. 274), 740.
Bauman v. Feist (107 Fed. Rep. 83), 660, 661.
Baumann, *In re* (96 Fed. Rep. 946), 156, 230.
Bauserman v. Blunt (147 U. S. 652), 319.
Baxter, *Ex parte* (12 Fed. Rep. 72), 339.
Baxter, *In re* (25 Fed. Rep. 703), 570.
Baxter, *In re* (28 Fed. Rep. 452), 588.
Baxter, *In re* (18 N. B. R. 62), 263.
Bayly v. University (106 U. S. 11), 694.
Bayne v. United States (93 U. S. 642), 764.
Beach v. Macon Grocery Co. (120 Fed. Rep. 736), 142, 199, 811, 813.
Beach v. Macon Gro. Co. (116 Fed. Rep. 143), 213, 215.
Beach v. Mosgrove (16 Fed. Rep. 305), 209.
Beal, *In re* (1 Low. 323), 373.
Beals, *In re* (8 Am. B. R. 639), 468, 569.
Bean, *In re* (100 Fed. Rep. 262), 408, 435, 442, 542.
Bean v. Brookmire (1 Dill. 25), 386, 389, 582.
Bear, *In re* (5 Fed. Rep. 53), 201.
Bear v. Chase (99 Fed. Rep. 920), 88, 90, 92.
Beardsley, *In re* (1 N. B. R. 304), 743.

References are to pages.

Beardsley v. Hall (36 Conn. 270), 785.
Beattie v. Gardner (4 Ben. 479), 575, 580.
Beauchamp, *In re* (101 Fed. Rep. 106), 443, 480.
Beaver Coal Co., *In re* (107 Fed. Rep. 98), 285, 725, 728.
Beaver Coal Co., *In re* (110 Fed. Rep. 630), 564, 569.
Beaver Coal Co., *In re* (113 Fed. Rep. 889), 94, 812.
Beck, *In re* (31 Fed. Rep. 554), 786.
Beck, *In re* (92 Fed. Rep. 889), 136, 137, 139.
Beck, *In re* (110 Fed. Rep. 140), 270.
Beck, *In re* (1 N. B. R. 588), 581.
Becker, *In re* (98 Fed. Rep. 407), 213, 407, 702, 712.
Becker, *In re* (106 Fed. Rep. 54), 409, 657.
Beckerford, *In re* (1 Dill. 45), 19, 394, 426, 602.
Beckham v. Drake (2 H. L. 579), 418, 419.
Becket, *In re* (2 Woods 173), 688, 694.
Bedingfield, *In re* (96 Fed. Rep. 190), 202, 219, 220, 240.
Beebe, *In re* (116 Fed. Rep. 48), 656, 660.
Beecher v. Bininger (7 Blatch. 170), 105.
Beerman, *In re* (112 Fed. Rep. 663), 574.
Beers v. Hanlin (99 Fed. Rep. 695), 155, 160, 189, 226, 318.
Beisenthal, *In re* (14 Blatch. 146), 27.
Belcher v. Burnett (126 Mass. 230), 395.
Belden, *In re* (4 N. B. R. 194), 619.
Belden, *In re* (4 Ben. 225), 739.
Belden, *In re* (120 Fed. Rep. 524), 714.
Belfast, The (7 Wall. 624), 603.
Bell v. Leggett (3 Selden, N. Y., 178), 662.
Bellah, *In re* (116 Fed. Rep. 69), 142, 199.
Bellis, *In re* (3 Ben. 386), 627, 628.
Bellis, *In re* (4 Ben. 53), 748, 749, 754.
Bellows, *In re* (3 Story 428), 564.
Belton v. Hodges (9 Bing. 365), 144.
Bemis, *In re* (104 Fed. Rep. 672), 657, 750.
Benedict, *In re* (8 Am. B. R. 463), 567, 769, 770, 771, 772, 776.
Benham, *In re* (8 N. B. R. 94), 223.
Bennet v. Avant (2 Sneed., Tenn., 152), 641.
Bennett, *Ex parte* (1 Pa. Law Jour. 145), 187.
Bennett, *In re* (2 N. B. R. 181), 408.
Bennett, *In re* (8 Ben. 561), 690.
Bennett v. Everett (3 R. I. 152), 781.
Benson, *In re* (8 Biss. 116), 415, 416.
Bentley v. Wells (61 Ill. 59), 710.
Berriam, *In re* (6 Ben. 297), 261.
Berry v. Jackson (8 Am. B. R. 485), 756.
Betts v. Bagley (12 Pick. 572), 293.
Bidwell, *In re* (2 N. B. R. 229), 266.
Bielby, *Ex parte* (13 Ves. 17), 339.
Bigelow, *In re* (2 Ben. 480), 332.
Bigler v. Waller (12 Wall. 142), 828, 830, 832.
Big Meadows Gas Co., *In re* (113 Fed. Rep. 974), 189, 226, 281.
Bilborough v. Holmes (5 Chan. Div. 255), 264.
Bimberg, *In re* (121 Fed. Rep. 942), 34, 735, 785.
Bingham, *In re* (94 Fed. Rep. 796), 296, 297, 298, 282, 311.
Bingham v. Morris (7 Cranch 99), 837.
Bininger, *In re* (7 Blatch. 262), 237.
Binns, *In re* (4 Ben. 152), 216.
Bishop v. Church (3 Atk. 691), 313.
Bissell Carpet Sweeper Co. v. Goshen Sweeper Co. (72 Fed. Rep. 519), 842.
Black, *In re* (104 Fed. Rep. 289), 434, 528.
Black, *In re* (17 N. B. R. 599), 336.
Black, *In re* (2 Ben. 196), 609, 751.
Black v. Blazo (117 Mass. 17), 785.
Black v. McClelland (12 N. B. R. 481), 290.
Black v. Zacharie (3 How. 483), 10.

References are to pages.

Blackburn v. Stannard (5 Law Rep. 250), 215.
Blackman, *In re* (6 Chi. Leg. News 18), 726.
Blackmore, *In re* (11 Fed. Rep. 412), 694.
Blagden, *Ex parte* (19 Ves. 465), 314.
Blain, *Ex parte* (12 Chan. Div. 528), 144, 152.
Blair, *In re* (99 Fed. Rep. 76), 157, 238, 247, 250, 251.
Blair, *In re* (102 Fed. Rep. 987), 72, 85, 98, 388, 609.
Blair, *In re* (106 Fed. Rep. 662), 808.
Blair, *In re* (108 Fed. Rep. 529), 563, 564, 566, 569.
Blair v. Turtle (5 Fed. Rep. 394), 206.
Blake, *Ex parte* (11 Ch. Div. 572), 401.
Blake v. Bigelow (5 Ga. 437), 764.
Blake v. Williams (6 Pick., Mass., 286), 377.
Blake, Moffitt & Towne v. Francis-Valentine Co (89 Fed. Rep. 691), 24, 69, 88, 215.
Blalock, *In re* (118 Fed. Rep. 679), 656, 660, 744 750.
Blanc v. Banks (10 Rob., La., 115), 779.
Blanchard v. Russell (13 Mass. 1), 20, 22, 23, 26, 377.
Blanford v. Foote (1 Cowp. 138), 293.
Blankfein, *In re* (97 Fed. Rep. 191), 269.
Blankfein & Deitz, *In re* (2 N. B. N. 40), 135.
Blanks v. Klein (49 Fed. Rep. 1), 834.
Blasdel v. Fowle (120 Mass. 447), 695.
Blease v. Garlington (92 U. S. 1), 834.
Blennerhassatt v. Sherman (105 U. S. 100), 170, 584, 595.
Blight's Estate, *In re* (1 Pa. L. J. 225), 733.
Blight v. Fisher (Pet. C. C. 41), 666.
Blin v. Pierce (20 Vt. 25), 412.
Blitz v. Brown (7 Wall. 693), 834.
Bloch, *In re* (109 Fed. Rep. 790), 156, 157, 158, 161, 163.
Blodgett, *In re* (5 N. B. R. 472), 276.
Bloss, *In re* (4 N. B. R. 427), 215, 216, 335, 340.
Blue Ridge Packing Co., *In re* (125 Fed. Rep. 619), 270, 328, 330, 349.
Blum v. Ellis (73 N. C. 293), 755.
Blum v. Ricks (39 Tex. 112), 769.
Blumberg, *In re* (94 Fed. Rep. 476), 563, 767, 769.
Blumer, *In re* (12 Fed. Rep. 489), 256, 257, 295.
Boardman, *In re* (103 Fed. Rep. 783), 409, 410.
Boas v. Hetzel (3 Pa. 298), 783.
Boasberg, *In re* (1 N. B. N. 133), 753.
Boatman's Sav. Bank v. State Sav. Ass'n (114 U. S. 265), 794.
Boese v. King (108 U. S. 379), 26, 30, 392, 710.
Bogart v. Supply Co. (27 Fed. Rep. 722), 667, 675.
Bolinger, *In re* (108 Fed. Rep. 374), 434, 442, 528.
Bolland v. Nash (8 B. & C. 105), 313.
Bolton, *Ex parte* (2 Rose 389), 339.
Bonesteel, *In re* (2 N. B. R. 330), 624.
Bonnet, *In re* (1 N. Y. Leg. Obs. 310), 10.
Book, *In re* (3 McLean 317), 145, 739.
Booneville Nat. Bank v. Blakey (107 Fed. Rep. 891), 72, 212, 213, 790, 820.
Boorstin, *In re* (114 Fed. Rep. 696), 431, 461, 462.
Booth, *In re* (96 Fed. Rep. 943), 92, 121, 709.
Booth v. Hutchinson (15 L. R. Eq. 30), 310.
Boothroyd, *In re* (14 N. B. R. 223), 443, 444.
Boestick v. Jordan (7 Tenn. 370), 396.
Boston Dry Goods Co., *In re* (125 Fed. Rep. 226), 814.
Boston, etc., R. Co., *In re* (9 Blatch. 409), 228, 233.
Bostwick v. Burnett (74 N. Y. 317), 25, 27.
Botts v. Hammond (99 Fed. Rep. 916), 568.
Bourne, *Ex parte* (2 Glyn. & J. 137), 240.
Blodgett, *In re* (10 N. B. R. 145), 443.
Bloomingdale v. Empire Rubber Co. (114 Fed. Rep. 1016), 375.

References are to pages.

Bousfield & Poole Mfg. Co., *In re* (17 N. B. R. 173), 325.
Boutelle, *In re* (2 N. B. R. 129), 739.
Bowden v. Johnson (107 U. S. 251), 836.
Bowen v. Christian (16 Fed. Rep. 730), 210.
Bowers, *Ex parte* (2 Deac. 99), 148.
Bowery Sav. Bank v. Clinton (2 Sandf., N. Y., 113), 776.
Bowes v. Howe (5 Taunt. 30), 408.
Bowie, *In re* (1 N. B. R. 628), 104, 710.
Bowman v. Harding (56 Me. 559), 564, 755, 756.
Bowyer's Appeal (21 Pa. St. 210), 434.
Boyd v. Glucklich (116 Fed. Rep. 131), 70, 666, 669, 671, 673, 676.
Boyd v. Lemon & Gale Co. (114 Fed. Rep. 647), 159, 163.
Boylan, *In re* (1 Ben. 266), 245.
Boyle v. Zacherie (6 Pet. 348), 22, 759.
Boynton, *In re* (10 Fed. Rep. 277), 143.
Boynton v. Ball (121 U. S. 466), 95, 293, 359, 766, 783.
Bracken v. Milner (104 Fed. Rep. 522), 769, 770, 771, 772, 776.
Bracken v. Union Pac. Ry. Co. (56 Fed. Rep. 477), 209.
Brackett v. Watkins (21 Wend., N. Y., 68), 434, 443.
Bradbury, *In re* (14 C. B. 15), 623.
Bradford v. Rice (102 Mass. 472), 293.
Bradley, *Ex parte* (7 Wall. 372), 675.
Bradley, *In re* (2 Biss. 515), 263.
Bradley Timber Co. v. White (121 Fed. Rep. 779), 166, 167, 200.
Bradshaw v. Jones (20 L. T. 781), 399.
Bradshaw v. Klein (2 Biss. 20), 104, 352, 382.
Bragg, *In re* (5 Law Rep. 323), 620.
Bragasa, *In re* (103 Fed. Rep. 936), 658.
Bragasa v. St. Louis Cycle Co. (107 Fed. Rep. 77), 127, 657.
Brand, *In re* (2 Hughes 334), 335.
Brandies v. Cochrane (105 U. S. 262), 822.
Brandon v. Pate (2 H. Black. 308), 418.
Brandon v. Sands (2 Ves. Jr. 514), 418.
Brandt, *In re* (2 N. B. R. 215), 618, 624.
Bray v. Cobb (91 Fed. Rep. 102), 107, 109, 114, 130, 196, 205, 230.
Bray v. Cobb (100 Fed. Rep. 270), 288, 302, 303, 305, 306, 320, 325, 397, 398.
Breck, *In re* (8 Ben. 93), 402.
Breneman, *In re* (Crabbe 456), 29.
Breslauer, *In re* (10 Am. B. R. 33), 72, 567.
Brett v. Brown (13 Abb. Pr. N. S., N. Y., 295), 206.
Brewer v. Dew (11 M. & W. 625), 421.
Brewster v. Wakefield (22 How. 118), 826.
Brice, *In re* (93 Fed. Rep. 942), 145, 175, 176.
Brice, *In re* (102 Fed. Rep. 114), 750.
Brick, *In re* (4 Fed. Rep. 804), 252, 265, 270, 421.
Bridges v. Sheldon (7 Fed. Rep. 45), 632, 667.
Bridgman, *In re* (2 N. B. R. 252), 731.
Briggs, *Ex parte* (2 Low. 389), 787.
Briggs v. McCullough (36 Cal. 542), 423.
Brinckmann (103 Fed. Rep. 65), 155, 189, 226, 318.
Brinkman, *In re* (6 N. B. R. 541), 710.
Bristol v. Sandford (12 Blatch. 341), 352.
Briswalter v. Long (14 Fed. Rep. 153), 247, 248.
Broach v. Powell (79 Ga. 79), 75.
Broadnax v. Bradford (50 Ala. 270), 770, 771.
Brobst v. Brobst (2 Wall. 96), 828.
Brock v. Hoppock (2 N. B. R. 7), 231.
Brock v. Terrill (2 N. B. R. 643), 370.
Brockett v. Brockett (2 How. 238), 822, 828 830.
Brockway, *In re* (12 Fed. Rep. 69), 748, 749.
Brockway, *In re* (23 Fed. Rep. 583), 738.

References are to pages.

Brodbine, *In re* (93 Fed. Rep. 643), 407.
Bromley, *In re* (3 N. B. R. 286), 618.
Bromley v. Smith (2 Biss. 511), 368, 418.
Brooke, *In re* (100 Fed. Rep. 432), 113, 276, 349.
Brooke v. Hewitt (3 Ves. 253), 418.
Brooke v. McCracken (10 N. B. R. 461), 104, 105.
Brooks, *In re* (91 Fed. Rep. 508), 101, 370.
Brooks v. Farwell (4 Fed. Rep. 167), 206.
Brooks v. Scroggins (11 B. R. 258), 388, 403, 583.
Broom, *In re* (123 Fed. Rep. 639), 724.
Broome v. Robinson (7 East 339), 399.
Brown, *In re* (91 Fed. Rep. 358), 403.
Brown, *In re* (100 Fed. Rep. 441), 442, 528.
Brown, *In re* (111 Fed. Rep. 979), 190.
Brown, *In re* (112 Fed. Rep. 49), 744.
Brown, *In re* (123 Fed. Rep. 336), 326, 696.
Brown, *In re* (19 N. B. R. 312), 786.
Brown, *In re* (3 N. B. R. 250), 431, 441.
Brown, *In re* (5 Law Rep. 121), 181.
Brown, *In re* (5 Ben. 1), 293.
Brown v. Case (6 Am. B. R. 744), 566, 567.
Brown v. Cuming (2 Caines, N. Y., 33), 310.
Brown v. Farmers' Bank (6 Bush., Ky., 198), 318.
Brown v. Heathcote (1 Atk. 160), 368, 731.
Brown v. Gibbons (37 Ia. 654), 710.
Brown v. Guichard (7 Am. B. R. 515), 388, 578, 609.
Brown v. McConnell (124 U. S. 489), 822, 827.
Brown v. New Bedford Savings Inst. (137 Mass. 262), 313.
Brown v. Roach (52 Miss. 536), 770.
Browne, *In re* (104 Fed. Rep.), 762), 94, 598.
Brownsville Mfg. Co. v. Lockwood (11 Fed. Rep. 705), 695.
Bruce, *In re* (6 Ben. 515), 291, 294.
Brummelkamp, *In re* (95 Fed. Rep. 814), 134, 187.
Brundage, *In re* (100 Fed. Rep. 613), 624.
Brundin, *In re* (112 Fed. Rep. 306), 137.
Brunquest, *In re* (7 Biss. 208), 320, 599, 602.
Bruss-Ritter Co., *In re* (90 Fed. Rep. 651), 17, 23, 24, 27.
Bryan, *Ex parte* (2 Hughes 273), 714.
Bryan, *In re* (3 N. B. R. 110), 601.
Bryan v. Bernheimer (181 U. S. 188), 30, 31, 32, 71, 72, 74, 81, 84, 86, 90, 98, 392.
Bryant, *In re* (104 Fed. Rep. 789), 659.
Bryant v. Small (35 Wis. 205), 602.
Buchan v. Sumner (2 Barb. Ch. 165), 258.
Buchanan v. Alexander (4 How. 20) 732.
Buchanan v. Smith (16 Wall. 277), 387, 388, 570, 577, 581.
Bucher v. Cheshire R. R. Co. (125 U. S. 582), 423.
Buckingham, *In re* (102 Fed. Rep. 972), 438.
Buckingham v. McLean (3 McLean 185), 352.
Buckingham v. McLean (13 How. 150), 571, 751, 832.
Buckland v. Papillon (1 L. R. Eq. 477), 401.
Buckner v. Calcote (28 Miss. 432), 256.
Buckner v. Jewell (2 Woods 220), 285, 398.
Bucyrus Machine Co., *In re* (5 N. B. R. 303), 261, 262.
Buder v. Columbia Distilling Co., (9 Am. B. R. 331), 609.
Buerk v. Imhaeuser (8 Fed. Rep 457), 205.
Buelow, *In re* (98 Fed. Rep. 86), 410, 424, 549, 551.
Bugbee, *In re* (9 N. B. R. 258), 394.
Bullock, *In re* (116 Fed. Rep. 667), 333.
Bullock Mfg. Co. v. Westinghouse Mfg. Co. (127 Fed. Rep. —), 676.
Bullwinkle, *In re* (111 Fed. Rep. 364), 658.

References are to pages.

Bullymore v. Cooper (46 N. Y. 236), 428.
Burbank v. Bigelow (92 U. S. 179), 76, 80, 87, 104, 105, 106, 608.
Burchell, *In re* (4 Fed. Rep. 406), 295, 694.
Burdett v. Willett, 411.
Burdock v. Jackson (15 N. B. R. 318), 593.
Burk, *In re* (Deady 425), 739, 743, 752.
Burk v. Winters (28 Ark. 6), 367.
Burka, *In re* (104 Fed. Rep. 326), 283, 394, 403, 416.
Burka, *In re* (107 Fed. Rep. 674), 146, 653.
Burkholder v. Stump (4 N. B. R. 597), 610.
Burkhardt, *In re* (33 Fed. Rep. 25), 648, 652.
Burkle, *In re* (116 Fed. Rep. 766), 375.
Burleigh v. Foreman (11 Am. B. R. 74), 790.
Burlington Malting Co., *In re* (109 Fed. Rep. 777), 190, 194.
Burnham v. Pidcock (5 Am. B. R. 590), 291, 769.
Burnham v. Street Ry. Co. (87 Fed. Rep. 168), 834.
Burnhisel v. Firman (22 Wall. 170), 413, 593.
Burns, *In re* (1 N. B. R. 174), 291.
Burns v. Allen (67 N. C. 140), 444.
Burnside v. Brigham (49 Mass. 75), 769.
Burpee v. National Bank (5 Biss. 405), 570.
Burr v. Hopkins (6 Biss. 345), 336, 605.
Burr v. Kimback (20 Fed. Rep. 432), 632, 669.
Burrell, *In re* (123 Fed. Rep. 414), 168.
Burrows v. Jemino (2 Stra. 733), 757.
Burrus, *In re* (97 Fed. Rep. 926), 137, 139.
Burt, *In re* (27 Fed. Rep. 548), 353.
Burton v. Lockett (9 Ark. 411), 377.
Busby, *In re* (124 Fed. Rep. 469), 332, 345.
Bush, *In re* (6 N. B. R. 179), 235.
Bush v. Cooper (18 How. 82), 761.
Bush v. Crawford (7 N. B. R. 299), 260.
Bush v. Lester (55 Ga. 579), 427.
Bushnell v. Crooke Min. & Smelting Co. (150 U. S. 83), 849.
Buskirk, *Ex parte* (72 Fed. Rep. 14), 669.
Butcher, *Ex parte* (13 Chan. Div. 465), 264.
Butcher v. Forman (6 Hill, N. Y. 583), 285.
Butler, *In re* (120 Fed. Rep. 100), 435, 461.
Butler, *In re* (6 N. B. R. 501), 397.
Butler v. Fayerweather (91 Fed. Rep. 458), 676.
Butler v. Goreley (146 U. S. 303), 20, 23.
Butterfield, *In re* (5 Biss. 120), 473.
Butterworth v. Hill (114 U. S. 128), 205, 208.
Butts, *In re* (120 Fed. Rep. 966), 88, 93, 770, 775, 776.
Buxbaum, *In re* (2 Hughes 339), 740.
Bybee, *In re* (124 Fed. Rep. 1011), 762.
Byers v. McAuley (149 U. S. 608), 97.
Byrne, *In re* (97 Fed. Rep. 762), 728.
Byrne, *In re* (1 N. B. R. 464), 257, 259.
Byrne, *In re* (1 Am. B. R. 444), 707.

C.

Cadogan v. Kennett (2 Cowp. 434), 383, 391.
Cadwell, *In re* (17 Fed. Rep. 693), 336.
Cady v. Whaling (7 Biss. 430), 382.
Cake v. Lewis (8 Penn. 493), 297.
Calahan v. Bank of Kentucky (82 Ky. 231), 408.
California Pac. R. Co., *In re* (3 Saw. 240), 17, 18, 69, 226, 238.
Callan v. Wilson (127 U. S. 540), 650.
Cambridge Inst. v. Littlefield (60 Mass. 210), 781.
Camden Rolling Mill Co., *In re* (3 N. B. R. 590), 240.
Cameron, etc., Ins. Co., *In re* (96 Fed. Rep. 756), 151.
Camp, *In re* (91 Fed. Rep. 745), 428, 429, 430, 434, 444, 461.

References are to pages.

Camp v. Giffard (7 Hill, N. Y., 169), 778.
Campbell, *In re* (102 Fed. Rep. 686), 726.
Campbell, *In re* (124 Fed. Rep. 417), 435, 440, 545, 546.
Campbell, *In re* (1 Abb., U. S., 185), 291, 570.
Campbell's Case (1 N. B. R. 165), 69.
Campbell v. Foster (35 N. Y. 361), 414.
Campbell v. Perkins (8 N. Y. 430), 769.
Canfield, *In re* (5 Law Rep. 415), 173.
Cannon, *In re* (121 Fed. Rep. 582), 596.
Cannon v. Dexter, etc., Co. (120 Fed. Rep. 657), 435, 530.
Cannon v. Wellford (22 Grat., Va., 195), 377.
Capelle v. M. E. Church (11 N. B. R. 536), 302.
Capot, *Ex parte* (1 Atk. 218), 339.
Capper, *Ex parte* (4 Chan. D. 724), 294.
Carey v. Hess (112 Ind. 398), 695.
Carey v. Nagel (2 Biss. 244), 418.
Carleton, *In re* (115 Fed. Rep. 246), 141, 184, 250, 253.
Carley, *In re* (106 Fed. Rep. 862), 343, 616, 624, 626, 627, 629, 630.
Carley, *In re* (117 Fed. Rep. 130), 743, 744, 811.
Carlin v. Carlin (8 Bush., Ky., 141), 773.
Carling v. Seymour Lumber Co. (113 Fed. Rep. 483), 367, 811.
Carmen v. Emerson (71 Fed. Rep. 264), 667.
Carmichael, *In re* (96 Fed. Rep. 594), 262, 750.
Carmichael, *In re* (108 Fed. Rep. 789), 475.
Carolina Cooperage Co., *In re* (96 Fed. Rep. 950) 120, 138, 139, 241, 303, 363, 726.
Carow, *In re* (41 How. Prac. 112), 118.
Carpenter, *In re* (1 N. B. R. 299), 632, 667.
Carpenter, *In re* (125 Fed. Rep. 831), 375.
Carpenter v. Marnell (3 B. & P. 40), 411.
Carpenter Bros. v. O'Connor (16 O. C. C. 526), 89, 99, 100, 365, 366, 371.
Carr, *In re* (116 Fed. Rep. 555), 73, 718, 732.
Carr, *In re* (117 Fed. Rep. 572), 137, 138, 139, 353, 717.
Carr v. Gale (2 Ware 330), 104, 105, 419.
Carr v. Hilton (1 Curtis 230), 751.
Carrier, *In re* (47 Fed. Rep. 438), 748.
Carroll Co. v. Young (119 Fed. Rep. 576), 702, 705, 707.
Carson v. Osborn (10 B. Mon., Ky., 155), 779, 782.
Carter v. Goodrich (1 How. Prac., N. Y., 239), 784.
Carter v. Hobbs (92 Fed. Rep. 594), 709.
Carter v. Hobbs (94 Fed. Rep. 108), 577.
Carter v. People's Nat. Bank (4 Am. B. R. 211), 89.
Carter v. Warne (4 Carr. & P. 191), 397, 400.
Carver & Co., *In re* (113 Fed. Rep. 138), 32, 85, 120, 121.
Carver v. Mf. Co. (2 Story 432), 285.
Cary, *In re* (10 Fed. Rep. 622), 669.
Cary Mfg. Co. v. Acme Co. (108 Fed. Rep. 873), 676.
Case v. Dunmore (23 Pa. St. 93), 434.
Casey, *In re* (10 Blatch. 376), 814.
Casey v. Cavaroc (96 U. S. 467), 597, 599.
Casey v. La Societe, etc. (2 Woods 77), 590.
Cashman, *In re* (103 Fed. Rep. 67), 658, 750.
Castle v. Lee (11 B. R. 80), 571, 580.
Caswell, *Ex parte* (1 Atk. 559), 381.
Cathcart, *In re*, 335, 339, 340.
Catlin v. Foster (1 Saw. 37), 310, 311.
Catlin v. Hoffman (2 Saw. 486), 591.
Cavanna v. Basset (3 Fed. Rep. 215), 695.
Caylus, *In re* (1 Low. 550), 310.
Central Trust Co. v. Continental Trust Co. (86 Fed. Rep. 517), 828.
Chace v. Chapin (130 Mass. 128), 367.

References are to pages.

Chadwick v. Starrett (27 Me. 138), 783.
Chamberlain, *In re* (125 Fed. Rep. 629), 748, 753.
Chamberlain v. Perkins (51 N. H. 340), 24, 27.
Chamberlin, *In re* (9 Ben. 149), 678, 684.
Chambers Calder Co., *In re* (98 Fed. Rep. 865), 76, 82, 89, 93, 100, 101, 360, 372, 374, 397, 398.
Chambers v. Neal (13 B. Mon., Ky., 256), 784.
Chambers v. Prince (75 Fed. Rep. 176), 174.
Champion, *In re* (7 Am. B. R. 560), 588.
Chandler v. Windship (6 Mass. 310), 282.
Chapman, *In re* (9 Ben. 311), 150.
Chapman, *In re* (99 Fed. Rep. 395), 167.
Chapman, *In re* (105 Fed. Rep. 901), 323.
Chapman v. Brewer (114 U. S. 158), 89, 234.
Chapman v. Forsyth (2 How. 202), 10, 772, 775.
Chapman v. Pickersgill (2 Wilson 145), 241.
Chappell, *In re* (113 Fed. Rep. 545), 158, 575.
Chappell v. United States (160 U. S. 499), 805.
Chase, *In re* (124 Fed. Rep. 753), 138, 729.
Chase v. Cannon (47 Fed. Rep. 674), 98.
Chateaugay Ore & Iron Co., *In re* (35 Fed. Rep. 804), 828, 832.
Chatfield v. O'Dwyer (101 Fed. Rep. 797), 819, 823, 824.
Chatt. Nat. Bank v. Rome Iron Co. (102 Fed. Rep. 755), 368, 562, 592, 597, 599.
Chauncey v. Dyke Bros. (119 Fed. Rep. 1), 71, 76, 603, 702, 705, 706, 707, 709.
Cheney, *In re* (5 Law Rep. 19) 637.
Cheney, *In re* (19 N. B. R. 16), 682.
Chequassat Lumber Co., *In re* (112 Fed. Rep. 56), 134, 201.
Chesapeake Oyster & Fish Co., *In re* (112 Fed. Rep. 960), 148, 149, 150.
Chesapeake Shoe Co. v. Seldner (122 Fed. Rep. 593), 369, 404, 582, 600, 808.
Chetwood, *In re* (165 U. S. 443), 798.
Chicago-Joplin Lead & Zinc Co., *In re* (104 Fed. Rep. 67), 149.
Chicago & Northwestern Ry. Co. v. Osborne (146 U. S. 354), 800, 802.
Chicago & P. R. Co. v. Blair (100 U. S. 661), 831, 832.
Chicago Title & Trust Co. v. Roebling (107 Fed. Rep. 71), 156, 165, 567, 575.
Chiles, *In re* (22 Wall. 157), 669, 670.
Chilton v. Cabiness (14 Ala. 447), 417, 419.
Chisholm (4 Fed. Rep. 526), 731.
Chism v. Bank of Friar's Point (5 Am. B. R. 56), 609.
Chittenden v. Barton (5 Am. B. R. 775), 388.
Christensen, *In re* (101 Fed. Rep. 243), 157, 231.
Christensen, *In re* (101 Fed. Rep. 802), 317.
Christy, *Ex parte* (3 How. 292), 91.
Christy, *Ex parte* (2 Dea. & Chit. 155), 265.
Chubb v. Upton (95 U. S. 665), 352), 406.
Church v. Winkley (73 Mass. 460), 780, 781.
Citizens Bank v. Ober (1 Woods 80), 713.
Citizens Nat. Bank v. De Pauw Co. (105 Fed. Rep. 926), 160.
City Bank, Petitioner (153 U. S. 246), 842.
City Bank, *In re* (6 N. B. R. 71), 312, 316.
City Bank v. Walton (5 Rob., La., 158), 755.
City Bank of New Orleans, *Ex parte* (3 How. 292), 10.
City Nat. Bank v. Bruce (109 Fed. Rep. 69), 592.
City Nat. Bank of Dallas v. Doolittle (107 Fed. Rep. 236), 685, 698.
City Nat. Bank v. Hunter (129 U. S. 557), 826, 842.
City Trust Co., *In re* (121 Fed. Rep. 706), 727.
Claff, *In re* (111 Fed. Rep. 506), 738, 762.
Claflin v. Cogan (48 N. H. 411), 778.
Claflin v. Houseman (93 U. S. 130), 76, 106, 359.

References are to pages.

Claiborne, *In re* (109 Fed. Rep. 74), 637, 646, 676.
Clairmont, *In re* (1 N. B. R. 276), 349.
Clapp v. Thomas (5 Allen, Mass., 158), 434.
Clarion Bank v. Jones (21 Wall. 325), 573, 575, 611.
Clark, *In re* (4 N. B. R. 237), 624.
Clark, *In re* (4 Ben. 88), 260, 634.
Clark, *In re* (4 Ben. 88), 260, 814, 732.
Clark, *In re* (9 Blatch. 379), 732, 814.
Clark v. American Mfg., etc., Co. (101 Fed. Rep. 962), 236.
Clark v. Binninger (38 How. Prac. 341), 69, 634.
Clark v. Calvert (8 Taunt. 742), 417.
Clark v. Clark (17 How. 315), 105, 420, 714.
Clark v. Dougherty (10 N. B. R. 21), 581.
Clark v. Ewing (3 Fed. Rep. 83), 76.
Clark v. Hume (Ryan & M. 207), 397, 399, 400.
Clark v. Iselin (21 Wall. 360), 163, 373, 413, 570, 586, 598, 599.
Clark v. Rowling (3 N. Y. 216), 293.
Clark v. Sparhawk (No. 2836 Fed. Cas.), 311.
Clark Thread Co. v. Willimantic Linen Co. (140 U. S. 481), 834.
Clarke v. Larremore (188 U. S. 486), 71, 72, 85, 88, 92, 98, 563, 567, 568, 569, 802.
Clarke v. Shaw (28 Fed. Rep. 356), 732.
Claster v. Soble (10 Am. B. R. 446), 288.
Clay, *Ex parte* (6 Ves. 813a), 256.
Clay v. Smith (3 Pet. 411), 23, 79, 207.
Cleveland v. Chamberlain (1 Black 419), 823.
Cleveland Ins. Co. v. Globe Ins. Co. (98 U. S. 366), 27.
Cleveland Ins. Co., *In re* (22 Fed. Rep. 204), 321.
Clements v. Hall (2 De G. & J. 172), 258.
Clements v. Moore (6 Wall. 312), 383.
Cliffe, *In re* (94 Fed. Rep. 354), 200, 224, 238.
Cliffe, *In re* (97 Fed. Rep. 540), 622, 624, 626.
Clifford, *In re* (2 Saw. 428), 403.
Clifton v. Foster (103 Mass. 233), 602, 709.
Clisdell, *In re* (101 Fed. Rep. 246), 746.
Clopton v. Spratt (52 Miss. 251), 776.
Clothier, *In re* (108 Fed. Rep. 199), 742.
Coan & Ten Broeke Mfg. Co., *In re* (6 Biss. 315), 413.
Cobb, *In re* (7 Am. B. R. 104), 621.
Cobb, *In re* (96 Fed. Rep. 821), 367, 368, 562, 585.
Cobb, *In re* (112 Fed. Rep. 655), 353, 717, 732.
Cobb v. Bray (91 Fed. Rep. 102), 125.
Cobb v. Overman (109 Fed. Rep. 65), 287, 288.
Cobb v. Overman (109 Fed. Rep. 324), 303.
Cobb v. Symonds (5 B. & A. 516), 149.
Cocks, *In re* (3 Ben. 260), 148.
Coddington, *In re* (118 Fed. Rep. 281), 156, 225.
Coe-Powers Co., *In re* (109 Fed. Rep. 550), 601.
Coffman, *In re* (93 Fed. Rep. 422), 402, 424, 536.
Cogley, *In re* (107 Fed. Rep. 73), 120, 372, 595, 704, 706, 709.
Cogswell, *In re* (1 Ben. 388), 273, 349.
Cohn, *In re* (6 N. B. R. 379), 610.
Colby v. Coates (6 Cush., Mass., 558), 731.
Cole, *In re* (106 Fed. Rep. 837), 88, 93.
Cole v. Duncan (58 Ill. 176), 709, 710.
Coleman, *In re* (2 N. B. R. 562), 581.
Coleman v. Davies (45 Ga. 489), 773.
Coller, *In re* (111 Fed. Rep. 503), 424, 481, 483.
Collier, *In re* (93 Fed. Rep. 191), 183, 435.
Collier, *In re* (12 N. B. R. 266), 243, 257, 264.
Collins, *In re* (3 Biss. 415), 146.
Collins v. Hood (4 McLean 186), 243, 259, 590, 751.

References are to pages.

Collins v. Jones (10 B. & C. 777), 313.
Collins v. Marshall (10 Rob., La., 112), 360.
Collumb v. Read (24 N. Y. 505), 258.
Colton Export & Import Co., *In re* (121 Fed. Rep. 663), 585.
Columbia Iron Wks. v. Nat. Lead Co. (127 Fed Rep. 99), 147, 148, 821, 822, 831.
Columbia Real Estate Co., *In re* (101 Fed. Rep. 965), 33, 71, 207, 222, 233, 234, 235.
Columbia Real Estate Co., *In re* (112 Fed. Rep. 643), 220, 816, 817, 824.
Columbian Ins. Co., *Ex parte* (2 Low. 5), 290.
Columbus Watch Co. v. Robbins (148 U. S. 266), 805, 806.
Colvin v. Jacksonville (158 U. S. 457), 805.
Colwell v. Tinker (6 Am. B. R. 434), 291, 765.
Comegys v. McCord (11 Ala. 932), 361.
Comegys v. Vasse (1 Pet. 193), 420.
Comfort v. Eisenbeis (11 Pa. 13), 781.
Comingor, *Ex parte* (107 Fed. Rep. 898), 32, 74, 81, 83, 84, 85, 669.
Comly v. Fisher (Taney 121), 611.
Comm. v. Erisman (21 Pitts. L. J. 69), 284, 765.
Commercial Bank v. Buckner (20 How. 108), 785.
Commonwealth v. Hutchinson (10 Pa. St. 466), 764.
Commonwealth v Shoe Insurance Co. (112 Mass. 131), 312.
Commonwealth v. Walker (108 Mass. 309), 623, 655.
Compton v. Jessup (68 Fed. Rep. 263), 97, 806.
Comstock, *In re* (22 Vt. 642), 764.
Comstock, *In re* (3 Saw. 517), 344, 620.
Comstock v. Bechtel (63 Wis. 656), 443.
Comstock v. Grout (17 Vt. 512), 643, 764.
Conant, *Ex parte* (77 Me. 275), 149.
Conant, *In re* (No. 3085 Fed. Cas.), 714.
Conger's Case (4 Atty. Gen. Op. 317), 676.
Conhaim, *In re* (97 Fed. Rep. 923), 576.
Conhaim, *In re* (100 Fed. Rep. 268), 723.
Conley, *In re* (120 Fed. Rep. 42), 749.
Connecticut v. Shelton (47 Conn. 400), 764.
Conn, *In re* (108 Fed. Rep. 525), 659.
Connell, *Ex parte* (Deac. 201), 258.
Connell Sons, *In re* (120 Fed. Rep. 846), 137, 139.
Conner, *In re* (1 Low. 532), 594, 604.
Connor v. Long (104 U. S. 228), 365.
Connor v. Scott (4 Dill. 242), 106.
Connolly, *In re* (100 Fed. Rep. 620), 81.
Conqueror, The (166 U. S. 110), 801.
Conrad, *In re* (6 Am. L. Rev. 385), 300.
Conrad v. Insurance Co. (6 Pet. 274), 611.
Conrader, *In re* (118 Fed. Rep. 676), 257.
Conro v. Crane (94 U. S. 441), 816.
Continental Nat. Bank v. Katz (1 Am. B. R. 19), 77, 88, 89, 93.
Cook, *Ex parte* (2 P. Wms. 500), 243.
Cook, *In re* (3 Biss. 122), 152, 153, 249, 603, 709.
Cook v. Farrington (104 Mass. 212), 335.
Cook v. Moffat (5 How. 295), 19, 22.
Cook v. Rogers (31 Mich. 391), 27.
Cook v. Tullis (18 Wall. 332), 368, 373, 413, 562, 584, 731.
Cook v. Whipple (55 N. Y. 150), 76.
Cooke, *In re* (30 Leg. Int. 404), 211.
Cooke, *In re* (3 Biss. 122), 259.
Cooke, *In re* (109 Fed. Rep. 631), 630.
Cooke v. Scovil (53 Atl. Rep. 692), 85.
Cooper, *Ex parte* (39 L. T. 260), 371.
Cooper v. Slight (27 L. R. Ch. Div. 565), 380.
Copeland v. Stephens (1 B. & A. 393), 398.

References are to pages.

Corbett, *In re* (104 Fed. Rep. 872), 82, 100, 101, 360, 366, 374, 586.
Corbett, *In re* (5 Am. B. R. 224), 76.
Corbett, *In re* (5 Saw. 206), 443, 444.
Corey v. Ripley (57 Me. 69), 785.
Corn, *In re* (106 Fed. Rep. 143), 660, 749.
Corn Exchange Bank, *In re* (15 N. B. R. 216), 322.
Cornell, *In re* (97 Fed. Rep. 29), 656.
Cornell v. Dakin (38 N. Y. 253), 784.
Cornwall, *In re* (9 Blatch. 114), 226, 227, 319.
Corwin, *In re* (1 Fed. Rep. 847), 787.
Cosgrove v. Cosby (86 Ind. 511), 311, 315.
Cotton, *In re* (2 N. Y. Leg. Obs. 370), 284, 765.
Cotton, *In re* (No. 3269 Fed. Cas.), 145.
Cotton v. James (M. & M. 273), 152.
Counselman v. Hitchcock (142 U. S. 562), 625.
County of Worcester, *In re* (102 Fed. Rep. 808), 808.
Courier-Journal Job Printing Co. v. Brewing Co. (101 Fed. Rep. 699), 810, 839.
Courtney v. Beale (84 Va. 692), 774.
Cove v. Purcell (56 N. Y. 649), 367.
Covell v. Heyman (111 U. S. 176), 97.
Covington, *In re* (110 Fed. Rep. 143), 121.
Covington Stock Yards v. Keith (121 U. S. 248), 830.
Cowen, *Ex parte* (2 L. R. Ch. App. 563), 688.
Cox v. Wilder (2 Dill. 45), 396, 435, 436, 439.
Cox v. Wilder (5 N. B. R. 443), 436, 439.
Coxe v. Hale (10 Blatch. 56), 591.
Crabb, *Ex parte* (8 De Gex, Mac. & G. 277), 149.
Craft, *In re* (2 Ben. 214), 237, 571, 751.
Crafts v. Mott (5 Barb., N. Y., 305), 297.
Crafts v. Mott (4 N. Y. 606), 298.
Cragen v. Carmichael (2 Dill. 519), 104.
Cragin v. Thompson (2 Dill. 513), 391, 610.
Craig, *In re* (4 N. B. R. 50), 624.
Cram, *In re* (1 Hask. 89), 271.
Crandall v. Nevada (6 Wall. 35), 835.
Crane v. Penny (2 Fed. Rep. 187), 368, 609, 731.
Crapo v. Kelly (16 Wall. 610), 630), 21, 376, 377.
Craufurd v. Attorney General (7 Price 5), 763.
Craven, *Ex parte* (10 L. R. Eq. 648), 390.
Crawford, *In re* (3 N. B. R. 698), 293.
Crawford, *In re* (5 M. B. R. 301), 295.
Crawford v. Dunbar (52 Cal. 36), 108.
Credit Co. v. Ark. Cent. R. Co. (128 U. S. 258), 821, 823.
Creditors v. Cozzens (3 N. B. R. 281), 215, 671.
Creditors v. Williams (4 N. B. R. 579), 740, 741, 742.
Crisfield v. State (55 Md. 192), 773.
Crist, *In re* (116 Fed. Rep. 1007), 656, 740.
Crittenden v. Barton (5 Am. B. R. 775), 578.
Crockett, *In re* (2 Ben. 514), 247, 421.
Croft, *In re* (8 Biss. 188), 443.
Crofton v. Poole (1 B. & Ad. 568), 415.
Cronan v. Cotting (104 Mass. 245), 772.
Cronin, *In re* (98 Fed. Rep. 584), 240.
Crooks v. People's Nat. Bank (3 Am. B. R. 238), 576, 585, 609.
Crooks v. Stuart (7 Fed. Rep 800), 355, 383, 595.
Crouch v. Gridley (6 Hill, N. Y., 250), 290, 765.
Crosbie v. Tooke (1 M. & K. 421), 401.
Crosby v. Wentworth (48 Mass. 10), 755.
Cross v. Evans (167 U. S. 60), 806.
Crow, *In re* (116 Fed. Rep. 110), 728.
Crystal Springs Bottling Co., *In re* (100 Fed. Rep. 265), 311.

References are to pages.

Cuddy, Petitioner (131 U. S. 281), 674, 676.
Cullen v. Dawson (24 Minn. 66), 416.
Cumming v. Clegg (52 Ga. 605), 431.
Cunningham, *In re* (19 N. B. R. 276), 731.
Cunningham v. German Insurance Bank (101 Fed. Rep. 977), 303, 819.
Cunningham v. German Nat. Bank (103 Fed. Rep. 932), 119, 810. 833, 834.
Curran v. Munger (6 N. B. R. 33), 163.
Curry v. McCauley (20 Fed. Rep. 583), 592.
Curtis, *In re* (91 Fed. Rep. 737), 24, 27.
Curtis, *In re* (94 Fed. Rep. 630), 191, 192.
Curtis, *In re* (100 Fed. Rep. 784), 137, 139, 818.
Curtis v. Slosson (6 Pa. 265), 784.
Cushman, *In re* (7 Ben. 482), 180.
Cutter v. Evans (115 Mass. 27), 293.
Cutter v. Folsom (17 N. H. 139), 18, 144.
Cuxon v. Chadley (I. C. & P. 174), 315.

D.

Daggett, *In re* (8 N. B. R. 433), 143.
Daggett v. Cook (37 Conn. 341), 564.
Dailey v. State (8 Blackf., Ind., 329), 108.
Dalby, *Ex parte* (1 Low. 431), 367.
Dallas v. Flues (No. 3544 Fed. Cas.), 345.
Dally v. Smith (4 Burr. 2148), 148.
Dambman v. White (48 Cal. 439), 367.
Damon, *In re* (104 Fed. Rep. 775), 133.
Dana, *In re* (68 Fed. Rep. 886), 648, 650, 652.
Danforth, *In re* (1 Pa. Law J. 148), 627.
Daniel v. Lazarus (65 Fed. Rep. 718), 99.
Daniell, *Ex parte* (7 Jur. 334), 148.
Daniels, *In re* (110 Fed. Rep. 745), 728, 729.
Daniels v. Palmer (35 Minn. 347), 148.
Danville v. Brown (128 U. S. 503), 830.
Danville Rolling Mill Co., *In re* (10 Am. B. R. 327), 304.
Darling v. Berry (13 Fed. Rep. 668), 19, 394, 426, 602.
Darwin, *In re* (117 Fed. Rep. 407), 564, 565, 566, 568.
Daubenny, *Ex parte* (3 Mont. & Ayr. 16), 149.
Daubner, *In re* (96 Fed. Rep. 805), 402.
Dauchy, *In re* (122 Fed. Rep. 688), 656.
Davenport, *Ex parte* (1 Low. 384), 324.
Davenport, *In re* (3 N. B. R. 77), 715.
Davenport v. Fletcher (16 How. 142), 828.
Davenport v. Tilton (51 Mass. 320), 564.
David v. Ellice (5 B. & C. 196), 264.
Davidson v. Lanier (4 Wall. 447), 830.
Davis, *In re* (112 Fed. Rep. 294), 375.
Davis, *In re* (2 N. B. R. 391), 321, 709.
Davis v. Anderson (6 N. B. R. 145), 321, 611.
Davis v. Bohle (92 Fed. Rep. 325), 32. 812.
Davis v. Friedlander (104 U. S. 570), 359, 562, 564.
Davis v. Geissler (162 U. S. 290), 805.
Davis v. Ham (3 Mass. 33), 286.
Davis v. R. R. Co. (1 Woods. 661), 714.
Davis v. Stevens (104 Fed. Rep. 235), 143, 157, 246, 247, 250.
Davis v. Stewart (8 Fed. Rep. 803), 375.
Davis v. Wakelee (156 U. S. 684), 829.
Davis, etc. Co. v. Barber (157 U. S. 673), 804.
Davy, *Ex parte* (Ridg. 289), 265.
Dawes v. Boylston (9 Mass. 337), 377.
Dawley, *In re* (94 Fed. Rep. 795), 542.
Dawson v. Hartsfield (79 N. C. 334), 293.
Day v. Bardell (97 Mass. 246), 24.
Day v. Beck & Gregg Hardw. Co. (114 Fed. Rep. 831), 168, 196.
Day v. Laflin (47 Mass. 280), 360.

References are to pages.

Day v. Superior Court (61 Cal. 489), 415.
Dayton v. Lash (94 U. S. 112), 832.
Dayton Nat. Bank v. Merchants Nat. Bank (37 O. S. 208), 598.
Dayville Woolen Co., *In re* (114 Fed. Rep. 674), 113, 276, 348.
Deacon v. Sewing Machine Co. (No. 3694*a* Fed. Cas.), 205.
Dean, *In re* (3 N. B. R. 768), 713.
Dean v. Plane (195 Ill. 495), 582.
Deane v. Caldwell (127 Mass. 244), 286.
Dearing v. Moffitt (6 Ala. 776), 780, 781.
Deckert, *In re* (2 Hughes 183), 426.
Deeze, *Ex parte* (1 Atk. 228), 309. 600.
De Forest, *In re* (9 N. B. R. 278), 233, 234.
Deland v. Miller & Chaney Bank (93 N. W. Rep. 304), 592, 609.
De Lany & Co., *In re* (124 Fed. Rep. 280), 88.
Delavergue v. Farrand (1 Mich., N. P., 90), 89.
Dell, *In re* (5 Saw. 344), 262.
Delling, *In re* (124 Fed. Rep. 852), 333.
Del Valle v. Harrison (93 U. S. 233), 821.
Demarest, *In re* (110 Fed. Rep. 638), 443, 507.
DeMetz, *In re* (No. 3781 Fed. Cas.), 328.
Dennett v. Mitchell (6 Law Rep. 16), 751.
Denning, *In re* (114 Fed. Rep. 219), 256.
Denny v. Bennett (128 U. S. 489), 21.
Denny v. Pironi (141 U. S. 121), 836.
Denver First Nat. Bank v. Klug 186 U. S. 203), 791, 799.
Derby, *In re* (6 Ben. 232), 144, 145, 227, 235.
Desmare v. United States (93 U. S. 610), 425.
Desobry v. Morange (18 Johns., N. Y., 336), 766.
Detert, *In re* (11 N. B. R. 293), 336, 385, 396, 436.
Devoe, *In re* (1 Low. 251), 639, 644, 770.
Devoe Mfg. Co., *Ex parte* (108 U. S. 401), 34.
Devries v. Shanahan (122 Fed. Rep. 629), 833, 835.
Diack, *In re* (100 Fed. Rep. 770), 409, 410.
Dial v. Reynolds (96 U. S. 340), 87.
Dibblee, *In re* (3 Ben. 283), 163, 586.
Dibblee, *In re* (3 Ben. 354), 700, 716.
Dick v. Powell (2 Swan., Tenn., 632), 293, 782.
Dickson v. Wyman (111 Fed. Rep. 726), 332, 333, 575, 587, 588, 808, 811, 817.
Dickenson v. Lockyer (4 Ves. 36), 264.
Dickinson v. Central Nat. Bank (129 Mass. 279), 405.
Dickinson v. Security Bank (110 Fed. Rep. 353), 585.
Dietz, *In re* (97 Fed. Rep. 563), 754.
Diggles, *In re* (8 Ben. 36), 697.
Dillard, *In re* (2 Hughes 190), 423, 424.
Dillard v. Collins (25 Grat., Va., 343), 421.
Diller, *In re* (100 Fed. Rep. 931), 442, 450, 453.
Dillon, *In re* (100 Fed. Rep. 627), 262, 315, 720, 766.
Dimock v. Revere Copper Co. (117 U. S., 565), 359, 766, 782, 784, 794.
Dingee v. Becker (9 N. B. R. 503), 755.
Dinglehoef, *In re* (109 Fed. Rep. 866), 515.
Dinsdale v. Eames (4 Moore 350), 293.
Distler v. McCauley (6 Am. B. R. 491), 291, 765.
Dixon's Case (3 Atty. Gen. Op. 622), 676.
Dixon, *In re* (114 Fed. Rep. 675), 127.
Doan v. Compton (2 N. B. R. 607), 164.
Docker-Foster & Co., *In re* (123 Fed. Rep., 190), 158, 333, 342.
Dodge, *In re* (No. 3946*a* Fed. Cas.), 181.
Dodge v. Knowles (114 U. S. 430), 821, 822, 828.
Doe v. Brittain (2 B. & Ald. 93), 380.
Doe v. Childress (21 Wall. 642), 562, 563, 756.
Doe v. Mining Co. (70 Fed. Rep. 455), 838.
Doig, *In re* (4 Fed. Rep. 193), 650.
Dole, *In re* (11 Blatch. 499), 613, 636.

References are to pages.

Donaldson v. Farwell (93 U. S. 631), 373, 375, 367, 368, 731.
Donnell v. Saving Bank (80 Mo. 165), 408.
Donnelly, *In re* (5 Fed. Rep. 783), 200, 238.
Dormire v. Cogly (8 Blackf., Ind., 177), 360.
Dorsey v. Kyle (30 Md. 512), 174.
Doscher, *In re* (120 Fed. Rep. 408), 157.
Dos Hermanos, The (10 Wheat. 306), 821, 822, 828.
Doty, *In re* (16 N. B. R. 202), 319.
Dougherty, *In re* (109 Fed. Rep. 480), 570.
Douglass, *In re* (11 Fed. Rep. 403), 787, 788.
Douglass v. Vogeler (6 Fed. Rep. 52), 593, 594.
Douglass v. Zinc Co. (50 Mo. 388), 602.
Dow's Estate, *In re* (105 Fed. Rep. 889), 660, 746.
Dow v. Sargent (15 N. H. 115), 592.
Dowell v. Dew (1 W. & C. Chan. 365), 401.
Downer v. Chamberlin (21 Vt. 414), 783.
Downer v. Dana (22 Vt. 337), 769.
Downing, *In re* (1 Dill. 33), 257, 264, 265, 270.
Downing v. Traders Bank (2 Dill. 136), 298.
Dowler v. Cushwa (27 Md. 354), 598.
Downs, *Ex parte* (1 Rose 96), 335.
Doyle v. Heath (22 R. I. 213), 564.
Doyle v. Sharpe (74 N. Y. 154), 217.
Drake, *In re* (114 Fed Rep. 229), 113.
Drake v. Rollo (3 Biss. 273), 312.
Dreeben, *In re* (101 Fed. Rep. 110), 135, 136, 341.
Dressel v. North State Lumber Co. (107 Fed. Rep. 255), 197.
Dressel v. North State Lumber Co. (119 Fed. Rep. 531), 120, 126, 344, 587, 588.
Dresser, *In re* (3 N. B. R. 557), 371, 623.
Dresser, *In re* (124 Fed. Rep. 915), 635, 640.
Dresser v. Brooks (3 Barb. 429), 293.
Dressler, *Ex parte* (9 Ch. Div. 252), 398.
Dreyer, *In re* (2 N. B. R. 212), 743.
Driggs v. Moore (1 Abb., U. S., 440), 594.
Driggs v. Russell (3 N. B. R. 161), 419.
Drisko, *In re* (2 Low. 430), 174, 762.
Drummond, *In re* (1 N. B. R. 231), 160, 162, 163, 200.
Drummond, *In re* (4 Biss. 149), 336, 590.
Duble, *In re* (117 Fed. Rep. 794), 728.
Dudley's Case (1 Pa. Law Jour. 302), 187.
Dudley v. Easton (104 U. S. 99), 351, 383, 562, 604, 606, 608.
Duerson, *In re* (13 N. B. R. 183), 426.
Duff, *In re* (4 Fed. Rep. 519), 148.
Duffy, *In re* (118 Fed. Rep. 926), 431, 528.
Dufour v. Lang (54 Fed. Rep. 913), 827.
Dugan v. Nichols (125 Mass. 45), 367, 375.
Duguid, *In re* (100 Fed. Rep. 274), 145, 153, 245, 248, 249, 254, 404, 444, 515, 516.
Duigman, *Ex parte* (11 L. R. Eq. 604), 688.
Dumahaut, *In re* (15 Blatch. 20), 631.
Dumont, *In re* (96 Fed. Rep. 542), (4 N. B. R. 17), 715.
Dunavent, *In re* (96 Fed. Rep. 542), 395, 404, 580.
Dunbar v. Dunbar (190 U. S. 340), 93, 282, 284, 286, 287, 288, 290, 291, 303, 304, 318, 765, 794.
Duncan, *In re* (8 Ben. 356), 235.
Duncan v. Hargrove (22 Ala. 150), 764.
Duncan v. Landis (106 Fed. Rep. 839), 156, 158, 820.
Dundas, *In re* (7 Am. B. R. 129), 572, 577, 586.
Dunham, *In re* (2 Ben. 488), 163, 169, 229.
Dunham, *In re* (27 Leg. Int. 404), 285, 397.
Dunkerson, *In re* (4 Biss. 227), 256.
Dunks v. Gray (3 Fed. Rep. 868), 668, 669.
Dunlap v. Rogers (47 N. H. 281), 759.
Dunn, *In re* (12 Blatch. 42), 233, 234.
Dunnigan, *In re* (95 Fed. Rep. 428), 145, 248.
Dunning, *In re* (94 Fed. Rep. 709), 822, 827.

References are to pages.

Dunning v. Perkins (2 Biss. 421), 580.
Dupee, *In re* (2 Low. 18), 786, 787, 788.
Duplan v. Silk Co. (191 U. S. 526), 796.
Dupree, *In re* (97 Fed. Rep. 28), 201, 203.
Durham, *In re* (104 Fed. Rep. 231), 427, 442, 448, 449.
Durham, *In re* (114 Fed. Rep. 750), 80, 81, 592.
Durham Paper Co. v. Seaboard Knitting Co. (121 Fed. Rep. 179), 191.
Dusenbury v. Hoyt (52 N. Y. 521), 779, 782, 785.
DuShane v. Beall (161 U. S. 513), 372.
Dutcher v. Wright (94 U. S. 553), 171, 203, 317, 387, 390, 584.
Dutton v. Cloar (65 S. W. Rep. 70), 609.
Dutton v. Morrison (17 Ves. 193), 169.
Dvorak, *In re* (107 Fed. Rep. 76), 737.
Dwight v. Merritt (4 Fed. Rep. 614), 208.
Dwyer v. Garlough (31 Ohio St. 158), 438.
Dyer v. Cleveland (18 Vt. 241), 778, 783.

E.

Eagles, *In re* (99 Fed. Rep. 695), 135, 255, 269, 270, 271, 273, 274, 275, 348.
Eames, *Ex parte* (2 Story 322), 20, 23, 26, 29.
Easum v. Cato (5 B. & Ald. 861), 310.
Eaton, *In re* (51 Fed. Rep. 804), 632, 669, 676.
Eaton, *In re* (110 Fed. Rep. 731), 661.
Economical Printing Co., *In re* (106 Fed. Rep. 839), 813.
Eckler v. Galbraith (12 Bush, Ky., 71), 779.
Edith, The (94 U. S. 518), 603.
Edmeads v. Newman (1 B. & C. 418), 312.
Edmonson v. Hyde (2 Saw. 205), 393, 433.
Eecles, *In re* (No. 4302 Fed. Cas.), 148.
Egbert v. McMichael (9 B. Mon., Ky., 44), 779, 782.
Eggert, *In re* (102 Fed. Rep. 735), 387, 388, 574, 578, 579, 580, 809.
Eidemiller, *In re* (105 Fed. Rep. 595), 145.
Eidom, *In re* (3 N. B. R. 106), 740, 743.
Eisenberg, *In re* (117 Fed. Rep. 786), 145, 654.
Elder, *In re* (1 Saw. 73), 328, 338, 345.
Eldred, *In re* (3 N. B. R. 256), 419.
Eldred v. Michigan Ins. Bank (17 Wall. 545), 79, 221.
Eldridge, *In re* (2 Hughes 256), 320.
Elk Park Min. & Mill. Co., *In re* (101 Fed. Rep. 422), 149.
Ellerbe, *In re* (13 Fed. Rep. 530), 667.
Ellerhorst, *In re* (5 N. B. R. 144), 296, 298.
Ellerhorst, *In re* (2 Saw. 218), 711.
Elliott, *In re* (2 N. B. R. 350), 246, 250, 267.
Elliott v. Higgins (83 N. C. 459), 773.
Elliott v. Keith (32 Mo. App. 585), 641.
Elliott v. Toeppner (187 U. S. 327), 75, 155, 158, 196, 230, 231, 792, 809, 817, 820.
Ellis, *In re* (1 N. B. R. 555), 441.
Ellis, *In re* (5 Ben. 421), 256.
Ellis v. Ham (28 Me. 385), 286, 293, 298.
Ellis v. McHenry (6 L. R. C. P. 234), 757, 758.
Ellithorpe, *In re* (111 Fed. Rep 163), 512, 514.
Ells, *In re* (98 Fed. Rep. 967), 304, 305, 306, 397, 401.
Elmira Steel Co., *In re* (109 Fed. Rep.456), 147, 164, 198, 228.
Emery v. Canal Nat. Bank (3 Cliff. 507), 263.
Emison, *In re* (2 N. B. R. 595), 330, 338, 339.
Empire Metallic Bedstead Co., *In re* (98 Fed. Rep. 981), 153, 167, 168.
Emslie, *In re* (102 Fed. Rep. 291), 76, 82, 89, 90, 92, 100, 101, 360, 374, 567, 601.
Engle, *In re* (105 Fed. Rep. 893), 366, 567.
English, *In re* (122 Fed. Rep. 113), 368, 562, 564, 566, 599, 600.
Epstein *In re* (109 Fed. Rep. 878), 363.
Epstein, *In re* (6 Am. B. R. 60), 375.

References are to pages.

Equitable L. & T. Co. v. Moss & Co. (125 Fed. Rep. 609), 604.
Erben's Case, 408.
Erwin v. United States (97 U. S. 392), 420.
Eschwege & Cohn, *In re* (8 Am. B. R. 282), 136.
Esdaile v. Sowerby (11 East 114), 408.
Estho v. Lear (7 Pet. 130), 835.
Etheridge Furniture Co., *In re* (92 Fed. Rep. 329), 30, 212, 222, 225.
Ethier, *In re* (118 Fed. Rep. 107), 714.
Eureka Ins. Co., *In re* (1 Low. 500), 304.
Evans, *In re* (116 Fed Rep. 909), 135, 428, 436, 515.
Evans, *In re* (3 N. B. R. 261), 604.
Evans v. Carey (29 Ala. 99), 780, 781.
Evans v. Hamrick & Co. (61 Pa. St. 19), 395.
Evans v. Lincoln Co. (204 Pa. St. 448), 306.
Evans v. State Bank (134 U. S. 330), 821, 831, 837.
Everett v. Stone (3 Story 446), 751.
Everitt, *In re* (9 N. B. R. 90), 423, 426.
Ewing, *In re* (115 Fed. Rep. 707), 161, 200.
Exchange Bank v. Moore (2 Bond 170), 300.
Eyster v. Gaff (91 U. S. 521), 75, 359, 365, 608.

F.

Factors, etc., Ins. Co. v. Murphy (111 U. S. 738), 795.
Fairbanks v. Amoskeag Bank (38 Fed. Rep. 630), 698.
Falco v. Kaupisch Creamery Co. (70 Pac. Rep. 286), 383, 606.
Falconer, *In re* (110 Fed. Rep. 111), 428, 433, 436, 439, 448, 449.
Falls City Shirt Mfg Co., *In re* (98 Fed. Rep 592), 335, 339, 601, 728.
Falter v. Reinhard (104 Fed. Rep. 292), 348.
Fanshawe v. Tracy (4 Biss. 490), 672, 673.
Fany, *In re* (116 Fed. Rep. 239), 738.
Farham, *In re* (2 Chan. Div., 1895, 805), 145.
Farish, *In re* (2 N. B. R. 168), 422, 431.
Farley, *In re* (115 Fed. Rep. 359), 252, 254.
Farley v. Danks (4 El. & Bl. 493), 241.
Farmer, *In re* (116 Fed. Rep. 763), 291.
Farmers Loan & Trust Co. v. Chicago, N. P. R. Co. (73 Fed. Rep. 314), 837.
Farmers Loan & Trust Co. v. Waterman (106 U. S. 265), 823.
Farmers & Mechanics Bank v. Smith (6 Wheat. 130), 20, 21.
Farnum, *In re* (6 Law Rep. 21), 263.
Farr v. Pearce (3 Madd. 74), 403.
Farrar v. Churchill (135 U. S. 609), 823.
Farrin v. Crawford (2 N. B. R. 602), 810.
Farrund, Williams & Clark v. Milburn & Co. (not reported), 102.
Faxon, *Ex parte* (1 Low. 404), 400.
Faxon v. Folvey (110 Mass. 392), 412.
Fay, *In re* (3 Ben. 660), 626.
Featherstonhaugh v. Fenwick (17 Ves. 308), 258, 259.
Federhen, *In re* (No. 4713*a* Fed. Cas.), 583, 591.
Fehley v. Barr (66 Penn. 196), 428, 432.
Feigenbaum, *In re* (121 Fed. Rep. 69), 738, 755, 811.
Feinberg, *In re* (3 Ben. 162), 620.
Felb, *In re* (91 Fed. Rep. 107), 271.
Felch v. Bughee (48 Me. 9), 759.
Feldstein, *In re* (115 Fed. Rep. 259), 748, 750, 818.
Felker v. Crane (77 Ga. 484), 427.
Fellows v. Freudenthal (102 Fed. Rep. 731), 127, 404, 405, 659.
Fellows v. Hall (3 McLean 281), 784.
Felsen, *In re* (124 Fed. Rep. 288), 633, 669.
Fendley, *In re* (10 N. B. R. 250), 215.
Fereday v. Wightwick (1 R. & M. 49), 258.
Ferguson, *In re* (95 Fed. Rep. 429), 166.
Ferris, *In re* (105 Fed. Rep. 356), 660.
Fetter v. Cirode (4 B. Mon., Ky., 482), 756.

References are to pages.

Feuerlicht, *In re* (8 Am. B. R. 550), 587.
Fidelity Trust & Saf. Vt. Co. v. Mobile St. R. R. Co. (53 Fed. Rep. 850), 206, 210.
Fidgeon *Ex parte* (4 Dea. 417), 294.
Field v. Baker (12 Blatch. 438), 165, 368.
Fielding, *In re* (96 Fed. Rep. 800), 126, 363.
Fields v. Karter (115 Fed. Rep. 950), 659.
Fife, *In re* (109 Fed. Rep. 880), 290, 292.
Filer, *In re* (5 Am. B. R. 332), 154, 160, 197, 425.
Filer, *In re* (125 Fed. Rep. 262), 303, 319.
Filley, *In re* (2 Cent. L. J. 419), 741.
Fillingin v. Thornton (49 Ga. 384), 173.
Finklestein, *In re* (101 Fed. Rep. 418), 658.
Finlay, *In re* (5 Biss. 480), 225.
Finnegan v. Hall (6 Am. B. R. 648), 290.
Firemen's Ins. Co., *In re* (3 Biss. 462), 302.
First Nat. Bank v. Haire (36 Ia. 443), 592.
First Nat. Bank v. Penn. Trust Co. (124 Fed. Rep. 968), 368, 562, 599.
Firth Co. v. Loan & Trust Co. (122 Fed. Rep. 569), 598.
Fischer v. Hays (6 Fed. Rep. 70), 675.
Fisher, *In re* (98 Fed. Rep. 89), 407.
Fisher, *In re* (103 Fed. Rep. 860), 808, 812.
Fisher v. Currier (7 Met., Mass., 424), 174, 415.
Fisher et al v. Currier (5 Law Rep. 217), 10.
Fisher v. Cushman (103 Fed. Rep. 867), 73, 79, 82, 101, 361, 374, 816.
Fisher v. Syfers (109 Ind. 514), 258.
Fisk, *Ex parte* (113 U. S. 713), 232, 344, 676.
Fitchard, *In re* (103 Fed. Rep. 742), 656, 660.
Fitzgerald v. Phillips (4 Martin, La., O. S. 292), 2.
Fitzgerald Co. v. Fitzgerald (137 U. S. 98), 204.
Fixen, *In re* (96 Fed. Rep. 748), 212, 213, 616, 627.
Fixen, *In re* (102 Fed. Rep. 295), 576.
Flagg v. Tyler (6 Mass. 33), 778.
Flanagan, *In re* (5 Saw. 312), 173.
Flanagan, *In re* (117 Fed. Rep. 695), 536.
Flanagan v. Pearson (42 Tex. 1), 774, 767, 768.
Flanders, *In re* (121 Fed. Rep. 936), 95.
Fleishman, *In re* (120 Fed. Rep. 960), 745.
Fleitas v. Mellen (39 Fed. Rep. 129), 783.
Fleitas v. Richardson (147 U. S. 550), 783.
Fleming v. Andrews (3 Fed. Rep. 632), 313, 590.
Fleming v. Buchanan (3 DeG., M. & G. 976), 381.
Fletcher v. Manning (12 M. & W. 571), 294.
Fletcher v. Morey (2 Story 555), 369, 731.
Fletcher v. Neally (20 N. H. 464), 779.
Fletcher v. Peck (6 Cranch 87), 836.
Flick, *In re* (105 Fed. Rep. 503), 345, 726.
Florcken, *In re* (107 Fed. Rep. 241), 72, 212.
Florida v. Charlotte Harbor Phosphate Co. (70 Fed. Rep. 883), 837, 838.
Flower v. Greenebaum (2 Fed. Rep. 987), 694.
Fly, *In re* (110 Fed. Rep. 141), 450, 452.
Foerst, *In re* (93 Fed. Rep. 190), 624, 627.
Fogarty v. Gerrity (1 Saw. 233), 235.
Foley v. Shriver (81 Va. 568), 732.
Foot, *In re* (11 Blatch. 530), 375.
Forbes v. Howe (102 Mass. 427), 571, 577.
Ford v. Belmont (7 Rob., N. Y., 97), 380.
Foreman v. Burleigh (109 Fed. Rep. 313), 819, 823.
Forgay v. Conrad (6 How. 201), 826.
Fornsworth, *In re* (5 Biss. 223), 312.
Forsaith v. Merritt (1 Low. 336), 583, 591.
Forster v. Wilson (12 M. & W. 203), 308.
Forsyth, *In re* (7 N. B. R. 174), 580.

References are to pages.

Forsyth v. Hammond (166 U. S. 513), 800, 802.
Forsyth v. Vehmeyer (177 U. S. 177), 770.
Forsyth v. Woods (11 Wall. 484), 304, 311, 315.
Fort v. McCully (59 Barb., N. Y., 87), 311.
Ft. Wayne Elec. Corp., *In re* (94 Fed. Rep. 109), 126, 363.
Ft. Wayne Elec. Corp., *In re* (95 Fed. Rep. 264), 309.
Fortune, *In re* (1 Low. 306), 285. 301.
Fortune, *In re* (1 Low. 384), 330.
Foster, *In re* (3 Ben. 386), 247.
Foster, *In re* (11 Am. B. R. 131), 161.
Foster, *In re* (18 N. B. R. 64), 163, 590.
Foster v. Ames (1 Low. 313), 702.
Foster v. Hackley (2 N. B. R. 406), 570, 573, 577, 590.
Foster v. Lowell (4 Mass. 307), 418.
Fourth Nat. Bank v. Francklyn, (120 U. S. 747), 282.
Fowler, *In re* (1 Low. 161), 185, 251.
Fowler, *In re* (2 Low. 122), 787.
Fowler, *In re* (93 Fed. Rep. 417), 404, 615.
Fowler v. Hart (13 How. 373), 605, 707.
Fowler v. Kendall (44 Me. 448), 774.
Fowler v. Lindsey (3 Dall. 411), 798.
Fowler v. Wood (26 S. C. 169), 431.
Fox v. Adams (5 Greenl., Me., 245), 377.
Fox v. Eckstein (4 N. B. R. 373), 160.
Fox v. Gardner (21 Wall. 475), 586.
Fox v. Paine (10 Ala. 523), 769.
Fox v. Woodruff (9 Barb. 498), 293.
Foxall v. Levy (1 Cranch C. C. 139), 637.
Foye, *In re* (2 Low. 399), 283.
Francis v. Ogden (22 N. L. J. 210), 784.
Francis-Valentine Co., *In re* (93 Fed. Rep. 953), 388.
Fraley v. Kelly (67 N. C. 78), 779, 780, 781.
Frank, *In re* (5 Ben. 164), 270, 324.
Frank v. Muslliner (9 Am. B. R. 229), 611.
Franklin, *In re* (8 Ben. 233), 159, 160, 390.
Franklin, *In re* (106 Fed. Rep. 666), 93.
Franklin v. Hosier (4 B. & Ald. 341), 600.
Franklin Sav. Fund Soc. Estate of (No. 5058 Fed. Cas.), 716.
Franklin Syndicate, *In re* (114 Fed. Rep. 205), 625.
Frank, *In re* (95 Fed. Rep. 635), 388.
Frazier, *In re* (117 Fed. Rep. 746), 591.
Frazier v. Banks (11 La. Ann. 31), 783.
Frazier v. Southern L. & T. Co. (99 Fed. Rep. 707), 31, 94, 96, 97, 564.
Frear, *In re* (2 Ben. 467), 262.
Frear, *In re* (10 Am. B. R. 199), 678, 679, 681, 682, 692.
Freche, *In re* (109 Fed. Rep. 720), 639, 646, 676, 765, 768.
Fredenberg, *In re* (2 Ben. 133), 620.
Freeman, *In re* (4 Ben. 245), 751.
Freeman v. Clay (48 Fed. Rep. 849), 828, 832.
Freeman v. Howe (24 How. 450), 76, 97, 370.
French v. Andrade (6 T. R. 582), 315.
French v. Carr (7 Ill. 664), 420.
French v. Shoemaker (12 Wall. 100), 829, 830.
Freund, *In re* (98 Fed. Rep. 81), 659, 660.
Freudenfels, *In re* (No. 5112*a* Fed. Cas.), 238.
Frey, *In re* (9 Fed. Rep. 376), 748, 753, 754.
Frey v. Torrey (8 Am. B. R. 196), 770, 771, 775.
Frice, *In re* (96 Fed. Rep. 611), 739, 744.
Frick, *In re* (1 Am. B. R. 719), 708, 723, 730.
Friedlander v. Holloman (9 B. R. 331), 361.
Friedrich, *In re* (100 Fed. Rep. 284), 428, 429, 439, 441, 554, 557.
Frisbee, *In re* (11 Blatch. 185), 391.
Frisbee, *In re* (4 Law Rep. 483), 181.
Frisbie, *In re* (13 N. B. R. 349), 612, 616.
Frizelle, *In re* (5 N. B. R. 122), 612, 613, 616, 741.

References are to pages.

Frothingham v. Haley (3 Mass. 68), 286.
Fuller, *Ex parte* (2 Story 327), 395.
Fulton Club, *In re* (113 Fed. Rep. 997), 150.
Fulwood v. Bushfield (14 Penn St. 90), 296, 297.
Funk, *In re* (101 Fed. Rep. 244), 145.
Funkenstein, *In re* (3 Saw. 605), 235.
Furth v. Stahl (10 Am. B. R. 442), 586.

G.

Gage & Co. v. Bell (124 Fed. Rep. 371), 190, 203, 227.
Gaines v. Rugg (148 U. S. 228), 843.
Gainey, *In re* (2 N. B. R. 525), 422, 431.
Galbraith, *Ex parte* (1 N. Y. Leg. Obs.n 5), 10.
Gallagher, *In re* (16 Blatch. 410), 407.
Gallimore, *Ex parte* (2 Rose 424), 149.
Gallinger, *In re* (1 Saw. 224), 237, 238.
Gallison, *In re* (2 Low 72), 293.
Galt, *In re* (120 Fed. Rep. 443), 369.
Galveston Ry. v. Gonzales (151 U. S. 496), 206.
Gammon, *In re* (109 Fed. Rep. 312), 657.
Gans v. Eilison (114 Fed. Rep. 734), 333, 576, 587.
Garcewich, *In re* (115 Fed. Rep. 369), 375, 404, 599, 811.
Garden, *In re* (93 Fed. Rep. 423), 430, 445, 446.
Gardner, *In re* (103 Fed. Rep. 922), 126.
Gardner v. Houghton (2 B. & S. 743), 758.
Garlington, *In re* (115 Fed. Rep. 999), 283, 288, 289.
Garneau v. Dozier (100 U. S. 7), 834.
Garner, *In re* (115 Fed. Rep. 200), 545, 434, 437.
Garrett, *In re* (2 Hughes 235), 765.
Garrett v. Sayles (1 Fed. Rep. 371), 282.
Garrison, *In re* (5 Ben. 430), 148.
Garrison v. Markley (7 N. B. R. 246), 105, 626.
Gasser, *In re* (104 Fed. Rep. 537), 135.
Gassett et al v. Morse (3 N. Y. Leg. Obs. 350), 10.
Gassett v. Grout (4 Net., Mass., 486), 732.
Gates v. Goodloe (101 U. S. 612), 836.
Gattman v. Honea (12 N. B. R. 493), 388, 593.
Gauss v. Schrader (48 Fed. Rep. 816), 260.
Gay, *In re* (98 Fed. Rep. 870), 183, 252, 254, 265.
Gay, *In re* (2 N. B. R. 358), 748, 749.
Gay v. Farran (2 Cin. Sup. Ct. 426), 772.
Gay v. Kingsley (93 Mass. 345), 407.
Gay v. Parpart (101 U. S., 391), 828, 829.
Gayle v. Randall (71 Ala. 469), 434.
Gaylord, *In re* (106 Fed. Rep. 833), 660.
Gaylord, *In re* (111 Fed. Rep. 717), 406.
Gaylord, *In re* (112 Fed. Rep. 668), 746, 818.
Gaylord, *In re* (113 Fed. Rep. 131), 323.
Geillinger v. Philippi (133 U. S. 246), 21.
Geister, *In re* (97 Fed. Rep. 322), 89.
George, *In re* (1 Low. 409), 267, 753.
George v. Clagett (7 T. R. 359), 315.
Georgia Handle Co., *In re* (109 Fed. Rep. 632), 602.
Gerry, *In re* (112 Fed. Rep. 957), 605, 702, 705, 708.
Gerdes, *In re* (102 Fed. Rep. 318), 77, 90, 92, 95, 359, 605.
Gerson, *In re* (105 Fed. Rep. 891), 289, 294.
Gerson, *In re* (107 Fed. Rep. 897), 295, 303, 304.
Gerstel, *In re* (10 Am. B. R. 411), 668, 674.
Ghiglione, *In re* (93 Fed. Rep. 186), 139, 241.
Gibbs, *In re* (109 Fed. Rep. 627), 428, 430, 704, 706, 709.
Gibson v. Boutts (4 M. & G. 169), 571.
Gibson v. Boutts (3 Scott 229), 751.
Gibson v. Carruthers (8 M. & W. 326), 417, 418, 419.
Gibson v. King (10 M. & W. 667), 148.

References are to pages.

Gibson v. Lewis (11 N. B. R. 247), 282.
Gibson v. Muskett (4 M. & G. 160), 571.
Gibson v. Warden (14 Wall. 244), 170, 368, 386, 389, 584, 605, 731.
Gilbert, *In re* (1 Low. 340), 612.
Gilbert, *In re* (2 N. B. R. 378), 614.
Gilbert, *In re* (112 Fed. Rep. 951), 158, 161, 162, 168.
Gilbert v. Quinby (1 Fed. Rep. 111), 731.
Gile, *In re* (5 Law Rep., 224), 187.
Gill, *In re* (106 Fed. Rep. 57), 348.
Gillette, *In re* (104 Fed. Rep. 769), 190, 222, 580,
Gilman v. Lockwood (4 Wall. 409), 23, 759.
Githens v. Shiffler (112 Fed. Rep. 505), 159, 163.
Glaser, *In re* (2 Ben. 180), 635, 639, 642, 645.
Glass, *In re* (119 Fed. Rep. 391), 134.
Glass, *In re* (119 Fed. Rep. 509), 742, 743, 744.
Gladding, *In re* (120 Fed. Rep. 709), 726.
Glenn v. Howard (65 Md. 40), 372, 761.
Glenn v. Johnson (18 Wall. 476), 419.
Glenny v. Langdon (98 U. S. 20), 352, 372, 383, 384, 417, 606.
Globe Cycle Wks., *In re* (2 Am. B. R. 447), 709.
Globe Ins. Co. v. Cleveland Ins. Co. (14 N. B. R. 311), 25, 26, 27, 29, 391.
Glover v. Love (26 Coop. Sup Ct. Rep. 657), 405.
Glover Grocery Co. v. Dorne (8 Am. B. R. 702), 694.
Goddard v. Ordway (94 U. S. 672), 829.
Goddard v. Weaver (1 Woods 257), 368, 731.
Godding v. Rosenthal (180 Mass. 43), 286.
Goldberg, *In re* (117 Fed. Rep. 692), 88, 90, 92.
Goldberg v. Harlan (67 N. E. Rep. 707), 609.
Golden v. Prince (2 Wash. C. C. 313), 20.
Goldey v. Morning News (156 U. S. 518), 206.
Goldman, *In re* (102 Fed. Rep. 122), 396.
Goldman v. Smith (93 Fed. Rep. 182), 163, 220, 222, 230.
Goldman, Bettman & Co. v. Smith (41 W. L. Bul. 4), 218.
Goldschmidt, *In re* (3 Ben. 379), 751.
Goldsmith, *In re* (118 Fed. Rep. 763), 126, 368, 652, 599, 703, 704, 706, 707, 710.
Goldville Mining Co., *In re* (123 Fed. Rep. 579), 126, 136.
Golson v. Niehoff (2 Biss. 434), 581.
Good, *In re* (78 Cal. 399), 148.
Good, *In re* (99 Fed. Rep. 389), 809, 813, 817, 820.
Goodale, *In re* (109 Fed. Rep. 783), 656, 660, 743, 746, 752.
Goodall v. Tuttle (3 Biss. 219), 19, 87, 423.
Goodfellow, *In re* (1 Low. 510), 143, 176, 185.
Goodier v. Barnes (91 Fed. Rep. 798), 103, 608.
Goodman, *In re* (5 Biss. 401), 146, 227.
Goodman v. Brenner (109 Fed. Rep. 481), 816, 817.
Goodman Shoe Co., *In re* (96 Fed. Rep. 949), 314.
Goodrich v. Dobson (43 Conn. 576), 310, 313.
Goodridge, *In re* (2 N. B. R. 324), 659.
Goodwin, *In re* (122 Fed. Rep. 111), 688.
Goodwin v. Noble (8 El. & B. 587), 397, 400.
Goodwin v. Stark (15 N. H. 218), 778.
Goodyear v. Mullee (5 Blatch. 429), 632, 669.
Gordon, *Ex parte* (1 Black, 503), 798.
Gordon, *In re* (115 Fed. Rep. 445), 542.
Gordon v. Anthony (16 Blatch. 453), 378.
Gormley v. Bunyan (138 U. S., 623), 361.
Gottardi, *In re* (7 Am. B. R. 723), 121.
Gould v. Sessions (76 Fed. Rep. 163), 676.
Grady, *In re* (3 N. B. R. 227), 266.
Graff, *In re* (8 Am. B. R. 744), 282.
Graff, *In re* (117 Fed. Rep. 343), 368, 562, 599.
Graff v. Bonnett (31 N. Y. 9), 414.
Graham, *Ex parte* (3 Wash. C. C. 456), 648.

References are to pages.

Graham, *In re* (2 Biss| 449), 436.
Graham v. Boston H. & E. R. Co. (118 U. S. 161), 234.
Graham v. Pierson (6 Hill, N. Y., 247), 290, 301, 784.
Graham v. Stark (3 N. B. R. 357), 573, 575.
Graham v. Stark (3 Ben. 520), 571, 575, 577, 578, 580, 592.
Graham v. Van Dieman's Land Co. (11 Exch. 101), 372, 405.
Graham v. Whichelo (1 Cr. & M. 186), 264.
Granger, *In re* (8 N. B. R. 30), 335.
Grant, *In re* (2 Story 312), 415, 419.
Grant, *In re* (106 Fed. Rep 496), 153, 163, 200, 245, 247, 249, 254.
Grant v. First Nat. Bank (97 U. S. 80), 570, 578, 592.
Grant Bros., *In re* (118 Fed. Rep. 73), 121.
Grant Shoe Co., *In re* (125 Fed. Rep. 576), 189.
Graver v. Faurot (162 U. S. 435), 806.
Graves, *In re* (9 Fed. Rep. 816), 320, 336.
Graves, *In re* (24 Fed. Rep. 550), 743.
Graves, *In re* (29 Fed. Rep. 60), 670.
Graves, *In re* (2 Ben. 100), 699, 716.
Graves v. Dolphin (1 Sim. 66), 414.
Gray, *In re* (3 Am. B. R. 647), 382, 383, 391, 392, 606.
Gray v. Bennett (3 Met., Mass., 526), 284, 418.
Gray v. Chicago, etc. R. R. Co. (Woolw. 63), 672.
Gray v. Chiswell (9 Ves. 118), 243.
Gray v. Rollo (18 Wall. 629), 311, 312, 315.
Great Western Telegraph Co., *In re* (5 Biss. 359), 234, 810.
Greater American Exposition, *In re* (102 Fed. Rep. 986), 94.
Greaves, *Ex parte* (5 L. R. Ch. App. 326), 688.
Green, *In re* (106 Fed. Rep. 313), 169.
Green, *In re* (116 Fed. Rep. 118), 257, 724.
Green v. Bank of England (3 Y. & C. 722), 405.
Green v. Blunt (50 Ia. 79), 434.
Green v. Elbert (137 U. S. 615), 821.
Green v. Sarmiento (3 Wash. C. C. 17), 759.
Green v. Spicer (1 R. & M. 395), 414.
Green River Deposit Bank v. Craig (110 Fed. Rep. 137), 142, 168, 199, 224, 249.
Greenberg, *In re* (106 Fed. Rep. 496), 633, 638.
Greenberg, *In re* (114 Fed. Rep. 773), 658, 659, 750.
Greenebaum, *In re* (1 Chi. Law Jour. 599), 687, 693.
Greenewald, *In re* (99 Fed. Rep. 705), 726.
Greening, *Ex parte* (13 Ves. 206), 407.
Greensfedler v. Corbett (3 N. B. R. 825), 404.
Greenwald v. Appell (17 Fed. Rep. 140), 755.
Grefe, *In re* (2 N. B. R. 329), 742.
Gregg, *In re* (1 Hask. 173), 366, 402.
Gregg, *In re* (4 N. B. R. 456), 388, 591.
Gregory v. Pike (70 Fed. Rep. 520), 210.
Gretchell, *In re* (8 Ben. 256), 234.
Greth, *In re* (112 Fed. Rep. 978), 336.
Grether v. Wright (75 Fed. Rep. 742), 230.
Griel v. Solomon (82 Ala. 85), 780.
Griffin v. Sutherland (14 Barb., N. Y., 456), 423.
Grigsby v. Purcell (99 U. S. 505), 837.
Grimes, *In re* (94 Fed. Rep. 800), 424, 426, 444, 515, 516.
Grimes, *In re* (96 Fed. Rep. 529), 398, 441, 515.
Griswold v. Pratt (9 Met. 16), 20, 23, 24, 25, 26, 29.
Grossman, *In re* (111 Fed. Rep. 507), 127, 658, 750.
Groves v. Kilgore (72 Me. 489), 148.
Grubbs-Wiley Grocery Co., *In re* 96 Fed. Rep. 183), 303, 726.
Guise v. Stafe (41 Ark. 249), 423.
Gumble v. Pitkin (124 U. S. 131), 97, 99.
Gunn v. Barry (15 Wall. 621), 423.
Gurewitz, *In re* (121 Fed. Rep. 982), 726.

References are to pages.

Gutman, *In re* (114 Fed. Rep. 1009), 89, 93.
Gutwillig, *In re* (90 Fed. Rep. 475), 23, 32, 88, 93, 167, 215, 391, 392.
Gutwillig, *In re* (92 Fed. Rep. 337), 89, 812.

H.

Haake, *In re* (2 Saw. 231), 289, 300, 435.
Hackney v. Raymond Bros. Co. (10 Am. B. R. 213), 388, 574, 578, 579, 580, 610.
Hadley, *In re* (12 N. B. R. 366), 199, 641.
Haensell, *In re* (91 Fed. Rep. 355), 420, 421.
Hagan, *In re* (6 Ben. 407), 722.
Haggerty v. Morrison (59 Mo. 324), 784.
Haines v. Carpenter (91 U. S. 254), 87.
Haines v. Stauffer (13 Pa. 541), 781.
Haldame v. United States (69 Fed. Rep. 819), 828.
Hale, *In re* (107 Fed. Rep. 432), 254, 267.
Halford, *Ex parte* (19 L. R. Eq. 436), 695.
Haliburton v. Carter (55 Mo. 435), 773.
Hall, *Ex parte* (No. 5919 Fed. Cas.), 176.
Hall, *In re* (2 Hughes 411), 441.
Hall v. Fowler (6 Hill, N. Y., 630), 778, 783.
Hall v. Scovel (10 N. B. R. 295), 601.
Hambright, *In re* (2 N. B. R. 498), 715.
Hamburger, *In re* (12 N. B. R. 277), 285, 398.
Hamilton, *In re* (1 Fed. Rep. 800), 262.
Hamilton, *In re* (102 Fed. Rep. 683), 728.
Hamilton, *In re* (4 Am. B. R. 717), 213.
Hamilton v. Reynolds (88 Ind. 191), 763, 771.
Hamlin, *Ex parte* (2 Low. 571), 697.
Hamlin, *In re* (8 Biss. 122), 240.
Hammer v. Freese (19 Pa. St. 255), 434.
Hammond, *Ex parte* (21 Wkly. Rep. 865), 266.
Hammond, *In re* (98 Fed. Rep. 845), 404.
Hammond, *In re* (1 Low. 381), 748, 749.
Hampton v. Rouse (22 Wall. 263), 365.
Handlin, *In re* (3 Dill. 290), 443.
Hankey v. Smith (3 T. R. 507), 312.
Hanna, *In re* (105 Fed. Rep. 587), 368, 562, 599.
Hanna, *In re* (5 Ben. 5), 271.
Hannahs, *In re* (8 Ben. 533), 691.
Hanover Nat. Bank v. Moyses (186 U. S. 181), 18, 20, 426.
Hansen, *In re* (107 Fed. Rep. 252), 659.
Hansen, *In re* (2 N. B. R. 211), 743.
Hanson, *Ex parte* (12 Ves. 346), 315.
Hanson v. Stevenson (1 B. & Ald. 303), 397, 399, 400.
Hapgood, *In re* (2 Low. 200), 164, 588.
Harcourt, *Ex parte* (2 Rose 203), 240.
Harddin, *In re* (1 N. B. R. 395), 180.
Hardee v. Wilson (146 U. S. 149), 824.
Hardin, *In re* (1 Hask. 163), 319.
Hardy v. Carter (8 Hump., Tenn., 153), 297.
Hardy v. Clark (3 N. B. R. 385), 233.
Hare, *In re* (119 Fed. Rep. 246), 113, 276, 277, 349.
Hargardine-McKittrick Dry Goods Co. v. Hudson (122 Fed. Rep. 232), 319, 334, 777, 760, 770.
Harper, *In re* (105 Fed. Rep. 900), 166, 167.
Harper Bros., *In re* (100 Fed. Rep. 266), 160, 167, 168.
Harpke, *In re* (116 Fed. Rep. 295), 576.
Harrel v. Beal (17 Wall. 590), 384.
Harrington, *In re* (99 Fed. Rep. 293), 536.
Harrington v. McNaughton (20 Vt. 293), 293.
Harris, *Ex parte* (2 Low. 568), 696.
Harris, *In re* (108 Fed. Rep. 517), 251.
Harris, *In re* (117 Fed Rep. 575), 684, 696.
Harris, *In re* (6 Ben. 375), 235.
Harris, *In re* (3 N. Y., Leg. Obs. 152), 187, 632.
Harris v. Barber (129 U. S. 368), 800.

References are to pages.

Harris v. Collins (13 Ala. 388), 361.
Harris v. Farwell (15 Beav. 31), 264.
Harris v. Peck (1 R. I. 262), 781.
Harrison v. Gamble (69 Mich. 96), 694.
Harrison Mercantile Co., *In re* (95 Fed. Rep. 123), 137, 139, 241.
Harrison v. Sterry (5 Cranch 289), 243, 325, 377. 729, 764.
Hart v. Smith (4 L. R. Q. B. 61), 688.
Harter v. Harlan (2 N. B. R. 238), 639.
Harthill, *In re* (4 Ben. 448), 217, 219.
Harthorn, *In re* (4 N. B. R. 103), 726.
Hartman, *In re* (96 Fed. Rep. 593), 246, 267.
Hartman, *In re* (121 Fed. Rep. 940), 607.
Harvey, *In re* (122 Fed. Rep. 745), 325, 702, 723.
Harvey's Estate, *In re* (13 L. R. Ch. Div. 216), 381.
Harvey v. Crane (5 N. B. R. 218), 393, 606.
Harvey v. Richmond, etc. R. Co. (64 Fed. Rep. 19), 206.
Harwood v. Diekerhoff (117 U. S. 200), 829, 830.
Haskell, *In re* (11 N. B. R. 164), 688.
Haskell v. Equitable Life Assur. Society (181 Mass. 341), 410.
Haskell v. Ingalls (1 Hask. 341), 571.
Haskin, *In re* (109 Fed. Rep. 789), 441, 528.
Haskins v. R. R. Co. (109 U. S. 106), 828.
Hasseltine v. Prince (95 Fed. Rep. 802), 395, 396.
Hassenbusch, *In re* (108 Fed. Rep. 35), 614, 640, 646, 812.
Hastings v. Wilson (Holt 290), 397, 400.
Hatch, *In re* (102 Fed. Rep. 280), 428, 442, 469.
Hatch v. Seely (13 N. B. R. 383), 335.
Hatcher v. Jones (53 Ga. 208), 431.
Hatje, *In re* (6 Biss. 436), 304.
Haughey v. Albion, 2 Bond 244), 104, 105, 570.
Haughton, *In re* (1 N. B. R. 460), 237.
Hausman, *In re* (121 Fed. Rep. 984), 669.
Havens, *In re* (1 N. B. R. 485), 349.
Havens, *In re* (8 Ben. 309), 219.
Havens & Geddes Co. v. Pierek 120 Fed. Rep. 244), 81, 100.
Hawk, *In re* (114 Fed. Rep. 916), 811.
Hawk v. Hawk (102 Fed. Rep. 679), 404.
Hawkeye Smelting Co., *In re* (8 N. B. R. 385), 229.
Hawkins, *Ex parte* (4 Ves. Jr. 691), 206.
Hawkins, *In re* (125 Fed. Rep. 633), 712.
Hawkins v. Hawkins (1 Q. B. D. 25), 290.
Hawley, *In re* (116 Fed. Rep. 428), 119.
Hawley, *In re* (117 Fed. Rep. 364), 713.
Haworth v. Travis (67 Ill. 301), 431.
Hayes v. Flowers (25 Miss. 169), 782.
Haynes, *In re* (2 N. B. R. 227), 276, 721, 733.
Haynes & Sons, *In re* (122 Fed. Rep. 660), 752.
Hays, *In re* (117 Fed. Rep. 879), 397.
Hays v. Fisher (102 U. S. 122), 670.
Hays, Foster & Ward Co., *In re* (117 Fed. Rep. 879), 305, 306.
Hazleton v. Valentine (1 Low. 270), 637, 643.
Headley, *In re* (97 Fed. Rep. 765), 323.
Heaney v. Birch (1 Rose 356), 149.
Heard v. Jones (15 N. B. R. 402), 335.
Heath, *In re* (7 N. B. R. 448), 613.
Heath v. Percival (1 P. W. 682), 264.
Heath v. Shaffer (93 Fed. Rep. 647), 77, 92.
Hebbert, *In re* (104 Fed. Rep. 322), 188.
Heffren v. Jayne (39 Ind. 463), 774.
Heffren v. Leroy (39 Ind. 471), 774.
Heinsfurter, *In re* (97 Fed. Rep. 198), 318.
Heller, *In re* (41 How. Prac. 213), 187.
Helmbold v. Helmbold Mfg. Co. (53 How. Prac. 453), 378.
Hemby-Hutchinson Pub. Co., *In re* (105 Fed. Rep. 909), 81.

References are to pages.

Henderson, *In re* (9 Fed. Rep. 196), 238.
Henderson v. Carbondale Co. (140 U. S. 25), 205.
Hendrie v. Sayles (98 U. S. 546), 379.
Hendry v. Ocean Steamship Co. (164 U. S. 707), 802.
Hendryx v. Fitzpatrick (19 Fed. Rep. 810), 669, 670, 676.
Henkel, *In re* (2 Saw. 305), 443.
Henly v. Lanier (75 N. C. 172), 427.
Hennequin v. Clewes (111 U. S. 676), 772, 775, 794.
Hennocksburgh, *In re* (6 Ben. 150), 318.
Henrich, *In re* (5 Blatch. 414), 647.
Henry, *In re* (9 Ben. 449), 693.
Henschel, *In re* (109 Fed. Rep. 861), 113, 276, 348.
Henschel, *In re* (113 Fed. Rep. 443), 277.
Hercules Mut. Ins. Co., *In re* (6 Ben. 35), 150.
Herdic, *In re* (1 Fed. Rep. 242), 753.
Herdon v. Givens (16 Ala. 261), 779.
Herndon v. Davenport (75 Tex. 462), 369.
Herndon v. Howard (9 Wall. 664), 359, 360, 367.
Herndon v. Ridgway et al (17 How. 424), 205.
Herrick, *In re* (13 N. B. R. 312), 261.
Herrman, *In re* (4 Ben. 126), 272.
Hersey v. Elliott (67 Me. 526), 407.
Hersey v. Fosdick (20 Fed. Rep. 44), 722.
Herzberg, *In re* (25 Fed. Rep. 690), 95.
Herzikopf, *In re* (118 Fed. Rep. 101), 134, 201.
Herzikopf, *In re* (121 Fed. Rep. 544), 157, 226, 231.
Hester, *In re* (5 N. B. R. 285), 396, 427, 428.
Hewes v. Parkman (20 Pick. Mass. 90), 434.
Hewitt v. Filbert (116 U. S. 142), 821.
Hewett v. Norton (Woods 68), 370.
Heyman, *In re* (95 Fed. Rep. 800), 296, 297, 298.
Heyman, *In re* (104 Fed. Rep. 677), 659.
Heyman, *In re* (108 Fed. Rep. 207), 698.
Hicks, *In re* (2 Fed. Rep. 851), 115.
Hicks, *In re* (107 Fed. Rep. 910), 240, 654.
Hicks v. Hotchkiss (7 John Ch. N. Y. 297), 759.
Hicks v. Knost (178 U. S. 541), 80, 85, 607, 792.
Hicks v. Langhorst (6 Am. B. R. 178), 577, 609.
Higgins Case (6 Coke 344), 265.
Hilborn, *In re* (104 Fed. Rep. 866), 275, 679, 682.
Hildebrant, *In re* (10 Am. B. R. 184), 303, 304, 319.
Hill, *In re* (96 Fed. Rep. 185), 428, 429, 430, 439, 461, 462.
Hill, *In re* (1 Ben. 321), 179, 180, 181.
Hill, *In re* (2 Ben. 136), 743.
Hill, *In re* (7 Ben. 378), 233.
Hill v. Bowers (4 Heisk. Tenn. 272), 396.
Hill v. Cowery (25 L. J. Ex. 285), 169.
Hill v. Dobie (8 Taunt. 325), 397, 400.
Hill v. Dobie (2 Moore 342), 397, 400.
Hill v. Gordon (45 Fed. Rep. 278), 208.
Hill v. Harding (107 U. S. 631), 359, 795.
Hill v. Harding (130 U. S. 699), 784.
Hill v. Levy (98 Fed. Rep. 94), 226, 232.
Hill v. Robbins (1 Mich. N. P. 305), 769.
Hill v. Robbins (22 Mich. 474), 779.
Hill v. Thompson (94 U. S. 322), 816.
Hills v. Alden (2 Hask. 299), 712, 713, 714.
Hilton, *In re* (104 Fed. Rep. 981), 762.
Hilton, *In re* (4 Am. B. R. 774), 88, 92.
Hinckel Brewing Co, *In re* (123 Fed. Rep. 942), 305, 307, 343.
Hinckel Brew. Co., *In re* (124 Fed. Rep. 702), 363.
Hinckley v. Morton (103 U. S. 764), 843.
Hindman, *In re* (104 Fed. Rep. 331), 450, 453.
Hinds, *Ex parte* (3 DeG. & S. 613), 258.
Hinds, *In re* (3 N. B. R. 351), 256.

References are to pages.

Hines, *In re* (117 Fed. Rep. 790), 435.
Hinsdale, *In re* (111 Fed. Rep. 502), 369.
Hirsch, *In re* (2 Ben. 493), 79, 205.
Hirsch, *In re* (96 Fed. Rep. 468), 744.
Hirsch, *In re* (97 Fed. Rep. 571), 244, 245.
Hirschman, *In re* (104 Fed. Rep. 69), 282, 303, 318, 319.
Hiscock v. Jaycox (12 N. B. R. 507), 258, 396.
Hitchcock v. Rollo (3 Biss. 276), 317.
Hitz, *Ex parte* (111 U. S. 766), 798.
Hixon, *In re* (93 Fed. Rep. 440), 744.
Hoadley, *In re* (2 N. B. R. 704), 395.
Hoag, *In re* (97 Fed. Rep. 543), 554.
Hoagland v. Crum (113 Ill. 365), 305.
Hobbs, *Ex parte* (2 Low. 491), 413.
Hobough v. Murphy (114 Pa. St. 358), 779.
Hoe v. Kahler (27 Fed. Rep. 145), 834.
Hoffman, *In re* (102 Fed. Rep. 979), 658.
Holbrook, *In re* (2 Low. 259), 260.
Holbrook v. Coney (25 Ill. 447), 377.
Holden, *In re* (114 Fed. Rep. 650), 411, 425, 810.
Holden v. Stratton (191 U. S. 115), 796.
Holgate, *In re* (8 Ben. 247), 788.
Holland v. Fuller (13 Ind. 195), 413.
Holland v. Withers (76 Ga. 667), 422.
Hollister, *In re* (3 Fed. Rep. 452), 296, 298.
Holloway, *In re* (93 Fed. Rep. 638), 92, 710.
Holman, *In re* (92 Fed. Rep. 512), 744.
Holst, *In re* (11 Fed. Rep. 856), 753.
Holstein, *In re* (114 Fed. Rep. 794), 658.
Holyoke v. Adams (59 N. Y. 233), 784.
Home Ins. Co. v. Hollis (53 Ga. 659), 359.
Hood v. Karper (5 N. B. R. 358), 581.
Hood v. Spencer (4 McLean 168), 769.
Hoole, *In re* (3 Fed. Rep. 496), 700, 716.
Hooson, *Ex parte* (L. R. 8 Ch. App. 251), 83.
Hoover, *In re* (105 Fed. Rep. 354), 788.
Hoover, *In re* (113 Fed. Rep. 136), 528.
Hoover v. Wise (91 U. S. 308), 570, 580, 588.
Hopkins, *In re* (103 Fed. Rep. 781), 542.
Hopkinson v. Lovering (11 L. R. Q. B. Div. 92), 400.
Horgan, *In re* (98 Fed. Rep. 414), 612, 624.
Horner v. Speed (2 Patt. & H. Va. 616), 779, 781, 782.
Horner v. Spelman (78 Ill. 206), 782.
Horner v. United States (44 Fed. Rep. 677), 650, 652.
Hornthal v. McRae (67 N. C. 21), 781.
Horton, *In re* (102 Fed. Rep. 986), 77.
Hornstein, *In re* (122 Fed. Rep. 266), 93, 97, 190, 333, 334, 761.
Hosie, *In re* (7 B. R. 691), 413.
Hoskins, *In re* (Crabbe 466), 637.
Hosmer v. Jewett (6 Ben. 208), 412, 413.
Hough v. National Bank (4 Biss. 349), 588.
Houghton, *In re* (2 Low. 328), 741.
Houghton, *In re* (10 N. B. R. 337), 754.
House, *In re* (1 N. Y. Leg. Obs. 348), 10, 163, 590.
House v. National Bank (43 O. S. 346), 408.
Houston, *In re* (94 Fed. Rep. 119), 765.
Houston v. City Bank (6 How. 486), 605.
Houston v. City Bank (107 Fed. Rep. 73), 706, 707.
Hovey, *In re* (5 Fed. Rep. 356), 722.
Hovey v. Home Insurance Co. (10 N. B. R. 224), 316.
How, *In re* (18 N. B. R. 565), 371, 623.
Howard, *In re* (95 Fed. Rep. 415), 616, 617, 619, 622, 667.
Howard, In re (100 Fed. Rep. 630), 345.

References are to pages.

Howard, *In re* (4 N. B. R. 571), 295.
Howard Nat. Bank, *Ex parte* (2 Low. 487), 696.
Howden, *In re* (111 Fed. Rep. 723), 659, 660, 744.
Howell, *In re* (105 Fed. Rep 594), 656.
Howland, *In re* (109 Fed. Rep. 869), 375.
Howland, *In re* (2 N. B. R. 357), 146, 227, 239.
Hoyt, *In re* (3 N. B. R. 55), 719, 733.
Hubbard, *In re* (1 Low. 190), 339.
Hubbard, *In re* (98 Fed. Rep. 710), 284, 291, 765.
Hubbard v. Tod (171 U. S. 474), 803.
Hubbell v. Cramp (11 Paige 310), 769.
Hudgins v. Kemp (18 How. 538), 829, 830, 835.
Hudgins v. Lane (2 Hughes 361), 270.
Hudson v. Guestier (7 Cranch 1), 840.
Huenergardt v. Brittain Dry Goods Co. (116 Fed. Rep. 31), 435, 443.
Hufnagel, *In re* (12 N. B. R. 554), 285, 397.
Hugewitter v. Von Sacks (4 Ben. 167), 413.
Hughes, *In re* (8 Biss. 107), 444.
Hughes v. Nelson (29 N. J. Eq. 547), 407.
Hughes v. Oliver (8 Pa. St. 426), 770.
Hull, *In re* (115 Fed. Rep. 858), 369, 393, 596, 600.
Humbert, *In re* (100 Fed. Rep. 439), 170, 222, 233.
Humphreys v. Blight (4 Dall. 370), 316, 317.
Hunt, *In re* (5 N. B. R. 433), 190.
Hunt, *In re* (5 N. B. R. 493), 427.
Hunt, *In re* (17 N. B. R. 205), 271.
Hunt, *In re* (26 Fed. Rep. 739), 750.
Hunt, *In re* (118 Fed. Rep. 282), 131, 201.
Hunt v. Oliver (109 U. S. 177), 830.
Hunter, *In re* (3 McLean 297), 786.
Hurst, *In re* (4 Dall. 387), 646.
Hurst, *In re* (1 Flipp. 162), 684, 695.
Hussey v. Danforth (77 Me. 17), 637.
Hussman, *In re* (2 N. B. R. 437), 160.
Hutchins v. Taylor (5 Law Rep. 289), 10, 751.
Hutchinson v. Campbell (25 Pa. St. 273), 434.
Hutchinson v. LeRoy (113 Fed. Rep. 202), 808, 811, 816, 839.
Hutchinson v. Otis (115 Fed. Rep. 937), 562, 839.
Hutchinson v. Otis (123 Fed. Rep. 14), 796.
Hutchinson v. Otis (190 U. S. 552), 320, 326, 338, 339, 819.
Hutto, *In re* (3 N. B R. 787), 601.
Hyde, *In re* (6 Fed. Rep. 587), 714.
Hyde v. Corrigan (9 N. B. R. 466), 581.
Hyde v. Sontag (1 Saw. 249), 382.
Hyde v. Tufts (45 N. Y. Sup. Ct. 56), 420.
Hyde v. Woods (94 U. S. 523), 406.
Hyde & Gload Mfg. Co., *In re* (103 Fed. Rep. 617), 239.
Hyman, *In re* (97 Fed. Rep. 195), 658.
Hyman v. Chales (12 Fed. Rep. 955), 205.
Hyslop v. Hoppock (5 Ben. 447), 207.

I.

Idaho & Ore. Land Imp. Co. v. Bradbury (132 U. S. 509), 835.
Idzall, *In re* (96 Fed. Rep. 314), 750.
Illinois Cent. Rd. v. Illinois (146 U. S. 387), 835.
Illinois Trust & Sav. Bank v. National Bank (15 Fed. Rep. 858), 413.
Imlay v. Carpentier (14 Cal. 173), 293.
Independent Ins. Co., *In re* Holmes 103), 27, 150.
Independent Ins. Co., *In re* (2 Low. 187), 302.
Independent Thread Co., *In re* (113 Fed. Rep. 998), 190.
Indianapolis, etc., R. Co., *In re* (5 Blss. 287), 240.
Ingalls v. Savage (4 Pa. 224), 782.
Inglehart v. Stansbury (151 U. S. 68), 825.
Inglis v. McDougal (1 J. B. Moore 196), 401.
Ingraham v. Geyer (13 Mass. 146), 377.
Ingraham v. Phillips (1 Day, Conn. 117), 564, 755, 756.

References are to pages.

Ingram v. Wilson (125 Fed. Rep. 913), 429.
Insley v. Garside (121 Fed. Rep. 699), 286, 296.
Insurance Co. v. Comstock (16 Wall. 258), 158, 820.
Interstate Com. Com. v. Ry. Co. (57 Fed. Rep. 948), 206.
Iowa Barb Wire Co. v. Southern Co. (30 Fed. Rep. 615), 669.
Iron Mountain Co., *In re* (9 Blatch. 320), 710.
Ironsides, The (4 Biss. 518), 87, 603.
Irvin, *In re* (120 Fed. Rep. 733), 423, 435, 443, 448, 810.
Irving v. Hughes (2 N. B. N. 61), 89, 215.
Irwin v. Williar (110 U. S. 507), 232.
Irwine, *In re* (1 Penn. L. J. 291), 17, 18.
Isaacs, *In re* (3 Saw. 35), 265.
Isidor, *In re* (2 Ben. 123), 612, 616.
Ives, *In re* (113 Fed. Rep. 911), 34, 184, 185, 809, 812.
Ives, *In re* (18 N. B R. 28), 285, 398.
Ives, *In re* (5 Dill. 146), 234, 746.
Ives v. Tregent (29 Mich. 390), 713.

J.

Jackson, *In re* (2 N. B. R. 508), 422, 431.
Jackson, *In re* (7 Biss. 280), 272, 273, 341.
Jackson, *In re* (94 Fed. Rep. 797), 93.
Jackson, *In re* (116 Fed. Rep. 46), 528.
Jackson v. Allen (30 Ark. 110), 431.
Jackson v. Burke (4 Heisk, Tenn., 614), 641.
Jackson v. Cummins (5 M. & W. 342), 600.
Jackson Iron Mfg. Co., *In re* (15 N. B. R. 438), 593.
Jacobs, *In re* (99 Fed. Rep. 539), 809.
Jacobs, *In re* (5 Saw. 548), 742.
Jacobs, *In re* (18 N. B. R. 48), 690.
Jacobs, *In re* (1 Am. B. R. 518), 577.
Jacobs v. George (150 U. S. 415), 831.
Jacobs v. Van Sickle (123 Fed. Rep. 340), 577.
Jacoby v. Distilling Co. (41 Minn. 227), 443.
Jaffrey v. Brown (29 Fed. Rep. 476), 375.
James, *In re* (2 N. B. R. 227), 721, 733.
James v. Atlantic Delaine Co. (11 N. B. R. 390), 282.
Jamieson, *In re* (120 Fed. Rep. 697), 744.
Janeway, *In re* (4 N. B. R. 100), 413.
Jaquith v. Alden (189 U. S. 78), 333, 572, 576, 587, 796.
Jaquith v. Rowley (188 U. S. 620), 74, 80, 83, 84, 85, 93, 608.
Jarecki Mfg. Co. v. McElwaine (107 Fed. Rep. 249), 245, 246, 265, 266.
Jaycox, *In re* (8 N. B. R. 241), 338.
Jefferson, *In re* (93 Fed. Rep. 948), 305, 306, 397.
Jefferson, *In re* (96 Fed. Rep. 826), 615.
Jeffries v. Bartlett (20 Fed. Rep. 495), 429.
Jeffries v. Laurie (27 Fed. Rep. 198), 667, 675.
Jeffs v. Wood (2 P. Wms. 128), 285.
Jehu, *In re* (94 Fed. Rep. 638), 184, 616, 817.
Jelsh, *In re* (9 N. B. R. 412), 233.
Jemison Mercantile Co., *In re* (112 Fed. Rep. 966), 240, 812.
Jenkins v. Armour (6 Biss. 312), 312.
Jenkins v. International Bank (127 W. S. 484), 794.
Jenks v. Opp. (43 Ind. 108), 778, 782.
Jerome v. McCarter (94 U. S. 734). 368, 562, 597, 598, 605, 731.
Jerome v. McCarter (21 Wall. 17), 829, 830.
Jersey City Ins. Co. v. Archer (122 N. Y. 376), 780.
Jervey v. The Carolina (66 Fed. Rep. 1013), 99.
Jewett, *Ex parte* (2 Low. 393), 683, 686, 687, 688, 690.
Jewett, *In re* (3 Fed. Rep. 503), 748, 753.
Jewett, *In re* (1 N. B. R. 491), 257.
Jewett v. Preston (27 Me. 400), 377.
Jobbins v. Montague (6 N. B. R. 509), 176.
Jobbins v. Montague (5 Ben. 425), 79, 205.

References are to pages.

Johnson, *In re* (2 Low. 129), 583, 590.
Johnson, *In re* (118 Fed. Rep. 312), 471.
Johnson v. Collins (116 Mass. 392), 564.
Johnson v. Fitzhugh (3 Barb. Ch. 360), 293.
Johnson v. Rogers (15 N. B. R. 1), 739, 753.
Johnson v. Spiller (1 Douglas 168), 319.
Johnson v. Wald (93 Fed. Rep. 640), 162, 163.
Johnson v. Waters (108 U. S. 4), 829, 830.
Johnson v. Waters (111 U. S. 673), 204.
Johnson Steel Co. v. N. B. Steel Co. (48 Fed. Rep. 191), 667.
Johnston, *In re* (25 Pitts. Leg. J. 141), 715.
Johnston v. Straus (26 Fed. Rep. 57), 591.
Jones, *In re* (97 Fed. Rep. 773), 405, 424, 554, 555.
Jones, *In re* (100 Fed. Rep. 781), 260.
Jones, *In re* (116 Fed. Rep. 431), 262.
Jones, *In re* (118 Fed. Rep. 673), 597.
Jones, *In re* (4 Am. B. R. 563), 587.
Jones, *In re* (2 Dill. 343), 431, 441.
Jones, *In re* (3 Chan. Div. 457), 148.
Jones v. Clifton (101 U. S. 225), 379.
Jones v. Emerson (1 Caines N. Y. 487), 643.
Jones v. Kinney (5 Ben. 529), 610.
Jones v. Knox (46 Ala. 53), 774.
Jones v. Leach (1 N. B. N. 595), 89, 370.
Jones v. Lellyett (30 Ga. 64), 755.
Jones v. MacKenzie (122 Fed. Rep. 390), 83.
Jones v. Mann (72 Fed. Rep. 85), 837.
Jones v. Newsom (7 Biss. 321), 413.
Jones v. Russell (44 Ga., 460) 778.
Jones v. Sleeper (2 N. Y. Leg. Obs. 131), 10, 164, 391, 588, 751.
Jones v. Smith (38 Fed. Rep. 380), 383.
Jones v. Stevens (5 Am. B. R. 571), 563, 567.
Jones v. Stevens (94 Me. 582), 584.
Jordan, *In re* (2 Fed. Rep. 319), 302.
Jordan, *In re* (8 N. B. R. 180), 17, 19, 394, 426, 602.
Jordan, *In re* (10 N. B. R. 427), 394, 426, 602.
Jorey, *In re* (2 Bond 336), 750.
Joseph, *In re* (24 Fed. Rep. 137), 680.
Josephson, *In re* (116 Fed. Rep. 404), 592, 595.
Josephson, *In re* (121 Fed. Rep. 142), 410, 411.
Judd v. Cushing (1 Cush. Mass. 531), 144.
Judson, *In re* (2 Ben. 210), 621.
Judson v. The Courier Co. (8 Fed. Rep. 422), 387, 589, 739, 753.
Judson v. Courier Co. (25 Fed. Rep. 705), 592.
Judson v. Etheridge (1 Cr. & M. 743), 600.

K.

Kahley, *In re* (2 Biss. 383), 258, 259.
Kohn, *In re* (9 Am. B. R. 107), 694.
Kaiser, *In re* (99 Fed. Rep. 689), 656, 660, 744.
Kaiser, *In re* (112 Fed. Rep. 955), 363.
Kaldenberg, *In re* (105 Fed. Rep. 232), 341.
Kallish, *In re* (Deady 575), 180.
Kane v. Haywood (66 N. C. 1), 669.
Kane v. Rice (10 N. B. R. 469), 595.
Kansas City Stone Co., *In re* (9 N. B. R. 76), 584.
Kanter, *In re* (117 Fed. Rep. 356), 625.
Kanter & Cohen, *In re* (121 Fed. Rep. 984), 810.
Karr v. Whittaker (5 N. B. R. 123), 235.
Kauffman v. Kennedy (25 Fed. Rep. 785), 206.
Kean, *In re* (2 Hughes 322), 19, 394, 426, 434, 602.
Kearney, *Ex parte* (7 Wheat. 38), 670, 676.
Keating v. Keefer (5 N. B. R. 133), 385, 436, 610.
Keegan v. King (96 Fed. Rep. 768), 71, 76, 82, 84, 94, 100, 101, 360, 374.
Keenan v Shanan (9 N. B. R. 441), 211.

References are to pages.

Keene v. Mould (16 Ohio 12), 18, 784.
Keet, *In re* (11 Am. B. R. 117), 707.
Keppel v. Tiffin Sav. Bank 337.
Kellar, *In re* (110 Fed. Rep. 348), 586, 587.
Keller, *In re* 109 Fed. Rep. 118), 336, 630, 708.
Keller v. Denmead (68 Penn. St. 449), 602.
Kellogg, *In re* (112 Fed. Rep. 52), 375.
Kellogg, *In re* (113 Fed. Rep. 120), 71, 84, 603.
Kellogg, *In re* (121 Fed. Rep. 333), 100, 368, 385, 708.
Kellogg v. Russell (11 Blatch. 519), 105.
Kellogg v. Schuyler (2 Denio N. Y. 73), 293, 765.
Kelly, *In re* (18 Fed. Rep. 528), 285.
Kelly, *In re* (91 Fed. Rep. 504), 200, 216, 218.
Kelly v. Scott (49 N. Y. 595), 367, 369, 731.
Kelly v. Sparks (54 Fed. Rep. 70), 443.
Kelly v. Strange (3 N. B. R. 8), 433, 438.
Kelly Dry Goods Co., *In re* (102 Fed. Rep. 747), 118, 170, 212, 213.
Kempner, *In re* (6 N. B. R. 521), 118, 371.
Kennedy v. Georgia State Bank (8 How. 610), 33, 836.
Kennedy v. Nat. Union Bank (23 Hun., N. Y., 494), 258.
Kenney, *In re* (95 Fed. Rep. 427), 88, 92, 98, 388.
Kenney, *In re* (97 Fed. Rep. 554), 195, 388.
Kenney, *In re* (105 Fed. Rep. 897), 72, 84, 88, 92, 563, 567.
Kentucky Nat. Bank v. Carley (121 Fed. Rep. 822), 739, 753, 811.
Kenyon, *In re* (112 Fed. Rep. 658), 658, 750, 751.
Kenyon v. Fenton (6 N. B. R. 238), 163.
Kerby-Dennis Co., *In re* (95 Fed. Rep. 116), 567, 601.
Kerosene Oil Co., *In re* (3 Ben. 35), 370, 374, 709.
Kerr, *In re* (2 N. B. R. 388), 570.
Kerr, *In re* (9 N. B. R. 566), 424.
Kerr v. Kerr (2 Q. B. 439), 290.
Kersten, *In re* (110 Fed. Rep. 929), 153, 167, 169, 249.
Ketcham v. McNamara (62 Am. B. R. 160), 27, 28, 30.
Ketchum, *In re* (1 Fed. Rep. 840), 406.
Keyes v. McKirrow (190 Mass. 261), 134.
Keystone Coal Co., *In re* (109 Fed. Rep. 872), 149.
Kibbe v. Benson (17 Wall. 624), 207.
Kidd v. Johnson (100 U. S. 617), 378.
Kimball, *In re* (7 Fed. Rep. 461), 149.
Kimball, *In re* (100 Fed. Rep. 777), 134, 330.
Kimball, *In re* (2 Ben. 38), 620, 635, 639, 645, 646.
Kimball, *In re* (2 Ben. 554), 636, 644, 645.
Kimball, *In re* (6 Blatch 292), 636, 772.
Kimball v. Rosenbaum (114 Fed. Rep. 85), 333, 576, 587.
Kimberling v. Hartley (1 Fed. Rep. 571), 359, 372.
Kindt, *In re* (98 Fed. Rep. 867), 70, 76, 134, 177.
Kindt, *In re* (101 Fed. Rep. 107), 387, 582, 583, 584, 590.
King, *In re* (3 Fed. Rep. 842), 714, 715.
King. Co. Henry C., *In re* (113 Fed. Rep. 110), 573, 587.
King v. Bowman (24 La. Ann. 506), 332, 340.
King v. Central Bank (6 Ga. 257), 776.
King v. Deitz (12 Penn. St. 156), 384, 606.
King v. Remington (36 Minn. 15), 369.
King v. Simmons (1 H. L. Cas. 754), 148.
Kingley v. Cousins (47 Me. 91), 780.
Kingsley, *In re* (1 Low. 216), 180, 319.
Kingsley, *In re* (6 Ben. 300), 619.
Kinkead, *In re* (3 Biss. 405), 146, 257.
Kinmouth v. Braeutigam (4 Am. B. R. 344), 567.
Kinne v. Lane (68 Fed. Rep. 436), 206.
Kinsman, *In re* (1 N. Y. Leg. Obs. 309), 174, 175.
Kintzing, *In re* (3 N. B. R. 217), 392.
Kip v. Bank of New York (10 Johns, N. Y. 63), 412.
Kipp, *In re* (4 N. B. R. 493), 604.

References are to pages.

Kirby v. Garrison (21 N. L. J. 179), 778.
Kirkland, *In re* (2 Am. Law Reg. 300), 603.
Kirkland, *In re* (14 N. B. R. 157), 729.
Kirtland, *In re* (10 Blatch. 515), 79, 207, 221, 632, 703.
Kitchen v. Bartsch (7 East 53), 407, 415.
Kitchen v. Randolph (93 U. S. 86), 829, 830.
Kittle v. Hall (29 Fed. Rep. 512), 378, 417.
Kittredge v. Emerson (15 N. H. 227), 564.
Kittredge v. Warren (14 N. H. 509), 564.
Kittrdege v. McLoughlin (33 Me. 327), 416.
Kitzinger, *In re* (19 N. B. R. 152), 261.
Kitzinger, *In re* (19 N. B. R. 238), 722.
Kitzinger, *In re* (19 N. B. R. 307), 722.
Klapholz, *In re* (113 Fed. Rep. 1002), 708.
Klein, *In re* (97 Fed. Rep. 31), 90.
Klein, *In re* (116 Fed. Rep. 523), 32, 85.
Klein, *In re* (1 How. 277), 17, 18. 26.
Kleinhans, *In re* (113 Fed. Rep. 107), 101, 213.
Kleinhans, *In re* (113 Fed. Rep. 537), 89.
Kletchka, *In re* (92 Fed. Rep. 901), 88.
Klingaman, *In re* (101 Fed. Rep. 691), 582, 583, 584, 591.
Knabe v. Hayes (71 N. C. 109), 769.
Knapp v. Anderson (71 N. Y. 466), 778.
Knickerbocker, *In re* (121 Fed. Rep. 1004), 72, 85, 98, 607, 608.
Knickerbocker v. Comstock (9 N. B. R. 484), 164, 220, 484, 588.
Knight, *In re* (125 Fed. Rep. 35), 31, 32, 74, 75, 77, 89, 91, 93, 97, 98, 99, 173.
Knight, *In re* (2 Biss. 518), 257, 263.
Knight v. Cheney (5 N. B. R. 305), 814.
Knott, *In re* (109 Fed. Rep. 626), 303.
Knott v. Putnam (107 Fed. Rep. 907), 93, 636, 646, 770, 772, 776.
Knowlton v. Moseley (105 Mass. 136), 382, 628.
Knox, *In re* (3 Am. B. R. 371), 345.
Knox. v. Exch. Bank (12 Wall. 379), 359, 360.
Kohlsaat, *In re* (18 N. B. R. 570), 731.
Kohn, *In re* (7 Am. B. R. 111), 587.
Kraft, *In re* (3 Fed. Rep. 892), 739, 753.
Krueger, *In re* (2 Low. 66), 251, 627.
Krinsky, *In re* (112 Fed. Rep. 972), 93, 95.
Krippendorf v. Hyde (110 U. S. 276), 97.
Krone v. Cooper (43 Ark. 547), 174.
Kross, *In re* (96 Fed. Rep. 816), 136, 139.
Kuffler, *In re* (97 Fed. Rep. 187), 113, 277, 349.
Kunzler v. Kohaus (5 Hill N. Y. 317), 17, 18, 784.
Kurtz, *In re* (11 Am. B. R. 129), 119.
Kyle & Gunter v. Bostick & Sherrod (10 Ala. 589), 296, 297.
Kyler, *In re* (2 Ben. 414), 79, 221, 343, 619, 632.

L.

Lachemeyer, *In re* (18 N. B. R. 270), 283.
Lacy, *In re* (12 Blatch. 322), 220.
Lafayette Ins. Co. v. French (18 How. 404), 425.
Lafleche, *In re* (109 Fed. Rep. 307), 659.
Lafountain v. Savings Bank (56 Vt. 332), 418.
Laird, *In re* (109 Fed. Rep. 550), 727.
Lalor v. Wattles (8 Ill. 225), 18.
Lake, *In re* (3 Biss. 204), 366.
Lake Superior Ship Canal R. & Iron Co., *In re* (7 N. B. R. 376), 273.
Lake Superior Ship Canal R. R. & Iron Co., *In re* (10 N. B. R. 76), 329.
Lambert, *In re* (2 N. B. R. 426), 428, 431.
Lammer, *In re* (7 Biss. 269), 443.
Lamoille County Nat. Bank v. Stevens (107 Fed. Rep. 245), 261.
Lampkin v. Starkey (7 Hun. N. Y. 479), 206.

References are to pages.

Lamson Consol. Store Service Co. v. Boland (114 Fed. Rep. 639), 288, 304, 305, 306, 397.
Lancaster v. Collins (7 Fed. Rep. 338), 589.
Lang, *In re* (2 N. B. R. 480), 171, 203, 317, 584.
Langdon, *In re* (2 Low. 387), 683.
Lange, *In re* (91 Fed. Rep. 361), 409, 411, 425, 469, 473.
Lange, *In re* (97 Fed. Rep. 197), 164, 200, 231, 238, 239, 586.
Langley v. Perry (2 N. B. R. 596), 27, 392, 810.
Langslow, *In re* (98 Fed. Rep. 869), 183, 252, 254.
Lane, *In re* (2 Low. 305), 313, 262, 583, 591.
Lane v. Nickerson (99 Ill. 284), 384, 606.
Lanesborough v. Jones (1 P. W. 326), 315.
Lansing v. Manton (14 N. B. R. 127), 211.
Lansing Boiler & Engine Works v. Ryerson (126 Fed. Rep. 157, 159.
Lantzenheimer, *In re* (124 Fed. Rep. 716), 331.
Lathrop, *In re* (4 N. B. R. 93), 626.
Lathrop, *In re* (3 Ben. 490), 345.
Lathrop v. Drake (91 U. S. 516), 79, 87, 95, 608.
Lathrop v. Stuart (5 McLean 167), 783.
La Tourette v. Price (28 Miss. 702), 782.
Lauck's Appeal (24 Pa. St. 426), 434.
Laudry v. Andrews (6 Am. B. R. 231), 585.
Laughlin, *In re* (96 Fed. Rep. 589), 246, 251, 252, 267.
Lau Ow Bew, Petitioner (141 U. S. 583), 802.
Lau Ow Bew v. United States (144 U. S. 58), 802.
Lawler, *In re* (110 Fed. Rep. 135), 727.
Lawrence, *In re* (10 Ben. 4), 169.
Lawrence v. Knowles (5 Bing. N. C. 399), 372, 417.
Lawson, *In re* (2 N. B. R. 396), 753.
Lazarus v. Hanks (7 Cin. Court Index No. 85, Jan. 13, 1899), 211.
Lazoris, *In re* (120 Fed. Rep. 716), 270, 349.
Lazzari v. Havens (79 N. Y. S. 395), 602.
Lea v. West Co. (91 Fed. Rep. 237), 88, 89, 93, 235.
Leachman, *In re* (1 N. B. R. 391), 620.
Leather Cloth Co. v. Cloth Co. (11 H. L. 523), 378.
Le Claire, *In re* (124 Fed. Rep. 654), 376, 469, 470, 657, 659.
Lee, *In re* (14 N. B. R. 89), 336.
Lee v. Phillips (6 Hill, N. Y. 246), 784.
Leeuw., *In re* (3 Am. B. R. 418), 657.
Le Favour, *In re* (8 Ben. 43), 237.
Leffingwell v. Warren (2 Black 603), 423.
Legg, *In re* (96 Fed. Rep. 326), 404.
Lehigh Lumber Co., *In re* (101 Fed. Rep. 216), 262.
Leibowitz, *In re* (108 Fed. Rep. 617), 302, 320, 325.
Leicester v. Hoadley (9 Am. B. R. 318), 768.
Leidigh Carriage Co. v. Stengel (95 Fed. Rep. 637), 18, 20, 24, 30, 31, 32, 72, 74, 84, 86, 98, 177, 191, 192, 201, 223, 230, 237.
Leigh, *In re* (96 Fed. Rep. 806), 369, 393.
Leighton v. Kelsey (57 Me. 85), 564, 755, 756.
Leiter v. Payson (9 N. B. R. 205), 234.
Leland, *In re* (5 Ben. 168), 265, 270.
Leland, *In re* (7 Ben. 156), 336, 604.
Leland, *In re* (10 Blatch. 502), 393.
Lemcke v. Booth (47 Mo. 385), 772.
Lemmon, Gale Co., *In re* (112 Fed. Rep. 296), 34, 603, 811.
Lennox, *Ex parte* (16 Q. B. D. 315), 292.
Lentz, *In re* (97 Fed. Rep. 486), 443.
Leon v. Galceran (11 Wall. 185), 603.
Leslie, *In re* (119 Fed. Rep. 406), 624, 658, 660, 746.
Lessee of Waller v. Best (3 How. 111), 10.
Lesser, *In re* (99 Fed. Rep. 913), 88.
Lesser, *In re* (100 Fed. Rep. 433), 77, 94, 241, 725.
Lesser, *In re* (114 Fed. Rep. 83), 657, 658.

References are to pages.

Letchfield, *In re* (5 Fed. Rep. 47), 257.
Letchworth, *In re* (19 Fed. Rep. 873), 294.
LeVay, *In re* (125 Fed. Rep. 990), 433.
Levor v. Seiter (8 Am. B. R. 459), 568, 577, 609.
Levi, *In re* (121 Fed. Rep. 198), 585.
Levin, *In re* (7 Biss. 231), 741.
Levy, *Ex parte* (11 L. R. Eq. 619), 688.
Levy, *In re* (95 Fed. Rep. 812), 247.
Levy, *In re* (101 Fed. Rep. 247), 183, 184, 349.
Levy, *In re* (6 Am. B. R. 299), 682.
Levy, *In re* (1 Ben. 496), 416, 620, 625.
Lewensohn, *In re* (98 Fed. Rep. 576), 113, 276, 277, 348, 349.
Lewensohn, *In re* (99 Fed. Rep. 73), 635, 636, 640.
Lewensohn, *In re* (121 Fed. Rep. 538), 342, 811.
Lewin, *In re* (103 Fed. Rep. 850), 122, 135.
Lewis, *In re* (99 Fed. Rep. 935), 301, 725, 728.
Lewis, *In re* (8 N. B. R. 546), 261.
Lewis, *In re* (14 N. B. R. 144), 683.
Lewis, *In re* (2 Ben. 96), 251.
Lewis, *In re* (4 Ben. 67), 627.
Lewis, *In re* (2 Hughes 320), 263.
Lewis v. Hawkins (23 Wall. 119), 756.
Lewis v. Owen (4 B. & Ald. 654), 758.
Lewis v. Sloan (68 N. C. 557), 234.
Lewis v. United States (92 U. S. 618), 325, 729, 764.
Lexan v. Wilson (43 Me. 186), 419.
Libby, *In re* (103 Fed. Rep. 776), 542, 544.
Libby v. Hopkins (104 U. S. 307), 310, 311, 312, 313.
Lickman v. Wilcox (1 Dill. 161), 575.
Liddell v. Wiswell (59 Vt. 365), 296.
Liebke v. Thomas (116 U. S. 605), 694.
Ligon v. Allen (56 Miss. 632), 693.
Lincoln v. Street Light Co. (59 Fed. Rep. 756), 838.
Lingan v. Bayley (1 Cranch. C. C. 112), 637.
Linton, *In re* (7 Am. B. R. 676), 575.
Linton v. Linton (15 Q. B. D. 239), 290.
Linton v. Stanton (12 How. 423), 794.
Lipman, *In re* (94 Fed. Rep. 353), 291, 319.
Lipset, Levittan & Co., *In re* (119 Fed. Rep. 379), 120, 622.
Liscomb v. Grace (26 Ark. 231), 296.
Lissbarger, *In re* (2 Fed. Rep. 153), 695.
Litchfield, *In re* (13 Fed. Rep. 868), 79, 205, 672.
Little, *In re* (110 Fed. Rep. 621), 469, 587, 598.
Little, *In re* (1 N. B. R. 341), 270.
Little, *In re* (2 Ben. 186), 266.
Little, *In re* (3 Ben. 25), 175.
Little v. Alexander (21 Wall. 500), 570.
Little Lumber Co., *In re* (101 Fed. Rep. 558), 135, 138, 139.
Little River Lumber Co., *In re* (92 Fed. Rep. 585), 592.
Littlefield v. Del. & Hud. Canal Co. (3 Clif. 371), 814.
Livermore v. Bagley (3 Mass. 487), 160.
Livingston v. Heineman (120 Fed. Rep. 786), 296, 298, 323, 333, 585, 586, 819, 823.
Lizardi v. Cohen (3 Gill, Md., 430), 757, 758, 759.
Lloyd, *In re* (22 Fed. Rep. 90), 256, 264.
Lloyd v. Chapman (93 Fed. Rep. 599), 822, 827.
Lloyd v. Strobridge (16 N B. R. 197), 593, 594.
Lloyd v. Turner (5 Saw. 463), 316.
Llyni Coal Co., *Ex parte* (7 Ch. App. 28), 401.
Lobb, *Ex parte* (7 Ves. 592), 265.
Lock v. Winning (3 Mass. 325), 386.
Locke, *In re* (1 Lowell 293), 69.
Locks, *In re* (104 Fed. Rep. 783), 659.
Lockwood, *In re* (104 Fed. Rep. 794), 722.
Lockwood v. Exchange Bank (190 U. S. 294), 77 93, 427, 429, 430, 546, 802.
Loder, *In re* (4 Ben. 125), 328.

References are to pages.

Loder, *In re* (4 Ben. 305), 294.
Lodge v. Dicas (3 B. & A. 611), 264.
Logan, *In re* (102 Fed. Rep. 876), 740.
Long, *In re* (116 Fed. Rep. 113), 428, 436, 528.
Long, *In re* (7 Ben. 141), 259, 263, 264.
Long v. Bullard (117 U. S. 617), 562, 593, 604, 794.
Long v. Murphy (27 Kan. 375), 443.
Longley v. Swayne (4 Heisk., Tenn., 506), 784.
Lord, *Ex parte* (16 Mees. & W. 462), 623.
Lord, *In re* (3 N. B. R. 243), 621.
Lord v. Hart (118 Mass. 271), 378.
Lord v. Veazie (8 How. 251), 823.
Loud v. Pierce (25 Me. 233), 18.
Louisville, etc., R. Co. v. Pope (74 Fed. Rep. 1), 805.
Louisville Trust Co. v. Comingor (184 U. S. 18), 32, 72, 74, 83, 84, 85, 242, 608, 668, 802, 809, 811.
Lount, *In re* (11 N. B. R. 315), 342, 344.
Low v. Durfee (5 Fed. Rep. 256), 83.
Lowe, *In re* (19 Fed. Rep. 589), 728.
Lowe, *In re* (11 N. B. R. 221), 260.
Lowenstein, *In re* (106 Fed. Rep. 51), 658.
Lowree, *In re* (1 Ben. 406), 338.
Lowry v. Morrison (11 Paige, N. Y., 327), 756.
Lucius, *In re* (124 Fed. Rep. 455), 429, 439.
Lucker v. Phœnix Co. (66 Fed. Rep. 161), 57.
Luckhardt, *In re* (101 Fed. Rep. 807), 142.
Ludlow, *In re* (1 N. Y. Leg. Obs. 332), 419.
Ludwig v. Highley (5 Pa. St. 132), 412.
Lumber Co. v. Sawyer, Minn., (78 N. W. Rep. 1038), 31.
Luxton v. North River Bridge (147 U. S. 337), 798.
Lyde v. Russell (1 B. & Ad. 394), 402.
Lyell v. Goodwin (4 McLean, 29), 206, 646.
Lynch, *In re* (101 Fed. Rep. 579), 424, 442, 461.
Lyon, *In re* (114 Fed. Rep. 326), 585.
Lyon, *In re* (121 Fed. Rep. 723), 296, 298, 323, 333, 585.
Lyon v. Bertram (20 How. 149), 361.
Lyon v. Clark (129 Mich. 381), 388, 574, 578, 579, 580, 609.
Lyon v. Isett (34 N. Y. Supr. 41), 784.
Lyons, *In re* (2 Saw. 524), 146.

M.

McAdoo v. Lummis (43 Tex. 227), 774.
McAlpine v. Tourtelotte (24 Fed. Rep. 69), 789.
McBachron, *In re* (116 Fed. Rep. 783), 748.
McBride, *In re* (19 N. B. R. 452), 729.
McBrien, *In re* (2 Ben. 513), 617. 340, 708, 723, 730.
McBrien, *In re* (3 Ben. 481), 624.
McBryde, *In re* (99 Fed. Rep. 686), 290, 292, 320, 441.
McCance v. Taylor (10 Grat., Va., 580), 755.
McCarthy v. Goodwin (8 Mo. App. 380), 293.
McCartney, *In re* (109 Fed. Rep. 621), 569.
McCarty, *In re* (111 Fed. Rep. 151), 744.
McCauley, *In re* (101 Fed. Rep. 223), 289, 290.
McClaskey v. Barr (45 Fed. Rep. 151), 208.
McClellan v. Pyeatt (50 Fed. Rep. 686), 827.
McCluskey v. McNeely (8 Ill. 578), 434.
McConnell, *In re* (9 N. B. R. 387), 723, 340, 708, 730.
McCormick, *In re* (97 Fed. Rep. 566), 121.
McCormick v. Pickering (4 N. Y. 276), 18.
McCormick Harvesting Machine Co. v. Aultman (69 Fed. Rep. 371), 806.
McCullough v. Caldwell (5 Ark. 237), 755.
McCullum, *In re* (113 Fed. Rep. 393), 71.
McCutcheon, *In re* (100 Fed. Rep. 779), 424, 441, 530, 531.

References are to pages.

McDaniel v. Stroud (106 Fed. Rep. 486), 260, 819, 823, 824.
McDonald v. Daskam (116 Fed. Rep. 276), 598, 599.
McDonald v. Davis (105 N. Y. 508), 766.
McDonald v. Ingraham (30 Miss. 389), 293.
Macdonald v. Moore (8 Ben. 579), 27.
McDonnell, *In re* (101 Fed. Rep. 239), 379, 410, 415.
McDougall v. Reid (5 Ala. 810), 784.
McDowell v. Addams (45 Pa. St. 432), 108, 192.
McEwen, *In re* (6 Biss. 294), 257, 259, 262.
McFadden, *In re* (3 N. B. R. 104), 350.
McFarlan Carriage Co. v. Solanas (106 Fed. Rep. 145), 103, 104, 361, 400, 401.
McFarland, *In re* (10 N. B. R. 381), 247.
McFarland v. Goodman (6 Biss. 111), 385, 435, 439, 396.
McFaun, *In re* (96 Fed. Rep. 592), 246, 266.
McGahan v. Anderson (113 Fed. Rep. 115), 428, 435, 530, 819.
McGee, *In re* (105 Fed. Rep. 895), 162.
McGehee v. Hentz (19 N. B. R. 136), 694.
McGill, *In re* (106 Fed. Rep. 57), 113, 276, 278, 348, 812.
McGilton *In re* (3 Biss. 144), 709.
McGrath, *In re* (5 Ben. 183), 398.
McGregor v. Balch (14 Vt. 428), 108.
McGurn, *In re* (102 Fed. Rep. 743), 656.
McHarry, *In re* (111 Fed. Rep. 498), 395.
McHenry v. Alford (168 U. S. 651), 807.
McHenry v. Societe Francaise (93 U. S. 58), 604, 606.
Macintire, *In re* (1 Ben. 277), 617.
McIntire, *In re* 2 Ben. 345), 726. 787.
McIntosh, *In re* (2 N. B. R. 506), 338.
McIntosh v. Trotter (3 M. & W. 184), 402.
McIver v. Wilson (1 Cranch. C. C. 423), 316.
McKay, *In re* (1 Low. 345), 367.
McKay v. Funk (37 Ia. 661), 710.
McKenna, *In re* (9 Fed. Rep. 27), 371, 394, 395, 396, 433.
McKenna v. Simpson (129 U. S. 506), 794.
McKercher & Pettigrew, *In re* (8 N. B. R. 409), 422.
McKey v. Lee (105 Fed. Rep. 923), 332, 345.
McKey v. Smith (105 Fed. Rep. 899), 85.
McKibben, *In re* (12 N. B. R. 97), 160, 200, 641.
McKinley, *In re* (7 Ben. 562), 234, 235.
McKinney, *In re* (15 Fed. Rep. 912), 320.
McKinney v. Reader (6 Watts 34), 434.
McKinsey v. Harding (4 N. B. R. 38), 292, 328.
McLam, *In re* (97 Fed. Rep. 922), 584, 597, 700.
McLaren, *In re* (125 Fed. Rep. 935), 233.
McLaughlin v. Swann (18 How. 217), 732.
MacLean, *Ex parte* (2 Mont. D. & D. 564), 294.
McLean, *In re* (15 N. B. R. 333), 262.
McLean v. Johnson (3 McLean 202), 29.
McLean v. Lafayette Bank (3 McLean 185), 370, 709.
McLean v. Mayo (113 Fed. Rep. 106), 94, 351, 354, 370.
McLean v. Meline (3 McLean 199), 29.
McLish v. Roff (141 U. S. 661), 804.
McMenomy v. Murray (3 Johns. Ch., N. Y., 435), 757, 758, 759.
McMillan v. McNeill (4 Wheat. 209), 22, 759.
McMinn v. Allen (67 N. C. 131), 774.
McMullen v. Bank of Penn. (2 Penn. St. 243), 282, 297.
McNair, *In re* (2 N. B. R. 343), 330, 339.
McNair, *In re* (2 N. B. R. 219), 617.
McNair v. McIntyre (113 Fed. Rep. 113), 594, 707, 715.
McNamara v. Helena Coal Co. (5 Am. B. R. 48), 119.
McNeil v. Knott (11 Ga. 142), 294, 783.
McVay, *In re* (13 Fed. Rep. 443), 313.
McVey, *In re* (2 N. B. R. 257), 740, 742, 752.

References are to pages.

M. & M. Nat. Bank v. Brady's Iron Co. (5 N. B. R. 491), 211.
Mace v. Wells (7 How. 272), 296, 297.
Macey v. Jordan (2 Den., N. Y., 570), 284, 765.
Machine Co. v. Goddard (95 Fed. Rep. 664), 833.
Macon Sash, Door & Lumber Co., *In re* (7 Am. B. R. 66), 27, 28, 30.
Mack v. Winslow (59 Fed. Rep. 316), 98.
Mackel v. Rochester (102 Fed. Rep. 314), 625.
Mackellar, *In re* (116 Fed. Rep. 547), 113, 276, 277, 278, 349.
Mackey, *In re* (110 Fed. Rep. 355), 143, 197.
Mackey v. Pattenden (30 L. J. Q. B. 225), 400.
Mackin v. United States (117 U. S. 348), 664.
Madison v. Dunkle (114 Ind. 262), 773, 774.
Magann v. Segal (92 Fed. Rep. 252), 714.
Magie, *In re* (2 Ben. 369), 175.
Magoon v. Warfield (3 Greene, Ia., 293), 769.
Maher, *In re*, 117, 212.
Mahler, *In re* (105 Fed. Rep. 428), 306.
Mahoney v. Ward. (100 Fed. Rep. 278), 178, 179, 198, 245.
Majestic, The (69 Fed. Rep. 844), 805.
Malcolm, *In re* (4 Law Rep. 488), 178, 181.
Malino, *In re* (118 Fed. Rep. 368), 113, 269, 271, 272, 276, 348.
Mall v. Ulrich (37 Fed. Rep. 653), 786.
Mallory, *In re* (1 Saw. 88), 89.
Mallory, *In re* (4 N. B. R. 153), 350, 356, 357.
Mallory Mfg. Co. v. Fox (20 Fed. Rep. 409), 83.
Melick, *In re* (4 N. B. R. 97), 243.
Mammoth Pine Lumber Co., *In re* (109 Fed. Rep. 308), 219.
Mammoth Pine L. Co., *In re* (116 Fed. Rep. 731), 126, 127, 128, 363.
Manhattan Ice Co., *In re* (114 Fed. Rep. 399), 189, 226, 282, 304.
Manning, *In re* (44 Fed. Rep. 275), 647, 648, 670.
Manning, *In re* (112 Fed. Rep. 948), 422, 428, 440.
Manning, *In re* (123 Fed. Rep. 180), 32, 442, 593.
Mansfield, *In re* (6 N. B. R. 388), 293.
Manufacturers' Nat. Bank, *In re* (5 Biss. 499), 143.
Manwarring v. Kouns (35 Tex. 171), 782, 783.
Maples, *In re* (105 Fed. Rep. 919), 141, 172, 291, 765, 768.
Marcer, *In re* (6 N. B. R. 351), 190.
March v. Heaton (1 Low. 278), 104, 365, 366.
Marcus, *In re* (104 Fed. Rep. 331), 301.
Marcus, *In re* (105 Fed. Rep. 907), 636, 638, 639, 646.
Marine Machine & Conveying Co., *In re* (91 Fed. Rep. 630), 170, 197.
Marioneaux's Case (1 Woods 37), 788.
Marks, *In re* (2 N. B. R. 575), 219.
Marks v. Barker (1 Wash. C. C. 178), 311, 312.
Markson v. Heaney (1 Dill. 497), 89, 370, 709.
Markson v. Hobson (2 Dill. 327), 574, 580.
Marlin, *Ex parte* (2 Bro. C. C. 15), 256.
Maroin, *In re* (1 Dill. 178), 227.
Marquette, *In re* (103 Fed. Rep. 777), 542, 543.
Marrett v. Atterbury (3 Dill. 444), 345.
Marrett v. Murphy (11 N. B. R. 131), 258.
Marsh v. Armstrong (20 Minn. 81), 219, 384.
Marsh v. Putnam (3 Gray 551), 22.
Marshall v. Knox (16 Wall. 551), 74, 80, 83, 104, 105, 608, 611.
Marshall v. Tray (74 Ill. 379), 779.
Marshall Paper Co., *In re* (102 Fed. Rep. 872), 94, 744, 778, 818.
Marshall, Field & Co. v. Wolf & Bro. (120 Fed. Rep. 815), 818, 824, 826.
Marston v. Stickney (55 N. H. 383), 602.
Martin, *Ex parte* (5 Law Rep. 158), 608.
Martin, *Ex parte* (No. 9149 Fed. Cas.), 87.
Martin, *In re* (2 Hughes 418), 431.

References are to pages.

Martin v. Berry (37 Cal. 208), 20, 23, 24, 26, 27.
Martin v. Bigelow (7 Am. B. R. 218), 575.
Martin v. Nightingale (3 Bing. 421), 149.
Marvin, *In re* (1 Dill. 178), 145.
Marwick, *In re* (2 Ware 233), 257.
Marx, *In re* (102 Fed. Rep. 676), 660, 746, 751.
Mason, *In re* (99 Fed. Rep. 256), 176, 185, 224, 746.
Mason v. Beebee (44 Fed. Rep. 558), 394.
Mason v. Bogg (2 Myl. & Cr. 446), 605.
Mason v. Hartford P. & F. R. Co. (19 Fed. Rep. 53), 80, 87.
Mason v. Hughart (9 B. Mon., Ky., 480), 781.
Mason v. Pewabic Co. (153 U. S. 361), 843.
Massachusetts Brick Co., *In re* (2 Low. 58), 192.
Masterson v. Herndon (10 Wall. 416), 825.
Mather v. Coe (92 Fed. Rep. 333), 200, 225.
Matson, *In re* (123 Fed. Rep. 743), 143.
Mathews, *In re* (109 Fed. Rep. 603), 703, 705, 706, 707, 709.
Matthews, *In re* (97 Fed. Rep. 772), 136.
Matthews v. Abbott (2 Hask. 289), 298, 299.
Matthews v. Puffer (10 Fed. Rep. 606), 206.
Matthews v. Tuffts (87 N. Y. 568), 206.
Matthews v. Westphal (48 Fed. Rep. 664), 386, 594.
Mattocks v. Baker (2 Fed. Rep. 445), 368.
Mattocks v. Lovering (3 Fed. Rep. 212), 316.
Mattocks v. Rogers (1 Hask. 547), 259.
Mattoon Nat. Bank v. First Nat. Bank (102 Fed. Rep. 728), 220, 222, 229, 230.
Mattot, *In re* (16 N. B. R. 485), 163, 586.
Maundrell, *Ex parte* (2 Mad. 315), 401.
Mawson, *In re* (1 N. B. R. 271), 613.
Mawson, *In re* (2 Ben. 332), 743.
Maxim v. Morse (8 Mass. 127), 779, 782.
Maxwell v. McCune (37 Tex. 515), 429, 434.
May, *In re* (1 Fed. Rep. 743), 674.
May, *In re* (17 N. B. R. 192), 263.
May, *In re* (19 N. B. R. 101), 262.
May, *In re* (2 Cin. Law Bul. 152), 431.
May v. Courtenay (47 Ala. 185), 564.
May v. Le Claire (18 Fed. Rep. 164), 594.
Maybin v. Raymond (15 N. B. R. 353), 735.
Mayer, *In re* (98 Fed. Rep. 839), 121, 673.
Mayer, *In re* (101 Fed. Rep. 227), 726.
Mayer, *In re* (101 Fed. Rep. 695), 136, 137, 139.
Mayer, *In re* (108 Fed. Rep. 599), 371, 427, 428, 554.
Mayer v. Helman (91 U. S. 496), 25, 26, 29, 30, 168, 393, 581.
Mayer v. Herman (10 Blatch. 256), 580.
Maynard v. Hecht (151 U. S. 324), 805.
Mayor v. Ketchum (67 How. Prac., N. Y., 161), 305.
Mays v. Fritton (20 Wall. 414), 387, 570, 710.
Mays v. Nat. Bank (64 Penn. 74), 366, 415.
Mead v. National Bank (6 Blatch. 180), 263.
Meader v. Sharpe (64 Ga. 125), 772.
Mechanics Bank v. Hazard (9 Johns., N. Y., 392), 766.
Medbury v. Swan (46 N. Y. 200), 784.
Medley, Petitioner (134 U. S. 160), 664.
Melick, *In re* (4 N. B. R. 97), 223.
Mellen, *In re* (97 Fed. Rep. 326), 612, 625.
Memphis v. Brown (94 U. S. 715), 830.
Mencke v. Rosenberg (9 Am. B. R. 323), 565, 568.
Mendenhall v. Hall (134 U. S. 559), 831.
Mendelsohn, *In re* (102 Fed. Rep. 119), 658, 750.
Mendelsohn, *In re* (3 Saw. 342), 169, 392.
Merchants Ins. Co., *In re* (6 Biss. 252), 280, 734.
Merchants Ins Co., *In re* (2 Biss. 162), 150, 164, 586.

References are to pages.

Merchants Bank v. Comstock (55 N. Y. 24), 332.
Merchants' Bank v. Thomas (121 Fed. Rep. 306), 288, 289.
Merchants Nat. Bank v. Cook (95 U. S. 342), 570, 590.
Mercur, *In re* (95 Fed. Rep. 634), 189, 202, 219, 220.
Mercur, *In re* (122 Fed. Rep. 384), 244, 245.
Meriwether, *In re* (107 Fed. Rep. 102), 422, 423, 444, 448.
Merrell, *In re* (19 Fed. Rep. 874), 283.
Merrick's Estate (5 Watts. & S., Penn., 9), 142.
Merrick, *In re* (7 N. B. R. 459), 327, 337.
Merritt, *In re* (7 Fed. Rep. 853), 149.
Metcalf v. Barker (187 U. S. 165), 31, 94, 95, 96, 97, 100, 359, 368, 562, 563, 564, 566, 599, 792.
Metcalf v. Officer (5 Dill. 565), 251.
Metcalf v. Watertown (128 U. S. 586), 836.
Metropolitan Nat. Bank v. Rogers (53 Fed. Rep. 776), 384.
Metzger, *In re* (2 N. B. R. 355), 383.
Meyer, *In re* (97 Fed. Rep. 757), 246.
Meyer, *In re* (98 Fed. Rep. 976), 220, 222, 243, 245, 247, 249, 254, 255, 265, 267, 391, 392, 817, 824.
Meyer, Henry L., *In re* (106 Fed. Rep. 828), 312.
Meyer, *In re* (115 Fed. Rep. 997), 333, 586.
Meyer, *In re* (2 N. B. R. 422), 581.
Meyer v. Pritchard (23 Law Coop. S. C. R. 961), 823.
Meyers, *In re* (96 Fed. Rp. 408), 246, 266.
Meyers, *In re* (97 Fed. Rep. 757), 251, 255, 265, 266.
Meyers, *In re* (99 Fed. Rep. 691), 312.
Meyers, *In re* (102 Fed. Rep. 869), 528.
Meyers, *In re* (105 Fed. Rep. 353), 657, 749, 823, 835.
Meyers, *In re* (2 Ben. 424), 383, 606.
Meyers v. Farrell (47 Miss. 283), 641.
Meyers v. Josephson (124 Fed. Rp. 734), 372, 406.
Mexican Ore Co. v. Mexican Co. (47 Fed. Rep. 353), 674.
Meymot, *Ex parte* (1 Atk. 196), 149.
Michaels v. Post (21 Wall. 398), 234, 387.
Michel, *In re* (95 Fed. Rep. 803), 136.
Michie, *In re* (116 Fed. Rep. 749), 74, 85.
Mifflin, *In re* (1 Penn. L. J. 146), 637, 642.
Migel, *In re* (2 N. B. R. 481), 636, 642.
Miller, *In re* (104 Fed. Rep. 764), 157, 190, 238, 239.
Miller, *In re* (118 Fed. Rep. 360), 595.
Miller, *In re* (6 Biss. 30), 76.
Miller, *In re* (1 N. Y. Leg. Obs. 180), 261, 262, 719.
Miller v. Gillespie (59 Mo. 220), 778.
Miller v. Keys (3 N. B. R. 224), 162, 226.
Miller Elec. Maintenance Co., *In re* (111 Fed. Rep. 515), 72.
Milligan, *Ex parte* (4 Wall. 110), 643.
Mills, *In re* (95 Fed. Rep. 269), 257.
Mills, *In re* (11 N. B. R. 74), 257, 262.
Mills, *In re* (7 Ben. 452), 280.
Mills v. Bennett (2 M. & S. 556), 152, 249.
Milne v. Moreton (6 Binn., Pa., 353), 377.
Milner v. Meek (95 U. S. 252), 84, 826.
Milwaukee v. Schailer & Schnihlau Co. (91 Fed. Rep. 858), 838.
Miner, *In re* (104 Fed. Rep. 520), 191, 199.
Miner, *In re* (114 Fed. Rep. 998), 659, 660.
Miner v. Markham (26 Fed. Rep. 387), 206.
Mingo Valley Creamery Co., *In re* (100 Fed. Rep. 282), 170, 202.
Minon v. Van Nostrand (1 Low. 458), 637.
Mitchel, *In re* (116 Fed. Rep. 87), 307, 368, 401, 561, 562, 599, 728.
Mitchell, *In re* (1 Am. B. R. 687), 138.
Mitchell v. Mnf. Co. (2 Story 648), 19.
Mitchell v. Marker (62 Fed. Rep. 139), 827.
Mitchell v. McClure (178 U. S. 539), 80, 85, 607, 791.

References are to pages.

Mitchell v. McKibben (8 N. B. R. 548), 104, 105.
Mitchell v. Singletary (19 Ohio 291), 769.
Mitchell v. United States (21 Wall. 352), 425.
Mitchell v. Winslow (2 Story 630), 368, 731.
Mock v. Howell (101 N. C. 443), 773.
Mock v. National Bank (107 Fed. Rep. 897), 287.
Mœbius, *In re* (116 Fed. Rep. 47), 302, 320, 325.
Moench, C. & Sons Co., *In re* (123 Fed. Rep. 965), 169, 191, 192, 220, 222.
Moffit v. Cruise (7 Cold., Tenn., 137), 360.
Moline, *Ex parte* (19 Ves. 216), 408.
Monongahela Bank v. Overholt (96 Pa. St. 327), 418.
Monroe, *In re* (114 Fed. Rep. 398), 768, 785.
Monroe v. Dewey (2 N. B. R. 840), 395.
Monroe v. Upton (50 N. Y. 593), 761.
Montgomery, *In re* (3 Ben. 565), 259, 339.
Montgomery, *In re* (3 N. B. R. 430), 340.
Montgomery v. Bucyrus Mach. Co. (92 U. S. 257), 375.
Mooney, *In re* (14 Blatch. 204), 623.
Moore, *In re* (104 Fed. Rep. 896), 72, 84, 86, 96.
Moore, *In re* (107 Fed. Rep. 234), 569.
Moore, *In re* (111 Fed. Rep. 145), 284, 290, 765.
Moore, *In re* (112 Fed. Rep. 289), 445, 446.
Moore, *In re* (5 Biss. 79), 250, 251.
Moore v. Jones (23 Vt. 739), 87, 368, 418.
Moore v. Stanwood (98 Ill. 605), 694.
Moore v. Waller (1 A. K. Marsh, Ky., 488), 776, 779.
Morales, *In re* (105 Fed. Rep. 761), 189, 226, 318.
Moran, *In re* (105 Fed. Rep. 901), 439.
Moran v. King (111 Fed. Rep. 730), 433, 545.
Moran v. Sturges (154 U. S. 256), 374.
Morgan, *In re* (10 Fed. Rep. 982), 658, 744, 750.
Morgan v. Allen (103 U. S. 498), 314.
Morgan v. Bain (L. R. 10 C. P. 15), 417.
Morgan v. Brundrett (5 B. & Ad. 296), 571, 751.
Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (137 U. S. 171), 374.
Morgan v. Mastick (2 N. B. R. 521), 163.
Morgan v. Rhodes (1 M. & K. 435), 401.
Morgan v. Thornhill (11 Wall. 65), 104, 105, 753, 816.
Morgan v. Wordell (178 Mass. 350), 286, 296, 298, 315.
Morier, *Ex parte* (12 Chan. Div. 491), 314.
Morley v. Lakeshore Ry. Co. (146 U. S. 162), 423.
Morrill, *In re* (2 Saw. 356), 606.
Morris, *Ex parte* (2 Low. 424), 298.
Morris, *In re* (Crabbe 70), 69.
Morris, *In re* (102 Fed. Rep. 1004), 147, 148, 149, 150.
Morris, *In re* (125 Fed. Rep. 841), 137.
Morris v. Brush (2 Woods 354), 593.
Morris v. Gilmer (129 U. S. 328), 425.
Morris Arc Lamp Co., *In re* (10 Am. B. R. 569), 406.
Morrison, *In re* (110 Fed. Rep. 734), 448.
Morrison v. Savage (56 Md. 142), 773.
Morrison v. Woolson (23 N. H. 11), 783.
Morrow, *Ex parte* (1 Low. 386), 402.
Morrow, *In re* (97 Fed. Rep. 574), 657.
Morrow, *In re* (2 Saw. 356), 298.
Morse, *In re* (7 N. B. R. 56), 356, 357.
Morse, *In re* (11 N. B. R. 482), 260.
Morse, *In re* (13 N. B. R. 376), 257.
Morse v. Cloyes (11 Barb., N. Y. 100), 783.
Morse v. Godfrey (3 Story 346), 751.
Morse v. Hovey (7 N. Y. Ch. Rep., 1 Sandf., 186), 18, 296, 297.
Morse v. Hutchins (102 Mass. 439), 770.

References are to pages.

Morse v. Lowell (48 Mass. 152), 774.
Morse v. Presby (25 N. H. 299), 769.
Morse v. Sewing Machine Co.)38 Fed. Rep. 482), 669.
Morton, *In re* (118 Fed. Rep. 908), 276, 348, 719.
Morton Boarding Stables, *In re* (108 Fed. Rep. 791), 149.
Mosby v. Steele & Metcalfe (7 Ala. 299), 415, 417.
Moses, *In re* (1 Fed. Rep. 845), 373.
Moses v. Pond (4 Am. B. R. 655), 97, 245, 248.
Moses v. St. Paul (67 Ala. 168), 598.
Mosier, *In re* (112 Fed. Rep. 138), 395, 443, 542.
Moss, *In re* (19 N. B. R. 132), 149.
Motor Co., *In re* (119 Fed. Rep. 441), 778.
Mott, *In re* (No. 9878 Fed. Cas.), 714.
Mount v. Manhattan Co. (41 N. J. Eq. 211), 234.
Mowbray, *Ex parte* (1 J. & W. 428), 407.
Moyer, *In re* (15 Fed. Rep. 598), 434.
Moyer, *In re* (93 Fed. Rep. 188), 167.
Moyer v. Dewey (103 U. S. 301), 383, 606, 783.
Mudd, *In re* (105 Fed. Rep. 348), 744.
Mueller v. Bruss (112 Wis. 406), 609.
Mueller v. Nugent (184 U. S. 1), 70, 71, 72, 74, 76, 84, 96, 100, 110, 366, 370, 371, 667, 668, 676, 802, 809, 810, 811, 812.
Muhlhauser, *In re* (121 Fed. Rep. 669), 713.
Muldaur, *In re* (8 Ben. 65), 138.
Mullen, *In re* (101 Fed. Rep. 413), 384.
Muller, *In re* (Deady 513), 69, 200, 215, 216, 219.
Mulliner v. Florence (3 Q. B. D. 484), 600.
Munn, *In re* (3 Biss. 442), 163.
Murdock, *In re* (1 Low. 362), 324, 739.
Murphy's Case (1 Schoale 8 L. 44), 285.
Murphy, *In re* (10 N. B. R. 48), 227.
Murphy v. Crawford (114 Pa. St. 496), 779.
Murphy v. Manning (134 Mass. 488), 759.
Murray, *In re* (98 Fed. Rep. 600), 209, 246, 250, 251, 253.
Murray, *In re* (14 Blatch. 43), 786.
Murray v. Jones (50 Ga. 109), 384.
Murray v. Murray (2 Johns. Ch. 60), 243.
Murray v. Riggs (15 John., N. Y., 571), 309.
Murray v. De Rotteham (6 John. Ch., N. Y., 52), 761.
Murrill v. Neill (8 How. 414), 243.
Mussey, *In re* (99 Fed. Rep. 71), 760.
Mutual Mercantile Agency, *In re* (111 Fed. Rep. 152), 150, 170.
Myers, *In re* (99 Fed. Rep. 691), 338.
Myers, *In re* (102 Fed. Rep. 869), 424.
Myers v. Callaghan (5 Fed. Rep. 726), 365.
Myrick, *In re* (3 N. B. R. 156), 339.

N.

Nachman, *In re* (114 Fed. Rep. 995), 625.
Nash v. Simpson (78 Me. 142), 372.
Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (61 Fed. Rep. 237), 834, 837, 843.
Nassau v. Parker (2 Penn. L. J. 298), 284, 765.
Nathan, *In re* (92 Fed. Rep. 590), 92, 93.
National Bank v. Gish's Assignee (72 Penn. 13), 368.
Nat. Bank v. Hobbs (9 Am. B. R. 190), 564.
Nat'l Bank v. Omaha (96 U. S. 737), 828.
Nat. Bank v. Sprague (20 N. J. Eq. 13), 258.
National Bank v. State Bank (10 Bush, Ky., 367), 372.
Nat. Bank v. Taylor (120 Mass. 124), 782, 784.
Nat. Bank v. Warren (96 U. S. 539), 570.
National Deposit Bank, *Ex parte* (26 W. R. 624), 148.
National Exch. Bank v. Moore (2 Bond 170), 226.
National Mercantile Bank, *Ex parte* (16 Ch. Div. 104), 402.
National Distilling Co. v. Seidel (79 N. W. R. 744), 359.

References are to pages.

Nations v. Johnson (24 How. 195), 832.
Neal v. Clark (95 U. S. 704), 769, 772, 775, 794.
Neely, *In re* (108 Fed. Rep. 371), 100.
Neely, *In re* (113 Fed. Rep. 210), 812.
Neilson, *In re* (7 N. B. R. 505), 234.
Neiman, *In re* (109 Fed. Rep. 113), 323.
Neimann, *In re* (124 Fed. Rep. 738), 406, 554, 556.
Nelson, *In re* (98 Fed. Rep. 76), 134, 167, 177, 200, 201, 238.
Nelson v. Carland (1 How. 265), 10.
Neustadter v. Dry Goods Co. (96 Fed. Rep. 830), 222, 240.
New Bedford Inst. v. Fair Haven Bank (9 Allen, Mass., 178), 299, 339.
New Brunswick Carpet Co., *In re* (4 Fed. Rep. 514), 289, 294.
Newcomer, *In re* (18 N. B. R. 85), 336.
New England Piano Co., *In re* (122 Fed. Rep. 937), 71.
Newhall, *Ex parte* (2 Story 360), 403, 415.
Newland, *In re* (6 Ben. 342), 332.
Newman, *In re* (3 Ben. 20), 148.
New Orleans v. Steamship Co. (20 Wall. 393), 670.
New Orleans, etc., R. R. Co. v. Delamore (114 U. S. 506), 27, 150.
New Quebrada Co. v. Carr (4 L. R. C. P. 651), 309.
Newton, *In re* (107 Fed. Rep. 439), 73.
New York Economical Printing Co., *In re* (110 Fed. Rep. 514), 369, 404, 596, 599, 600.
New York & W. Water Co., *In re* (98 Fed. Rep. 711), 147, 149, 150.
Nice & Schreiber, *In re* (123 Fed. Rep. 987), 113, 277.
Nicholas, *In re* (122 Fed. Rep. 299), 368, 562, 599.
Nicholas v. Murray (5 Saw. 320), 230, 325.
Nichols v. Bellows (22 Vt. 581), 368.
Nichols v. Eaton (91 U. S. 716), 368, 394, 414, 415.
Nichols v. Levy (5 Wall. 433), 394, 414.
Nichols v. Nixey (29 L. R. Ch. Div. 1005), 380.
Nicholson v. Gouthit (2 H. Black. 609), 408.
Nickodemus, *In re* (3 N. B. R. 230), 223.
Nisbit v. Macon Co. (12 Fed. Rep. 686), 580.
Nisbet v. Quinn (7 Fed. Rep. 760), 590.
Noble v. Hammond (129 U. S. 65), 769, 770, 775.
Noesen, *In re* (6 Biss. 443), 319.
Nooman, *In re* (3 N. B. R. 267), 753.
Noonan, *In re* (10 N. B. R. 330), 266, 270.
Noonan, *In re* (3 Biss. 491), 247.
Noonan v. Chester Park Athletic Co. (93 Fed. Rep. 576), 822.
Noonan v. Orton (34 Wis. 259), 421.
Norcross v. Mercantile Co. (101 Fed. Rep. 796), 820, 822.
Norris' Case (4 N. B. R. 35), 33.
Norris, *In re* (2 Hask. 19), 260, 264.
Norris v. Beach (2 Johns., N. Y., 294), 206.
Norris v. Hassler (23 Fed. Rep. 581), 667.
North v. House (6 N. B. R. 365), 581.
North v. Taylor (6 Am. B. R. 233), 574.
Northern Iron Co., *In re* (14 N. B. R. 356), 270, 273, 341.
Norton, *In re* (6 N. B. R. 297), 275.
Norton v. Billings (4 Fed. Rep. 623), 590.
Norton v. Switzer (93 U. S. 355), 359.
Norton v. Walker (3 Ex. 480), 646.
Norwood, *Ex parte* (3 Biss. 504), 324.
Novak, *In re* (101 Fed. Rep. 300), 189, 199.
Novak, *In re* (111 Fed. Rep. 161), 395.
Nowlan, *Ex parte* (6 Durn. & East. 58), 623.
Nudd v. Barrows (91 U. S. 426), 590.
Nugent v. Boyd (3 How. 426), 10.

O.

Oakley v. Bennett (11 How. 33), 367, 376, 394, 395.
Oakley v. Corry (10 La. Ann. 502), 366.
Oakley v. Gardiner (2 La. Ann. 1005), 372.

References are to pages.

Oates v. Parish (47 Ala. 157), 785.
O'Brien, *In re* (1 N. B. R. 176), 146.
O'Brien v. Weld (92 U. S. 81), 794.
Ocean Nat. Bank v. Olcott (46 N. Y. 12), 785.
Oconee Milling Co., *In re* (109 Fed. Rep. 866), 708.
O'Connell, *In re* (98 Fed. Rep. 83), 136.
O'Connor, *In re* (112 Fed. Rep. 666), 375.
Odell, *In re* (9 Ben. 209), 149.
Odell, *In re* (9 Ben. 247), 680.
Oderkirk, *In re* (103 Fed. Rep. 779), 268, 542.
Odwin v. Forbes (Buch. 57), 758.
O'Donnell v. Segar (25 Mich. 366), 443.
O'Donohoe, *In re* (3 N. B. R. 245), 627, 628.
O'Dowd v. Russell (14 Wall. 404), 825.
O'Gara, *In re* (97 Fed. Rep. 932), 658.
Ogden v. Cowley (2 Johns., N. Y., 274), 312.
Ogden v. Jackson (1 John., N. Y., 370), 599.
Ogden v. Saunders (12 Wheat. 213), 20, 22, 26, 759.
Ogilvie v. Knox Ins. Co. (22 How. 380), 406.
Ogles, *In re* (93 Fed. Rep. 426), 200
O'Halloran, *In re* (8 Ben. 128), 220.
O'Hara v. McConnell (91 U. S. 151), 205.
Ohlemacher v. Broek (44 Up. Can. Rep. 366), 758.
Okell, *In re* (2 Ben. 144), 617.
Okell, *In re* (2 N. B. R. 105), 753.
Okey v. Bennett (11 How. 33), 634.
Olcott v. McLean (50 How. Prac. 455), 573.
Oleson, *In re* (110 Fed. Rep. 796), 416, 786.
Oliver v. Sanborn (60 Mich. 346), 369.
Olewine, *In re* (125 Fed. Rep. 840), 407.
O'Mara, *In re* (4 Biss. 406), 642.
O'Neil, *Ex parte* (1 Low. 163), 290, 292, 301, 328.
O'Neil v. Dougherty (46 Cal. 575), 360.
O'Neil v. Glover (5 Gray 159), 160.
Ontario Bank v. Mumford (5 N. Y. Chan. Rep. 616), 412.
Oregon Bulletin Print. & Pub. Co., *In re* (13 N. B. R. 503), 162, 163, 231, 586.
O'Reilly v. Edrington (96 U. S. 724), 828.
Orem v. Harley (3 N. B. R. 263), 200, 223.
Oriental Society, *In re* (104 Fed. Rep. 975), 148.
Orne, *In re* (1 Ben. 361), 272. 300, 310.
Orne, *In re* (1 Ben. 420), 180.
Osage, etc., R. Co., *In re* (9 N. B. R. 281), 227.
Osborn, *In re* (104 Fed. Rep. 780), 424, 434, 439, 442, 512, 514.
Osborn v. McBride (3 Saw. 590), 259.
Osborn v. Perkins (112 Fed. Rep. 127), 658.
Osborne, *In re* (115 Fed. Rep. 1), 833.
Osgood v. Maguire (61 N. Y. 529), 377.
Ostrander v. Meunch (12 Fed. Rep. 562), 25.
Otis v. Gazlin (31 Me. 567), 780.
Otis v. Hadley (112 Mass. 100), 571, 575, 577.
Ott, *In re* (95 Fed. Rep. 274), 724.
Otto, *In re* (115 Fed. Rep. 860), 658.
Ouimette, *In re* (1 Saw. 47), 225, 226, 227.
Owen v. Brown (120 Fed. Rep. 812), 165, 167 170.
Owens, *In re* (6 Biss. 432), 431.
Owens v. Bruce (109 Fed. Rep. 72), 715.
Owings, *In re* (109 Fed. Rep. 623), 336.
Owsley v. Cobin (15 N. B. R. 489), 772.

P.

Pacific Coast Warehouse Co., *In re* (123 Fed. Rep. 749), 150.
Pacific R. Co. v. Ketchum (95 U. S. 1), 835.
Pacific Railroad v. Missouri Pacific Railway Co. (3 Fed. Rep. 772), 205, 210.
Pack v. Bathhurst (3 Atk. 269), 381.
Paddock, *In re* (6 N. B. R. 132), 619.
Paddock, *In re* (6 N. B. R. 396), 343.

References are to pages.

Paddock v. Fish (10 Fed. Rep. 125), 573, 592.
Page v. Broom (3 Brav. 36), 401.
Page v. Godden (2 Starkie 309), 397, 400.
Page v. Edmonds (187 U. S. 596), 406, 796.
Paige, *In re* (99 Fed. Rep. 538), 224.
Paine v. Caldwell (1 Hask. 452), 79, 205.
Paliser, *In re* (136 U. S. 261), 650.
Palmer, *In re* (3 N. B. R. 283), 581.
Palmer v. Day, 1895, (2 Q. B. 618), 310.
Palmer v. Hussey (119 U. S. 96), 769, 772, 773, 775, 794.
Palmer v. Preston (45 Vt. 154), 767.
Paper Co., *In re* (102 Fed. Rep. 872), 756.
Paret v. Ticknor (4 Dill. 111), 695.
Parish, *In re* (122 Fed. Rep. 553), 657, 743, 752.
Park, *In re* (102 Fed. Rep. 602), 436, 439, 442, 448.
Park v. Casey (35 Tex. 536), 782, 783.
Parker, *In re* (11 Fed. Rep. 397), 594.
Parker, *In re* (4 Biss. 401), 657.
Parker, *In re* (5 Saw. 58), 443.
Parker v. Atwood (52 N. H. 181), 785.
Parker v. Hotchkiss (1 Wall. Jr. 269), 206.
Parker v. Muggridge (2 Story 334), 368, 731.
Parker v. Norton (6 T. R. 695), 319.
Parkes, *In re* (10 N. B. R. 82), 271, 338, 339.
Parkinson v. United States (121 U. S. 281), 664.
Parks, *In re* (9 N. B. R. 270), 444.
Parmelee Library, *In re* (120 Fed. Rep. 235), 150.
Parmenter Mfg. Co. v. Hamilton (51 N. E. 529), 17, 23, 24, 26, 27, 30.
Parmenter Mfg. Co. v. Stoever (97 Fed. Rep. 330), 166, 167, 170, 202, 817.
Pascal, *In re* (10 Wall. 491), 667.
Pattern v. Carley (8 Am. B. R. 482), 600.
Patterson, *In re* (1 Ben. 448), 325, 622.
Patterson, *In re* (1 Ben. 496), 416, 625.
Patterson, *In re* (2 Ben. 155), 636, 639, 645.
Patterson v. United States (2 Wheat. 221), 798.
Patterson & Co., *In re* (125 Fed. Rep. 562), 375.
Pattison & Co. v. Oliver (10 R. I. 448), 769.
Pattison v. Wilbur (10 R. I. 448), 756.
Patty-Joiner & Embank Co. v. Cummins (4 Am. B. R. 269), 30.
Pauly, *In re* (2 Am. B. R. 333), 242.
Payne v. Able (7 Bush, Ky., 344), 756, 769, 776.
Payne v. Solomon (14 N. B. R. 162), 163, 586.
Payson v. Brooke (No. 10857 Fed. Cas.), 406.
Payson v. Dietz (2 Dill. 504), 106.
Payson v. Stoever (2 Dill. 427), 406.
Payson v. Withers (5 Biss. 269), 406.
Peacock, *In re* (101 Fed. Rep. 560), 745.
Pearce, *In re* (21 Vt. 611), 657.
Pearsall v. Smith (149 U. S. 231), 382.
Pearson, *In re* (95 Fed. Rep. 425), 164, 586.
Pease, *In re* (29 Fed. Rep. 595), 79, 207, 221, 619.
Pease, *In re* (6 N. B. R. 173), 345.
Pease, *In re* (13 N. B. R. 168), 264.
Peaslee v. Haberstro (15 Blatch. 472), 208.
Peck, *In re* (120 Fed. Rep. 972), 743, 744, 752.
Peck v. Connell (6 Am. B. R. 93), 568.
Peck v. Connell (8 Am. B. R. 500), 609.
Peck v. Hibbard (26 Vt. 698), 758, 759.
Peck v. Jenness (7 How. 625), 87, 97, 562, 563, 755.
Peckham v. Burrows (3 Story 511), 570, 578.
Peiper v. Harmer (5 B. R. 252), 361.
Peiser, *In re* (115 Fed. Rep. 199), 87, 608.
Pekin Plow Co., *In re* (112 Fed. Rep. 308), 596, 811.

References are to pages.

Peltasohn, *In re* (4 Dill. 107), 371, 668, 670.
Pence v. Cochran (6 Fed. Rep. 269), 728.
Pender v. Brown (120 Fed. Rep. 496), 836, 837.
Penfield v. C. & O. R. R. Co. (29 Fed. Rep. 494), 174.
Penn, *In re* (4 Ben. 99), 176.
Penn Co. v. Ry. Co. (55 Fed. Rep. 131), 834.
Pennell v. Percival (13 Pa. 197), 783.
Pennewell, *In re* (119 Fed. Rep. 139), 283, 288, 289, 304, 305, 306, 397.
Pennington v. Sale (1 N. B. R. 572), 370.
Penny v. Taylor (10 N. B. R. 200), 436.
People v. Duncan (41 Cal. 508), 407.
People v. Palmer (46 Ill. 398), 434.
People v. Spaulding (10 Paige, N. Y., 284), 765.
People v. Whitman (10 Cal. 38), 108.
People's Bank v. Brown (112 Fed. Rep. 652), 624, 626, 627, 628.
People's Mail Steamship Co., *In re* (3 Ben. 226), 37, 370, 374.
Perdue, *In re* (2 N. B. R. 183), 432, 601.
Perkins, *Ex parte* (5 Biss. 254), 356, 812.
Perkins v. Fourniquet (14 How. 313), 842.
Perley v. Dole (38 Me. 558), 366.
Perley v. Mason (64 N. H. 6), 23.
Perrin, *In re* (7 N. B. R. 283), 592.
Perry v. Aldrich (13 N. H. 343), 305.
Perry v. Langley (1 N. B. R. 559), 192.
Perry v. Somerly (57 Me. 552), 564.
Peter Paul Book Co., *In re* (104 Fed. Rep. 786), 170, 286, 323, 725, 729.
Petersen, *In re* (95 Fed. Rep. 417), 424, 450, 453.
Peterson v. Nash (112 Fed. Rep. 311), 587, 820, 821.
Pettis, *In re* (7 Am. Law Reg. 695), 639.
Petrie, *In re* (5 Ben. 110), 312.
Peugh v. Davis (110 U. S. 227), 821, 822.
Pevear, *In re* (17 N. B. R. 461), 727.
Pfromm, *In re* (8 N. B. R. 357), 275.
Phelan, *In re* (62 Fed. Rep. 817), 673.
Phelan v. Iron Mountain Bank (4 Dill. 88), 413.
Phelps, *In re* (1 N. B. R. 525), 275.
Phelps v. Borland (103 N. Y. 406), 758, 759.
Phelps v. McDonald (99 U. S. 298), 420.
Phelps v. Sellick (8 N. B. R. 390), 710.
Philadelphia & Lewes Transp. Co., *In re* (114 Fed. Rep. 403), 149, 150.
Philips v. Turner (114 Fed. Rep. 726), 80.
Phillips v. Allen (8 B. & Ald. 477), 758.
Phillips v. Dreher Shoe Co. (112 Fed. Rep. 404), 282, 296.
Phillps v. Eyre (L. R. 6 Q. B. 1), 758.
Phillips v. Solomon (42 Ga. 192), 776.
Phoenix Bessemer Steel Co., *In re* (4 Ch. Div. 108), 417.
Phoenix Ins. Co. v. Wulf (1 Fed. Rep. 775), 207, 208.
Phosphate Co. v. Edwards (70 Fed. Rep. 728), 828, 832.
Pickens v. Dent (106 Fed. Rep. 657), 31, 77, 81, 365.
Pickens v. Roy (187 U. S. 177), 31, 94, 95, 96, 359, 365, 563, 564.
Pickett v. McGavick (14 N. B. R. 236), 786.
Pierce, *In re* (102 Fed. Rep. 977), 97, 247, 248.
Pierce, *In re* (103 Fed. Rep. 64), 656, 660, 744, 754.
Pierce, *In re* (111 Fed. Rep. 516), 115, 116, 127, 355.
Pierce v. Evans (61 Penn. 415), 575.
Pierce v. O'Brien (129 Mass. 314), 759.
Pierce v. Wilcox (40 Ind. 70), 710, 755.
Piercy v. Roberts (1 Myl. & K. 4), 414.
Pierson, *In re* (10 N. B. R. 107), 648, 736.
Pike v. Lowell (32 Me. 245), 361.
Pike v. McDonald (32 Me. 418), 293.
Pilger, *In re* (118 Fed. Rep. 206), 142.

References are to pages.

Pingrey v. National Ins. Co. (144 Mass. 374), 410.
Pioneer Paper Co., *In re* (7 Ben. 250), 622, 626.
Pirie v. Chicago Title & Trust Co. (182 U. S. 438), 332, 345, 572, 576, 585, 796.
Pitt, *In re* (8 Ben. 389), 239.
Pittlekow, *In re* (92 Fed. Rep. 901), 92, 707, 709.
Pittman, *In re* (1 Curtis 186), 667, 674.
Pittock, *In re* (2 Saw. 416), 300.
Pitts, *In re* (19 N. B. R. 63), 767.
Platt v. Johnson (168 Pa. 47), 305.
Platt v. Oreston (19 N. B. R. 241), 25.
Platt v. Preston (19 N. B. R. 241), 27.
Plimpton, *In re* (103 Fed. Rep. 775), 112, 184.
Plimpton v. Winslow (9 Fed. Rep. 365), 206.
Plotke, *In re* (104 Fed. Rep. 964), 197.
Poillon v. Lawrence (77 N. Y. 208), 785.
Poland v. Glyn (4 Bing. 22*n*), 751.
Poleman, *In re* (5 Biss. 526), 436, 437.
Polleys v. River Ins. Co. (113 U. S. 81), 821.
Pollock v. Jones (124 Fed. Rep. 163), 388, 597.
Pond v. Kimball (101 Mass. 105), 434, 444.
Pond v. New York Exch. Bank (124 Fed. Rep. 992), 82, 360, 607, 608, 609, 716.
Ponsford v. Walton (3 L. J. C. P. Cas. 167), 169.
Pool v. McDonald (15 N. B. R. 560), 679, 681, 698.
Pope, *In re* (98 Fed. Rep. 722), 423, 469.
Port Huron Dry Dock Co., *In re* (14 N. B. R. 253), 327.
Porter, *In re* (109 Fed. Rep. 111), 92, 709.
Porter v. Lazear (190 U. S. 81), 373, 376, 396, 419, 438, 439, 604, 761.
Porter v. Porter (31 Me. 169), 781.
Porter v. Sabin (149 U. S. 473), 76, 370.
Post v. Corbin (5 N. B. R. 11), 581, 590.
Post, Adm., v. Losey et al (111 Ind. 74), 296.
Postal Telegraph Co., *In re* (85 Fed. Rep. 853), 842.
Potts, *Ex parte*, Crabbe (469), 10, 163, 200, 390.
Potter v. Brown (5 East 130), 757, 758.
Potter v. Couch (141 U. S. 319), 414.
Powell, *In re* (2 N. B. R. 45), 349, 356.
Powell v. Lloyd (1 Y. & J. 427), 401.
Powles v. Hargreaves (3 DeGex, A. M. & G. 445), 339.
Prankard, *In re* (1 N. B. R. 297), 250, 251.
Pratt, *In re* (2 Low. 96), 145, 227.
Pratt, *In re* (1 Flip. 353), 432.
Pratt v. Burr (5 Biss. 36), 443.
Pratt v. Curtis (2 Low. 87), 383.
Pratt v. Russell (61 Mass. 462), 780, 781, 782.
Prescott, *Ex parte* (1 Atk. 230), 311.
Prescott, *In re* (5 Biss. 523), 300.
Preston v. Simons (1 Rich. S. C. 262), 783.
Prewett v. Caruthers (20 Miss. 491), 781.
Price, *In re* (91 Fed. Rep. 635), 612, 613, 615, 624.
Price, *In re* (92 Fed. Rep. 987), 96, 97, 352.
Price, *In re* (6 N. B. R. 400), 443.
Price, *In re* (8 N. B. R. 514), 231.
Price v. Moulton (10 C. B. 561), 265.
Price v. Price (48 Fed. Rep. 823), 359.
Prichard v. Budd (76 Fed. Rep. 710), 828.
Prime v. Brandon Mfg. Co. (16 Blatch. 453), 378.
Proctor, *In re* (6 Am. B. R. 660), 587.
Producers Bank v. Farnum (5 Allen, Mass. 10), 759.
Protector, The (11 Wall. 82), 835.
Proudfoot, *Ex parte* (1 Atk. 252), 415.
Prouty, *In re* (24 Fed. Rep. 554), 356.
Providence County Sav. Bank v. Frost (8 Ben. 293), 300.
Providence & Stonington Steamship Co. v. Ins. Co. (11 Fed. Rep. 284), 732.
Provident Institution v. Massachusetts (6 Wall. 630), 423.
Public Schools v. Walker (9 Wall. 603), 840.

References are to pages.

Pugh v. Arton L. R. (8 Eq. 626), 402.
Pullman Palace Car Co. v. Central Transportation Co. (171 U. S. 138), 800, 805.
Pullman's Car Co. v. Pennsylvania (141 U. S. 18), 21, 22.
Pulsifer, *In re* (14 Fed. Rep. 247), 295.
Pulsifer v. Hussey (97 Me. 434), 410, 411, 425.
Punnett, *Ex parte* (16 Ch. Div. 226), 402.
Pupke v. Churchill (91 Mo. 81), 695.
Purcell, *In re* (18 N. B. R. 447), 695.
Purple v. Farrington (119 Ind. 164), 258.
Pursell, *In re* (114 Fed. Rep. 371), 615.
Purvine, *In re* (96 Fed. Rep. 192), 633, 668, 673, 810, 812.
Purvis, *In re* (1 N. B. R. 163), 270, 277.
Pusey, *In re* (6 N. B. R. 40), 368, 731.
Pusey, *In re* (7 N. B. R. 45), 159, 390.
Putnam v. Story (132 Mass. 205), 395.

Q.

Quackenbush, *In re* (102 Fed. Rep. 282), 657, 658.
Quelin v. Moisson (1 Knapp 265*n*), 758.
Quimby Freight Forwarding Co., *In re* (121 Fed. Rep. 139), 149, 150.

R.

Randall, *In re* Deady (557), 223, 392.
Randall, *In re* (1 Saw. 56), 366, 584.
Randall, *In re* (5 Law Rep. 115), 187.
Randall v. Brigham (7 Wall. 540), 674.
Randall v. Rich (11 Mass. 494), 305.
Radford v. Folsom (123 U. S. 725), 821, 832.
Rafferty, *In re* (7 Am. B. R. 415), 469.
Rahilly v. Wilson (3 Dill. 420), 373.
Railroad Co. v. Bradleys (7 Wall. 575), 822, 827, 830.
Railroad Co. v. Ellsworth (77 Fed. Rep. 664), 837.
Railroad Equipment Co. v. Southern Ry. Co. 831.
Railroad Co. v. Reeder (76 Fed. Rep. 550), 838.
Railroad Co. v. Shutte (100 U. S. 644), 830, 834.
Railway Co. v. Stewart (95 U. S. 279), 834.
Rainsford, *In re* (5 N. B. R. 381), 787.
Randolph v. Scruggs (190 U. S. 533), 29, 30, 31, 32, 93, 138, 139, 168, 242, 286, 323, 391, 392, 729, 792, 818.
Rank, *In re* Crabbe (493), 637.
Rankin v. National Bank (14 N. B. R. 4), 580.
Ransom v. Geer (12 Fed. Rep. 607), 695.
Rathbone, *In re* (2 Ben. 138), 743.
Rathbone v. Ayer (82 N. Y. Supp. 235), 406.
Ray, *In re* (2 Ben. 33), 180, 319.
Ray v. Norseworthy (23 Wall. 128), 706, 707.
Raymond v. Merchant (3 Cow. 147), 293.
Raynor, *In re* (11 Blatch 43), 200.
Read & Knight, *In re* (7 Am. B. R. 111), 576, 587.
Reakirt, *In re* (7 N. B. R. 329) 622.
Real Estate Trust Co. v. Thompson (7 Am. B. R. 520), 80.
Redfield, *In re* (2 Ben. 71), 180.
Redmond, *In re* (9 N. B. R. 408), 152, 200, 249.
Reed, *In re* (3 Fed. Rep. 798), 336.
Reed, *In re* (6 Biss. 250), 319.
Reed v. Bullington (49 Miss. 223), 755, 785.
Reed v. Equitable Trust (8 Am. B. R. 242), 75, 77, 89, 94, 95, 359, 567.
Reed v. McIntyre (98 U. S. 507), 26, 565.
Reed v. Vaughn (15 Mo. 137), 18.
Reed Bros. & Co. v. Taylor (32 Ia. 209), 25, 27.
Reese, *In re* (115 Fed. Rep. 993), 440.
Reg. v. Boyd (5 Cox Cr. Cac. 502), 665.
Reg v. Ewington (41 E. C. L. 148), 665.
Reg. v. Lands (33 Eng. Law & Eq. 536), 665.
Regan v. Zeeb (28 Ohio St. 483), 432.
Reichman, *In re* (91 Fed. Rep. 624), 164, 166.

References are to pages.

Reid, Murdock & Co. v. Cross (1 Am. B. R. 34), 77, 89.
Reiley v. Lamar (2 Cranch 344), 822.
Reiman, *In re* (7 Ben. 455), 17, 18. 683, 686, 688.
Reiman, *In re* (12 Blatch 562), 678, 693.
Reitz v. The People (72 Ill. 435), 774.
Rekerdres, *In re* (108 Fed Rep. 206), 113, 276, 348.
Reliance Storage & Warehouse Co., *In re* (100 Fed. Rep. 619), 119, 212, 213, 214, 345.
Remington Auto & Motor Co., *In re* (119 Fed. Rep. 441), 94, 756.
Republic Ins. Co., *In re* (3 Biss. 452), 406.
Republic Iron Co., *In re* (8 N. B. R. 197), 324.
Repplier v. Bloodgood (1 Sweeney, N. Y. Sup. Ct. 34), 588.
Resler, *In re* (95 Fed. Rep. 804), 319.
Retzer v. Wood (109 U. S. 187), 361.
Revell. *Ex parte* (13 Q. B. D. 720), 292.
Rex v. Jones (24 E. C. L. 156), 665.
Rex v. Pixley, Bunbury 202), 763.
Reynolds, *In re* (9 N. B. R. 50), 23, 26, 27.
Reynolds v. Hanna (55 Fed. Rep. 795), 394.
Rhodes, *In re* (105 Fed. Rep. 231), 302, 320.
Rhodes, *In re* (109 Fed. Rep. 117), 441, 520, 521.
Rhodes v. Farish (16 Mo. App. 434), 174.
Rice, *In re* (9 N. B. R. 373), 257, 264.
Rice v. Grafton Mills (117 Mass. 228), 573, 589.
Rice v. Maxwell (21 Miss. 289), 662.
Rice v. Melenoy (41 Ia. 395), 589.
Richard, *In re* (94 Fed. Rep. 633), 30, 291, 323, 336, 442, 515.
Richard, *In re* (101 Fed. Rep. 792), 412.
Richards, *In re* (96 Fed. Rep. 935), 566, 568, 812, 813, 814.
Richards, *In re* (103 Fed Rep. 849), 113, 135, 269, 279.
Richards, *In re* (4 Ben. 303), 626,
Richards v. Nixon (20 Pa. 191, 784.
Richardson, *In re* (2 Ben. 517), 95.
Richardson, *In re* (11 N. B. R. 114), 444.
Richardson v. Green (130 U. S. 104), 821, 831, 832.
Richardson v. Woodward (104 Fed. Rep. 873), 422, 545.
Richmond, The (9 Fed. Rep. 863), 103.
Richmond v. Brown (66 Me. 373), 774.
Richter's Estate, *In re* (1 Dill. 544), 336.
Riddle's Sons, *In re* (122 Fed. Rep. 559), 587.
Rider, *In re* (96 Fed. Rep. 808), 679, 681, 323, 341, 678.
Ridgeway v. Clare (19 Beav. 111), 243.
Riggin v. Magwire (15 Wall. 549), 286, 287, 761.
Riggs v. Roberts (85 N. C. 151), 779.
Riggs v. White (4 Heisk. Tenn., 503), 784.
Riker, *In re* (5 Am. B. R. 720), 93.
Riordan, *In re* (14 N. B. R. 332), 336.
Ripon Knitting Wks. v. Schrieber (101 Fed. Rep. 810), 633, 668, 673, 675.
Rison v. Knapp (1 Dill. 187), 573, 590, 751.
Rix v. Capitol Bank (2 Dill. 367), 428, 431, 437, 593.
Risteen, *In re* (122 Fed. Rep. 732), 207.
Roalswick, *In re* (110 Fed. Rep. 639), 375.
Robarts v. Bree (8 Chan. Div. 198), 316.
Roberts v. Wood (38 Wis. 60), 755.
Robinson, *Ex parte* (19 Wall 510), 666, 675.
Robinson, *In re* (123 Fed. Rep. 841), 743, 752.
Robinson, *In re* (6 Blatch. 253), 644.
Robinson, *In re* (8 Ben. 406), 344.
Robinson v. Denny (57 Ala. 492), 395.
Robinson v. Elliott (22 Wall. 513), 595
Robinson v. Hall (8 Ben. 61), 365
Robinson v. Ins. Co. Bank (9 Biss. 117), 588
Robinson v. Soule (56 Miss. 519), 694.

References are to pages.

Roche, *In re* (101 Fed. Rep. 956), 137, 140, 818, 819, 823.
Rochford, *In re* (124 Fed. Rep. 182), 70, 71, 84, 707, 709.
Rockett, *Ex parte* (2 Low. 522), 726.
Rockwood, *In re* (91 Fed. Rep. 393), 217.
Roddin, *In re* (6 Biss. 377), 261.
Roden v. Jaco (17 Ala. 344), 293.
Rodger, *In re* (18 N. B. R. 381), 693.
Rodgers, *In re* (125 Fed. Rep. 169), 100, 101, 212, 213, 355.
Roeber, *In re* (121 Fed. Rep. 449), 602.
Roeller v. Ames (33 Minn. 132), 732.
Rogers, *In re* (2 N. B. R. 307), 163.
Rogers v. Ins. Co. (1 La. Ann. 161), 293.
Rogers v. Palmer (102 U. S. 263), 570, 580.
Rogers v. Riessner (31 Fed. Rep. 591), 210.
Rogers v. Spence (13 M. & W. 571), 417, 421.
Rogers v. Stevenson (16 Minn. 68), 367.
Rogers v. Winsor (6 N. B. R. 246), 378.
Rogers Milling Co., *In re* (102 Fed. Rep. 687), 190.
Rohde v. Proctor (4 B. & Cres. 517), 408.
Rollins v. Twitchell (2 Hask. 66), 317.
Rollins Gold & Silver Min. Co., *In re* (102 Fed. Rep. 982), 149.
Romaine v. Union Ins. Co. (28 Fed. Rep. 634), 205, 209.
Romanow, *In re* (92 Fed. Rep. 510), 30, 191, 202, 219, 220.
Rome Planing Mills, *In re* (96 Fed. Rep. 812), 158, 161, 164, 166, 202, 225, 231.
Ronk, *In re* (111 Fed. Rep. 154), 593, 596.
Rooney, *In re* (109 Fed. Rep. 601), 402, 404.
Roosa, *In re* (119 Fed. Rep. 542), 658, 787.
Rose v. Hart (8 Taunt. 506), 309, 312, 313.
Rosenbaum, *In re* (1 N. B. R. 541), 247, 260.
Rosenberg, *In re* (3 Ben. 14), 95, 760.
Rosenberg, *In re* (3 Ben. 366), 611.
Rosenberg, *In re* (116 Fed. Rep. 402), 630, 762, 705, 706, 707.
Rosenfield, *In re* (1 N. B. R. 319), 416.
Rosenfield, *In re* (2 N. B. R. 116), 752, 753, 754.
Rosenfields, *In re* (11 N. B. R. 86), 238.
Rosenthal, *In re* (108 Fed. Rep. 368), 95.
Rosenthal v. Lehman (120 Fed. Rep. 848), 137.
Rosenthal v. Walker (111 U. S. 185), 609.
Rosey, *In re* (6 Ben. 507), 730.
Ross, *Ex parte* (Buck 125), 311, 315.
Ross v. Jordan (62 Ga. 298), 779.
Ross v. Saunders (105 Fed. Rep. 915), 685, 693, 818, 826.
Rosser, *In re* (96 Fed. Rep. 305), 625.
Rosser, *In re* (101 Fed. Rep. 562), 71, 96, 371, 633, 668.
Ross-Meehan Foundry Co. v. Southern Car & Foundry Co. (124 Fed. Rep. 403), 87, 213.
Rouse, *In re* (40 Law Bul., Ohio, 220), 282, 303.
Rouse, Hazard & Co., *In re* (91 Fed. Rep. 96), 19, 24, 347, 727.
Rusch, *In re* (116 Fed. Rep. 270) 809.
Rush v. Lake (122 Fed. Rep. 561) 821, 839.
Rushford v. Hadfield (6 East 519), 600.
Russell, *Ex parte* (16 N. B. R. 476), 260.
Russell, *In re* (97 Fed. Rep. 32), 246, 256, 260.
Russell, *In re* (101 Fed. Rep. 248), 76, 82, 93, 100, 236, 360, 361, 374.
Russell, *In re* (105 Fed. Rep. 501), 119, 342.
Russell, *In re* (10 Ch. App. 255), 691.
Russell v. Cheatham (16 Miss. 703), 769.
Russell v. Owen (61 Mo. 185), 318.
Russell v. Phelps (42 Mich. 388), 713.
Russie, *In re* (96 Fed. Rep. 609), 396.
Ryan, *In re* (114 Fed. Rep. 373), 202, 219, 220.
Ryan, *In re* (6 N. B. R. 235), 713, 714.
Ryan, *In re* (2 Saw. 411), 148, 155.

References are to pages.

S.

St. Cyr. v. Daignault (103 Fed. Rep. 854), 567.
St. John, *In re* (105 Fed. Rep. 234), 395.
St. John's College v. Carter (8 Law Journ. Eq. E. S. 218), 668.
Sabin, *In re* (18 N. B. R. 151), 79, 207, 221.
Sabin v. Camp (98 Fed. Rep. 578), 583, 587, 593, 597.
Sabine, *In re* (1 Am. B. R. 315), 709.
Sacchi, *In re* (6 N. B. R. 398), 357.
Sackett v. Andrews (5 Hill 327), 18.
Sadler v. Immel (15 Nev. 265), 25, 27.
Sage v. R. R. Co. (96 U. S. 712), 822, 827, 829.
Sagor & Bro., *In re* (121 Fed. Rep. 658), 333, 576, 587.
Saint v. Pilley (L. R. 10 Ex. 137), 401.
Salaberry, *In re* (107 Fed. Rep. 95), 138, 139, 188.
Sallee, *In re* (2 N. B. R. 228), 179.
Salkey, *In re* (5 Biss. 486), 613, 625.
Salkey, *In re* (6 Biss. 269), 371, 623, 624, 666, 668, 670.
Samson v. Burton (5 Ben. 343), 91, 563, 634.
Samuels v. Cravens (10 Ark. 380), 781.
Sanborn, *In re* (96 Fed. Rep. 551), 605, 707.
Sanderlin, *In re* (109 Fed. Rep. 857), 594, 708, 715, 730.
Sanderson's Trust (3 K. & J. 497), 414.
Sandford v. Chase (3 Cowen, N. Y., 381), 206.
Sandford v. Lackland (2 Dill. 6), 395, 414.
Sanford v. Sanford (58 N. Y. 67), 293, 301, 360.
Sandford Fork & Tool Co., *In re* (160 U. S. 247), 843.
Sands v. Codwise (4 Johns., N. Y., 536), 385.
San Gabriel Sanatorium Co., *In re* (95 Fed. Rep. 271), 148.
San Gabriel Sanatorium Co., *In re* (102 Fed. Rep. 310), 92.
San Gabriel Sanatorium Co., *In re* (111 Fed. Rep. 892), 811.
Sanger v. Upton (91 U. S. 56), 314.
Sapiro, *In re* (92 Fed. Rep. 340), 626.
Sargent, *In re* (13 N. B. R. 144), 238.
Saul, *In re* (5 Fed. Rep. 715), 245.
Saunders, *In re* (2 Low. 444), 271.
Saunders v. The Commonwealth (10 Grat., Va., 494), 764, 774.
Saunders v. Mitchell (61 Miss. 321), 146.
Saunders v. Williams (5 N. H. 213), 377.
Saunderson v. Rowles (4 Burr. 2064), 148.
Sauthoff, *In re* (7 Biss. 167), 332.
Sauthoff, *In re* (8 Biss. 35), 443.
Savage, *In re* (12 Fed. Rep. 719), 735.
Savage, *In re* (16 N. B. R. 368), 256.
Savin, *In re* (131 U. S. 267), 666, 674.
Savings Bank v. Webster (48 N. H. 21), 784.
Savoye v. Marsh (10 Met., Mass., 594), 759.
Sawyer, *In re* (124 U. S. 207), 672, 673.
Sawyer, *In re* (2 Hask. 337), 739, 753.
Sawyer, *In re* (2 Low. 475), 690.
Sawyer v. Hoag (17 Wall. 622), 311, 312, 313, 314, 406.
Sawyer v. Turpin (91 U. S. 114), 197, 393, 413, 574, 575, 593.
Seaboard Steel Casting Co. v. Trigg (124 Fed. Rep. 75), 168, 200.
Seabolt, *In re* (113 Fed. Rep. 766), 427, 444, 515, 516.
Seabury, *In re* (10 N. B. R. 90), 740.
Sears, *In re* (117 Fed. Rep. 294), 200, 239, 811.
Seaton, *Ex parte* (8 Mor. 97), 292.
Seay, *In re* (113 Fed. Rep. 969), 333, 587.
Sebring v. Wellington (6 Am. B. R. 671), 572, 577, 580, 584.
Secor, *In re* (18 Fed. Rep. 319), 285.
Seckendorf, *In re* (2 Ben. 462), 613, 742.
Seckler, *In re* (106 Fed. Rep. 484), 317.
Second Nat. Bank v. State Nat. Bank (10 Bush, Ky., 367), 755.
Seddon, *Ex parte* (2 Cox 49), 265.
Sedgwick v. Grinnell (9 Ben. 429), 365.

References are to pages.

Sedgwick v. Place (1 N. B. R. 673), 27, 392.
Sedgwick v. Place (12 Blatch. 163), 384.
Sedgwick v. Sheffield (6 Ben. 21), 577.
Seebold, *In re* (105 Fed. Rep. 910), 809, 810, 813.
Seldner v. Smith (40 Md. 602), 766.
Selkrig v. Davies & Salt (2 Dow. 230), 377.
Sellers v. Bell (94 Fed. Rep. 801), 183, 405, 424, 445.
Semmel, *In re* (118 Fed. Rep. 487), 659.
Senior v. Pierce (31 Fed. Rep. 625), 97.
Sessions v. Romadka (145 U. S. 39), 372, 378, 417.
Severin v. Robinson (60 N. E. Rep. 966), 609.
Sewell, *In re* (111 Fed. Rep. 791), 596.
Seymour, *In re* (1 Ben. 348), 636, 639, 772.
Seymour v. Browning (17 Ohio 362), 782.
Seymour v. Freer (5 Wall. 822), 828.
Seymour v. Street (5 Neb. 85), 785.
Scammon v. Cole (3 Cliff. 472), 570, 578.
Scammon v. Cole (1 Hask. 214), 574, 575, 577.
Scammon v. Kimball (92 U. S. 362), 312, 314.
Scanlan, *In re* (97 Fed. Rep. 26), 726.
Schaefer, *In re* (104 Fed. Rep. 973), 289, 294.
Schaeffer, *In re* (105 Fed. Rep. 352), 704, 706.
Schechter, *In re* (9 Am. B. R. 729), 435, 455.
Scheiffer, *In re* (2 N. B. R. 591), 276, 277.
Scheld, *In re* (104 Fed. Rep. 870), 411, 424, 450.
Schenck, *In re* (116 Fed. Rep. 554), 745.
Schenkein (113 Fed. Rep. 421), 155, 161, 190.
Scheurer v. Smith, etc., Co. (112 Fed. Rep. 407), 151, 165, 195.
Schiller, *In re* (96 Fed. Rep. 400), 119.
Schlesinger, *In re* (102 Fed. Rep. 117), 633, 668.
Schlitz v. Schatz (2 Biss. 248), 427, 431, 593.
Schnepf, *In re* (2 Ben. 72), 570.
Scholtz, *In re* (106 Fed. Rep. 834), 77, 242, 729.
Schonberg, *In re* (7 Ben. 211), 621.
Schondler v. Wace (1 Camp. 487), 418.
Schrom, *In re* (97 Fed. Rep. 760), 86.
Schuchardt, *In re* (8 Ben. 585), 318.
Schulenburg v. Kabwrech (2 Dill. 132), 610.
Schuller, *In re* (108 Fed. Rep. 591), 388, 433, 554, 597.
Schultz, *In re* (109 Fed. Rep. 264), 749.
Schumpert, *In re* (8 N. B. R. 415), 377, 402.
Schuyler, *In re* (3 Ben. 200), 739, 753, 754.
Schwartz, *In re* (14 Fed. Rep. 787), 669.
Schwartz, *In re* (14 Blatch. 196), 319.
Scott, *In re* (11 Fed. Rep. 133), 160.
Scott, *In re* (93 Fed. Rep. 418), 328, 338.
Scott, *In re* (95 Fed. Rep. 815), 619, 625.
Scott, *In re* (99 Fed. Rep. 404), 119, 133, 214.
Scott, *In re* (111 Fed. Rej. 144), 185.
Scott, *In re* (1 Abb., U. S., 336), 603.
Scott, *In re* (15 N. B. R. 73), 678, 682, 697.
Scott v. Ellery (142 U. S. 381), 755.
Scott v. Kelly (22 Wall. 57), 76, 710, 794.
Scott v. Surman (Willes' Rep. 400), 411.
Scott v. Wilson (115 Fed. Rep. 284), 790, 809.
Scovill v. Thayer (105 U. S. 143), 311, 314.
Scully, *In re* (108 Fed. Rep. 372), 270, 271.
Schachter, *In re* (9 Am. B. R. 499), 674.
Shaeffer, *In re* (105 Fed. Rep. 352), 396, 438.
Shaffer, *In re* (104 Fed. Rep. 982), 73, 325.
Shaffer, *In re* (124 Fed. Rep. 111), 304, 306.
Shaffer v. Fritchery (4 N. B. R. 548), 104.

References are to pages.

Shainwald v. Lewis (5 Fed. Rep. 513), 80, 87.
Shapiro, *In re* (106 Fed. Rep. 495), 153, 160, 200, 247, 249, 254.
Sharon v. Hill (24 Fed. Rep. 726), 667.
Sharp v. Philadelphia Warehouse Co. (10 Fed. Rep. 379), 590.
Shaw, *In re* (9 Fed. Rep. 495), 698.
Shaw, *In re* (109 Fed. Rep. 780), 340, 727.
Shaw v. Quincy Mining Co. (145 U. S. 444), 206, 425.
Shawhan v. Wherrett (7 How. 627), 10, 234, 366, 367, 386.
Shay v. Sessaman (10 Pa. St. 432), 419.
Shea, *In re* (122 Fed. Rep. 742), 714.
Shears v. Solhinger (10 Abb. Pr. N. S. 287), 20, 23, 26, 27.
Sheehan, *In re* (8 N. B. R. 353), 227, 291, 642, 723.
Sheldon v. Rothschild (8 Taunt. 156), 311.
Sheldon v. Rounds (40 Mich. 427), 429.
Shenberger, *In re* (102 Fed. Rep. 978), 395.
Shepard, *In re* (97 Fed. Rep. 187), 93, 765.
Shepard, *In re* (3 Ben. 347), 583, 591.
Shepard, *In re* (1 N. B. R. 439), 320, 337, 739.
Shepherd v. Murril (90 N. C. 208), 434.
Shera, *In re* (114 Fed. Rep. 207), 622, 625.
Sheridan, *In re* (98 Fed. Rep. 406), 583, 587, 597.
Sherman v. Bingham (3 Cliff. 552), 19, 80, 87, 95, 608.
Sherman v. Hobart (26 Vt. 60), 781.
Sherman v. International Bank (8 Biss. 371), 239.
Sherman v. Luckhardt (9 Am. B. R. 307), 585.
Sherman v. Luckhardt (11 Am. B. R. 26), 389.
Sherwood, *In re* (9 Ben. 66), 148.
Shields, *In re* (4 Dill. 588), 678.
Shields v. Coleman (157 U. S. 168), 76, 370, 804.
Shirley, *In re* (112 Fed. Rep. 301), 592, 595, 596, 811.
Shoemaker, *In re* (112 Fed. Rep. 648), 88.
Shoemaker, *In re* (4 Biss. 245), 742.
Shouse, *In re* (Crabbe 482), 10, 163, 194, 590.
Shuman v. Strauss (52 N. Y. 404), 645, 780.
Shurtleff v. Thompson (63 Me. 118), 784.
Sibbald v. United States (12 Pet. 488), 842.
Sidle, *In re* (2 N. B. R. 220), 764, 765.
Sievers, *In re* (91 Fed. Rep. 366), 30, 212.
Sigafus v. Porter (84 Fed. Rep. 430), 806.
Sigsby v. Willis (3 Ben. 371), 283, 285, 298.
Silberstein v. Stahl (4 Am. B. R. 626), 591.
Silver v. Ladd (6 Wall. 440), 830.
Silverman's Case (1 Saw. 410), 17, 69, 163, 225, 586.
Silverman, *In re* (97 Fed. Rep. 325), 139, 241.
Silverman, *In re* (101 Fed. Rep. 219), 281, 303.
Simmons, *In re* (10 N. B. R. 253), 238.
Simonson v. Sinsheimer (95 Fed. Rep. 948), 191, 201, 223, 237.
Simonson v. Sinsheimer (100 Fed. Rep. 426), 230, 817.
Simonson, Whiteson & Co., *In re* (92 Fed. Rep. 904), 201, 237.
Simpson, *Ex parte* (De Gex 9), 571, 751.
Simpson, *In re* (2 N. B. R. 47), 643.
Simpson v. Houston (97 N. C. 344), 427.
Simpson v. Van Etten (108 Fed. Rep. 199), 567.
Sims, *In re* (9 Fed. Rep. 440), 786.
Sims, *In re* (118 Fed. Rep. 356), 724.
Singer v. Jacobs (11 Fed. Rep. 559), 581, 596.
Singer v. Sloane (3 Dill. 110), 388.
Sinsheimer v. Simonson (107 Fed. Rep. 898), 242.
Sisler, *In re* (96 Fed. Rep. 402), 430, 515, 516.
Skelley, *In re* (3 Biss. 260), 226, 227.
Skillin v. Malbrun (78 N. Y. Supp. 436), 610.
Skinner, *In re* (97 Fed. Rep. 190), 656.

References are to pages.

Slack, *In re* (111 Fed. Rep. 523), 396.
Slaughter v. Detlney (15 Ind. 49), 434.
Slingluff, *In re* (105 Fed. Rep. 502), 659.
Slingluff, *In re* (106 Fed. Rep. 154), 409, 410.
Slipper v. Stidstine (5 T. R. 493), 315.
Sloan v. Lewis (22 Wall. 150), 193, 234, 289, 300.
Slomka, *In re* (122 Fed. Rep. 630), 727.
Small v. Muller (8 Am. B. R. 448), 75.
Smith, *Ex parte* (2 Rose 64), 604.
Smith, *Ex parte* (1 M. D. & D. 165), 264.
Smith, *In re* (16 Fed. Rep. 465), 744, 749.
Smith, *In re* (92 Fed. Rep. 135), 27, 30, 74.
Smith, *In re* (93 Fed. Rep. 791), 113, 119, 120, 371, 428, 440, 441, 536.
Smith, *In re* (96 Fed. Rep. 832), 405, 424, 536, 537.
Smith, *In re* (108 Fed. Rep. 39), 126, 136, 137, 138, 139.
Smith, *In re* (112 Fed. Rep. 509), 628, 656.
Smith, *In re* (8 Am. B. R. 55), 94.
Smith, *In re* (9 Am. B. R. 98), 79, 210.
Smith, *In re* (5 N. B. R. 20), 740.
Smith, *In re* (8 N. B. R. 401), 426.
Smith, *In re* (13 N. B. R. 500), 257.
Smith, *In re* (16 N. B. R. 113), 262.
Smith, *In re* (8 Blatch. 461), 739.
Smith, *In re* (2 Ben. 113), 113, 274.
Smith, *In re* (4 Ben. 1), 392.
Smith, *In re* (2 Low. 69), 149.
Smith v. Belford (106 Fed. Rep. 658), 70, 110, 116, 672, 674.
Smith v. Brinkerhoff (2 Selden, N. Y., 305), 316.
Smith v. Buchanan (1 East. 6), 758.
Smith v. Chandler (69 Mass. 392), 407.
Smith v. Cooper (120 Fed. Rep. 230), 137, 139.
Smith v. Ely (10 N. B. R. 553), 382, 606.
Smith v. Engle (14 N. B. R. 481), 693.
Smith v. Gordon (6 Law. Rep. 313), 372, 397, 398, 400, 417.
Smith v. Hill (8 Gray 572), 317.
Smith v. Hodson (4 T. R. 212), 310.
Smith v. Hodson (50 Wis. 279), 763.
Smith v. Jameson (5 T. R. 601), 264.
Smith v. Keegan (111 Fed. Rep. 157), 656, 660.
Smith v. Kehr (2 Dill. 50), 432, 436, 611.
Smith v. McLean (10 N. B. R. 260), 581, 590, 591.
Smith v. Marshal (2 Atk. 70), 205.
Smith v. Mason (14 Wall. 419), 83, 104, 105, 608.
Smith v. Pickering (1 Peak's N. P. Rep. 69), 407.
Smith v. Profitt (82 Va. 832), 414. 785.
Smith v. Ramsey (27 O. S. 339), 785.
Smith v. Smith (5 Ves. 189), 258, 396.
Smith v. Teutonia Ins. Co. (6 Am. Law Rep. 584), 164, 586.
Smith v. Union Bank (5 Pet. 518), 21, 536.
Smith v. Wheeler (55 N. Y. App. Div. 170), 297.
Snedaker, *In re* (3 N. B. R. 629), 332.
Snell, *In re* (125 Fed. Rep. 154), 94, 96.
Snelling, *In re* (19 N. B. R. 120), 690.
Snowdon v. Dales (6 Sim. 524), 414.
Societe v. Distilling Co. (42 Fed. Rep. 96), 532, 668, 669.
Sohier v. Johnson (111 Mass. 238), 378.
Soldiers' Business, Messenger & Dispatch Co., *In re* (3 Ben. 204), 593.
Solis, *In re* (4 Ben. 143), 613.
Solomon, *Ex parte* (1 Glyn. & J. 25), 339.
Soltykoff, *In re* (1 Q. B., 1891, 415), 145.
Son, *In re* (2 Ben. 153), 743.
Sonstiby v. Keeley (11 Fed. Rep. 578), 589.
Soper, *In re* (1 Am. B. R. 193), 634.
Soudan Mfg. Co., *In re* (113 Fed. Rep. 804), 388, 578, 592.
South End Imp. Co. v. Harden (52 Atl. 1127), 602, 603.

References are to pages.

Southard v. Benner (72 N. Y. 424), 382.
Southern v. Fisher (6 S. C. 345), 75.
Southern Pac. Co. v. Denton (146 U. S. 202), 206.
South Straffordshire Ry. Co. v. Burnside (5 Ex. Rep. 128), 405.
Southwick v. Whipple (2 Fed. Rep. 770), 594.
Spades, *In re* (6 Biss. 448), 679, 681, 693.
Spalding v. Dixon (21 Vt..45), 283.
Spalding v. New York (4 How. 21), 284.
Sparhawk v. Cloon (125 Mass. 263), 414.
Sparhawk v. Cochran (30 Leg. Int. 233), 368.
Sparhawk v. Richards (12 N. B. R. 74), 589.
Sparhawk v. Yerkes (142 U. S. 1), 372, 400, 406, 417.
Spaulding v. McGovern (10 N. B. R. 188), 105.
Speake v. Kinard (4 S. C. 54), 438.
Spear, *In re* (103 Fed. Rep. 779), 750.
Spenceley v. Schulenberg (7 East. 357), 627.
Spencer v. Duplan Silk Co. (191 U. S. 526), 103, 106, 791.
Spencer v. Duplan Silk Co. (112 Fed. Rep. 638), 369, 393, 599.
Spencer v. Lapsley (20 How. 264), 102, 103.
Speyer, *In re* (42 How. Prac. 397), 118.
Speyer, *In re* (6 N. B. R. 255), 371, 668, 670.
Spillman, *In re* (13 N. B. R. 214), 682.
Spindle v. Shreve (111 U. S. 546), 394, 396, 414.
Spitley v. Frost (15 Fed. Rep. 304), 434.
Spofford, *In re* (62 Fed. Rep. 443), 667.
Spooner v. Russell (30 Me. 454), 779, 780.
Spreckles v. McClain (192 U. S. 376), 791.
Springer v. Foster (2 Story 385), 22.
Squire v. Compton (Vin. Ab. Dower G. pl. 60), 396.
Stalker, *In re* (123 Fed. Rep. 961), 723, 724.
Stamp, *Ex parte* (1 De Gex 345), 145.
Standard Laundry Co., *In re* (112 Fed. Rep. 126), 368, 369, 562.
Standard Laundry Co., *In re* (112 Fed. Rep. 126), 592, 599.
Staniforth v. Fellowes (1 Marsh. 184), 311, 316.
Stansfield, *Ex parte* (4 Saw. 334), 359.
Stansfield v. Portsmouth (4 C. B. N. S. 120), 401, 402.
Stanton, *In re* (6 Cush., Miss., 447), 256.
Stark v. Stinson (23 N. H. 259), 781.
State v. Pike (15 N. H. 83), 623, 655.
State v. Valle (41 Ia. 29), 108.
State Bank v. Wilborn (6 Ark. 35), 18.
State Ins. Co., *In re* (16 Fed. Rep. 756), 318, 324, 345.
Staunton, *In re* (117 Fed. Rep. 507), 528.
Steam Vehicle Co., *In re* (10 Am. B. R. 385), 572, 587.
Stearns v. Flick (103 Fed. Rep. 919), 286, 729, 323.
Stedman v. Bank (117 Fed. Rep. 237), 388, 578, 592.
Steed, *In re* (107 Fed. Rep. 682), 515, 516, 660, 743, 752.
Steele, *In re* (98 Fed. Rep. 78), 409, 410, 469.
Steele v. Buel (104 Fed. Rep. 968), 409, 411, 415, 422, 425, 469, 790, 820.
Steele v. Graves (68 Ala. 21), 774.
Steele v. Moody (53 Ala. 418), 434.
Stegar, *In re* (113 Fed. Rep. 978), 173.
Steiger v. Bonn (4 Fed. Rep. 17), 206.
Stein, *In re* (94 Fed. Rep. 124), 719, 720, 722, 734.
Stein, *In re* (105 Fed. Rep. 719), 202, 219, 220.
Steiner, *In re* (1 Pa. L. J. 368), 726.
Steininger Mercantile Co., *In re* (107 Fed. Rep. 669), 389, 595, 597.
Stelling v. Jones Lumber Co. (8 Am. B. R. 521), 790.
Stengel-Rothschild v. Leidigh Carriage Co., 91, 215.
Stephens, *Ex parte* (11 Ves. 24), 315.
Stephens, *In re* (111 Fed. Rep. 192), 131, 161.
Stephens, *In re* (3 Biss. 187), 329, 336, 345, 604.

References are to pages.

Stephens v. Cady (14 How. 531), 378.
Stephenson v. Jackson (2 Hughes 204), 263.
Stern v. Nussbaum (47 How. Pr., N. Y. 489), 769.
Stern, Falk & Co. v. Louisville Trust Co. (112 Fed. Rep. 501), 572.
Steuer, *In re* (104 Fed. Rep. 976), 81, 84.
Stevens, *In re* (104 Fed. Rep. 323), 262.
Stevens, *In re* (107 Fed. Rep. 243), 326, 327, 328, 338.
Stevens, *In re* (1 Saw. 397), 248, 265, 270.
Stevens, *In re* (1 Low. 397), 143.
Stevens, *In re* (2 Biss. 373), 424.
Stevens v. Earles (25 Mich. 40), 369.
Stevenson, *In re* (6 Fed. Rep. 710), 703, 714.
Stevenson, *In re* (93 Fed. Rep. 789), 423, 444, 515, 616.
Stevenson, *In re* (94 Fed. Rep. 110), 201, 203.
Stevenson v. McLaren (14 N. B. R. 403), 217.
Stewart, *In re* (3 N. B. R. 108), 173.
Stewart, *In re* (13 N. B. R. 295), 444.
Stewart v. Anderson (10 Ala. 504), 755.
Stewart v. Emerson (52 N. H. 301), 770, 771.
Stewart v. Hargrove (23 Ala. 429), 407, 784.
Stewart v. Ingle (9 Wheat. 526), 799.
Stewart v. Isidor (5 Abb. Pr. N. S. N. Y. 68), 338, 340.
Stewart v. Loomis, (No. 13433 Fed. Cas.), 10.
Stewart v. Platt (101 U. S. 731), 159, 562, 595.
Stewart v. Reckless (24 N. L. J. 427), 780, 781.
Stewart v. Sonneborn (98 U. S. 187), 241.
Stewne v. Aylesworth (18 Conn. 244), 418.
Steyer, *In re* (98 Fed. Rep. 290), 213.
Stickney v. Wilt (23 Wall. 150), 84.
Stickwell v. Woodward (52 Vt. 234), 293.
Stiles v. Lay (9 Ala. 795), 174, 176.
Stillwell, *In re* (7 N. B. R. 226), 271.
Stillwell v. Cope (4 Denoo N. Y. 225), 780.
Stockwell v. Silloway (105 Mass. 517), 637, 638.
Stockwell v. U. S. (13 Wall. 531), 284.
Stoddard v. Locke (43 Vt. 574), 564.
Stoddart, *In re* (114 Fed. Rep. 486), 661.
Stoever, *In re* (105 Fed. Rep. 355), 342.
Stokes, *In re* (106 Fed. Rep. 312), 32, 71, 72, 74, 84, 86, 96, 98, 254.
Stokes, *In re* (1 N. B. R. 489), 357.
Stokes v. Mason (10 R. I. 261), 770), 771.
Stone, *In re* (116 Fed. Rep. 35), 423, 435, 443, 448.
Stoner, *In re* (105 Fed. Rep. 752), 403.
Storm, *In re* (103 Fed. Rep. 618), 167.
Stotts, *In re* (93 Fed. Rep. 438), 120, 135, 136, 138, 139.
Stout, *In re* (109 Fed. Rep. 794), 494.
Stout v. Milling Co. (13 Fed. Rep. 802), 597.
Stowell, *In re* (24 Fed. Rep. 468), 695.
Stowers, *In re* (1 Low. 528), 247.
Strachen, *In re* (3 Biss. 181), 301, 324, 345.
Strachan v. Barton (11 Ex. 647), 571, 751.
Strain v. Gourdin (2 Woods 380), 584.
Strang v. Bradner (114 U. S. 555), 769, 770, 775, 794.
Strassburger, *In re* (4 Woods 557), 730.
Stratton v. Perry (2 Tenn. Ch. 633), 293.
Strause v. Hooper (105 Fed. Rep. 590), 255, 261, 267.
Strauss, *In re* (2 N. B. R. 48), 727.
Strauss v. Stern, 256.
Street v. Dawson (4 N. B. R. 207), 104, 105, 570.
Streeter v. Summer (31 N. H. 542), 372, 408, 419.
Strenz, *In re* (8 Fed. Rep. 311), 589.
Strong v. Clawson (10 Ill. 346), 769.

References are to pages.

Stubbs, *In re* (4 N. B. R. 376), 27.
Stuckey v. Masonic Savings Bank 108 U. S. 74), 570, 578, 592.
Studebaker, *In re* (124 Fed. Rep. 945), 750.
Sturgeon, *In re* (1 N. B. R. 498), 346.
Sturgis v. Crowninshield (4 Wheat. 195), 18, 19, 20, 21, 26.
Stuyvesant Bank, *In re* (6 Ben. 33), 620, 626.
Styer, *In re* (98 Fed. Rep. 290), 605, 704, 706.
Suburban Electric Co., *In re* (not reported), 149.
Sulling v. Gunderman (35 Tex. 545), 427.
Sullivan v. Bridge (1 Mass. 511), 420.
Sullivan v. Heiskill (Crabbe 525), 20, 23, 26.
Summers v. Abbott (122 Fed. Rep. 36), 138, 729.
Sumner, *In re* (101 Fed. Rep. 224), 341.
Supervisors v. Kennicott (94 U. S. 498), 843.
Surety Guarantee & T. Co., *In re* (121 Fed. Rep. 73), 143, 149.
Sutherland, *In re* (2 Biss. 405), 814.
Sutherland, *In re* (6 Biss. 526), 406.
Sutherland, *In re* (Deady 344), 224, 225.
Sutherland, *In re* (Deady 416), 283, 284.
Sutherland, *In re* (Deady 573), 740, 741, 753.
Sutherland v. Davis (42 Ind. 26), 365.
Sutherland v. Lake Superior Canal Co. (9 N. B. R. 298), 105.
Sutro v. Hoile (2 Neb. 186), 375.
Suydam v. Broadnax (14 Pet. 67), 22.
Swan, *In re* (150 U. S. 637), 672, 673.
Swan v. Robinson (5 Fed. Rep. 287), 577, 580.
Swarts v. Fourth Nat. Bank (117 Fed. Rep. 1), 282, 296, 297, 298, 323, 333, 576, 585.
Swarts v. Siegel (114 Fed. Rep. 1001), 574, 576.
Swarts v. Siegel (117 Fed. Rep. 13), 296, 298, 323, 585.
Sweatt v. Boston, etc. R. Co. (3 Cliff 339), 18.
Sweet, *In re* (36 Fed. Rep. 761), 755.
Swepson v. Rouse (63 N. C. 34), 412.
Swift, *In re* (105 Fed. Rep. 493), 303.
Swift, *In re* (106 Fed. Rep. 65), 262, 298.
Swift, *In re* (108 Fed. Rep. 212), 367.
Swift, *In re* (112 Fed. Rep. 315), 282, 304.
Swift, *In re* (118 Fed. Rep. 348), 120, 121.
Swords, *In re* (112 Fed. Rep. 661), 429, 461.
Sylvester v. Edgecomb (76 Me. 499), 148.
Sykes, *In re* (106 Fed. Rep. 669), 182.
Symonds v. Barnes (59 Me. 191), 769.

T.

Tait v. Fourth Nat. Bank (2 N. B. R. 1145), 388, 577, 609.
Taitt, *Ex parte* (16 Ves. 193), 256.
Talbott, *In re* (116 Fed. Rep. 417), 428, 436, 461.
Talcott, *Ex parte* (9 N. B. R. 502), 298.
Talcott v. Dudley (5 Ill. 427), 369, 731.
Tallman, *In re* (2 Ben. 404), 741.
Tampa Suburban R. R. Co., *In re* (168 U. S. 583), 798, 800.
Tanner, *In re* (1 Low. 215), 621.
Tatum, *In re* (112 Fed. Rep. 50), 729.
Taylor, *In re* (95 Fed. Rep. 956), 369, 393.
Taylor, *In re* (102 Fed. Rep. 728), 142, 198, 199.
Taylor, *In re* (114 Fed. Rep. 607), 435, 675.
Taylor, *In re* (8 Ves. 328), 623.
Taylor v. Carryl (20 How. 583), 76, 370.
Taylor v. Irwin (20 Fed. Rep. 615), 372, 400, 417.
Taylor v. Nixon (1 Sneed, Tenn. 352), 781.
Taylor v. Plumer (3 Maule & S. 562), 413.
Taylor v. Rasch (5 N. B. R. 399), 104, 258.
Taylor v. Rasch (1 Flip. 385), 261, 262.
Taylor v. Robertson (21 Fed. Rep. 209), 366, 584.
Taylor v. Taylor (4 Am. B. R. 211), 77.

References are to pages.

Taylor v. Taylor (59 N. J. Eq. 84), 564.
Tazewell County v. Davenport (40 Ill. 197), 174.
Tebbetts, *In re* (5 Law Rep. 259), 739.
Tebo, *In re* (101 Fed. Rep. 419), 116, 127, 135, 137, 242, 708, 723, 725, 730.
Tecopa Mining & Smelting Co., *In re* (110 Fed. Rep. 120), 147.
Tempest, *Ex parte* (6 L. R. Ch. App. 70), 390.
Temple, *In re* (4 Saw. 92), 247.
Ten Eyck, *In re* (7 N. B. R. 26), 397.
Tennessee, etc., R. Co. v. East Alabama Ry. Co. (75 Ala. 529), 373, 376.
Terrell, *In re* (51 Fed. Rep. 213), 650, 653.
Terrill, *In re* (103 Fed. Rep. 781), 136.
Terry, *Ex parte* (128 U. S. 289), 676.
Terry v. Abraham (93 U. S. 38), 825.
Tertelling, *In re* (2 Dill. 339), 271.
Tesson, *In re* (9 N. B. R. 378), 261, 263.
Texas & Pac. Ry. Co. v. Anderson (149 U. S. 237), 842.
Texas & P. Ry. Co. v. Murphy (111 U. S. 488), 830.
Thatcher v. Rockwell (105 U. S. 467), 359.
Thomas, *Ex parte* (2 Mont. D. & DeG. 294), 402.
Thomas, *Ex parte* (44 L. T. 781), 402.
Thomas, *In re* (96 Fed. Rep. 828), 549.
Thomas, *In re* (3 N. B. N. 38), 95.
Thomas, *In re* (11 N. B. R. 330), 235.
Thomas, *In re* (29 W. R. 527), 402.
Thomas, v. C. N. O. & T. P. Ry. Co., 673.
Thomas v. Hudson (13 Mees. & W. 353), 646.
Thomas v. Jones (39 Wis. 124), 769.
Thomas v. Pemberton & Kittredge (7 Taunt. 205), 397, 399, 400.
Thomas v. Shaw (2 Cin. Sup. Ct. 97), 784.
Thomason v. Frere (10 East 418), 316.
Thompson, *In re* (102 Fed. Rep. 287), 142.
Thompson, *In re* (115 Fed. Rep. 924), 461, 462.
Thompson, *In re* (122 Fed. Rep. 174), 32, 74, 98.
Thompson, *In re* (2 Am. B. R. 216), 714.
Thompson, *In re* (2 Ben. 166), 742.
Thompson's Sons, *In re* (123 Fed Rep. 174), 325, 326.
Thompson v. Alger (53 Mass. 442), 18.
Thompson v. Spittle (102 Mass. 207), 258.
Thompson v. Towne (Prec. Ch. 52), 380.
Thomson v. Harding (3 C. B. N. S. 254), 266.
Thomson v. Wooster (114 U. S. 104), 237.
Thornhill v. Bank (1 Woods 1), 20, 23, 26.
Thornhill v. Bank of Louisville (3 N. B. R. 435), 143.
Thorp, *In re* (2 Ware 294), 353.
Thrall v. Crampton (9 Ben. 218), 258.
Three Friends The (166 U. S. 1), 800.
Thurmond v. Andrews (10 Bush Ky. 400), 383, 769.
Tichenor v. Allen (13 Grat. Va. 15), 710.
Tiffany v. Boatman's Savings Institution (18 Wall. 375), 368, 418, 592.
Tiffany v. Lucas (15 Wall 410), 159, 381, 387, 388, 390, 573, 574, 589.
Tifft, *In re* (19 N. B. R. 201), 87.
Tilden, *In re* (91 Fed. Rep. 500), 354, 469, 723, 724.
Tinker v. Hurst (70 Mich. 159), 695.
Tipton v. Tipton (87 Ky. 243), 174.
Tirrell v. Freeman (139 Mass. 297), 695.
Titterton v. Cooper (9 L. R. Q. B. Div. 473), 399.
Tobias, *In re* (103 Fed. Rep. 68), 545, 546.
Tobias v. Rogers (13 N. Y. 59), 778.
Todd, *In re* (109 Fed. Rep. 265), 115, 116, 123, 127, 128, 139.
Todd, *In re* (112 Fed. Rep. 315), 657.
Toenes v. Moog (78 Ala. 558), 434.
Toland v. Sprague (12 Pet. 300), 205.

References are to pages.

Toledo, etc., R. Co. v. Penn. Co. (54 Fed. Rep. 746), 669, 672, 673.
Tollett, *In re* (106 Fed. Rep. 866), 436, 439, 534.
Tonne, In re (13 N. B. R. 170), 443.
Tontine Surety Co., *In re* (116 Fed. Rep. 401), 147.
Toof v. Martin (13 Wall. 40), 162, 197, 386, 387, 570, 571, 574, 575, 577, 590, 591.
Tooker, *In re* (8 Ben. 390), 695.
Topham, *Ex parte* (8 L. R. Ch. App. 614), 390.
Towne, *In re* (10 Am. B. R. 284), 326.
Towne v. Smith (1 Wood. & N. 115), 759.
Townsend, *In re* (2 Ben. 62), 737.
Townshend v. Windham (2 Ves., Sen. 1), 381.
Traders Bank v. Campbell (14 Wall. 87), 24, 570, 575.
Trafton, *Ex parte* (2 Low. 505), 693.
Train v. Marshall Papar Co. (180 Mass. 513), 778.
Traphagen, *Ex parte* (1 N. Y. Leg. Obs. 98), 739.
Trask, *In re* (7 Ben. 60), 626, 627.
Tredway v. Kaufman (21 Pa. 256), 609.
Tremont Nat. Bank, *Ex parte* (2 Low. 409), 408.
Trimble v. Woodhead (102 U. S. 647), 383, 563, 606.
Tripp v. Santa Rosa Street R. Co. (144 M. S. 126), 832.
Troth, *In re* (104 Fed. Rep. 291), 127.
Troy Woolen Co., *In re* (8 N. B. R. 412), 314.
Truitt v. Truitt (38 Ind. 16), 710, 755.
Trust Co. v. Benbow (96 Fed. Rep. 514), 707.
Trustees v. Bosseiux (3 Fed. Rep. 917), 320.
Tua v. Carriere (117 U. S. 209), 20, 23.
Tubbs v. Williams (9 Fed. N. C. 1), 296, 297.
Tuck v. Fryson (6 Bing. 321), 372, 401.
Tucker v. Daly (7 Grat. Va. 330), 367.
Tucker v. Oxley (5 Cranch. 34), 311, 315.
Tudor, *In re* (96 Fed. Rep. 942), 110, 118.
Tudor, *In re* (100 Fed. Rep. 796), 624, 631.
Tuesley v. Robinson (103 Mass. 558), 431.
Tufts v. Sylvester (79 Me. 213), 375.
Tug River Coal & Salt Co. v. Brigel (67 Fed. Rep. 625), 836.
Tune, *In re* (115 Fed. Rep. 906), 74, 78, 445, 446, 569, 571.
Tunno v. Bethune (2 Dessau. S. C. 285), 297.
Turnbull, *In re* (106 Fed. Rep. 667), 424, 440, 481, 482.
Turner v. Richardson (7 East. 336), 397, 400.
Turner v. Thomas (6 L. R. C. P. 610), 309.
Turner v. Turner (108 Fed. Rep. 785), 290, 292, 318, 765.
Turrill v. Crawley (13 Ad. & El. 197), 600.
Tuttle v. Truax (1 N. B. R. 601), 581.
Twaddell, *In re* (110 Fed. Rep. 145), 395.
Twogood, *Ex parte* (11 Ves. 517), 311, 315.
Tyler, *In re* (104 Fed. Rep. 778), 99, 369.
Tyler, *In re* (49 U. S. 180), 675, 676.
Tyrrel, *In re* (2 N. B. R. 200), 743.
Tyrrel v. Hammerstein (6 Am. B. R. 430), 768.

U.

Udall v. Steamship "Ohio" (17 How. 17), 835.
Ufelder Clothing Co., *In re* (98 Fed. Rep. 409), 322, 341.
Ulman v. Ritter (72 Fed. Rep. 1000), 632, 669.
Ulrich, *In re* (3 Ben. 355), 79, 204, 207, 221, 632.
Ulrich, *In re* (6 Ben. 483), 374.
Underwood v. Eastman (18 N. H. 582), 781, 782.
Ungewitter v. Von Sachs (4 Ben. 167), 302, 580.
Union Pac. R. Co., *In re* (10 N. B. R. 178), 149, 163, 390.
Union Pacific Co. v. Callaghan (161 U. S. 95), 829.
Union Pacific R. Co. v. United States (116 U. S. 402), 834.
Union Sugar Refinery v. Mathieson (2 Cliff. 304), 206.

References are to pages.

Union Trust Co., *In re* (122 Fed. Rep. 937), 70, 704, 810, 812.
United States, *Ex parte* (1 Gall. 338), 103.
United States v. Adams (6 Wall. 101), 822.
United States v. Anonymous (21 Fed. Rep. 761), 667, 671, 673, 674.
United States v. Armejo (131 U. S. Appendix lxxxii), 832, 833.
United States v. Atcheson (16 Fed. Rep. 853), 671, 674.
United States v. Bayer (4 Dill. 407), 665.
United States v. Berry (24 Fed. Rep. 780), 670, 672.
United States v. Block (4 Saw. 211), 655, 664.
United States v Booth (18 How. 477), 833.
United States v. Brawner (7 Fed. Rep. 86), 648, 650, 652.
United States v. Caldwell (2 Dall. 333), 667.
United States v. Carter (3 Cranch C. C. 423), 666.
United States v. Curry (6 How. 106), 79, 221, 833.
United States v. Davis (3 McLean 483), 763.
United States v. De Walt (128 U. S. 393), 664.
United States v. Dewey (39 Fed. Rep. 251), 351.
United States v. Dobbins (5 Law Rep. 81), 642.
United States v. Dodge (2 Gall. 313), 674.
United States v. Fletcher (147 U. S. 664), 652.
United States v. Fowkes (49 Fed. Rep. 50), 648, 653.
United States v. Gomez (1 Wall. 690), 821, 822.
United States v. Gomez (3 Wall. 766), 833, 837.
United States v. Griswold (8 Fed. Rep. 496), 592.
United States v. Hammond (104 Fed. Rep. 862), 693, 818.
United States v. Herron (20 Wall. 251), 325, 729, 762, 763, 774.
United States v. Hewecker (164 U. S. 46), 804.
United States v. Hopewell (51 Fed. Rep. 798), 836.
United States v. Houghton (14 Fed. Rep. 544), 665.
United States v. Jackson (2 Fed. Rep. 502), 665.
United States v. Jacobi (1 Flip. 108), 649.
United States v. Jahn (155 U. S. 109), 804.
United States v. Justices (10 Fed. Rep. 461), 674.
United States v. King (Wall. Sen. 13), 762.
United States v. Latorre (8 Blatch. 134), 662, 665.
United States v. Montgomery (2 Dall. 335), 205.
United States v. Memphis, etc., R. Co. (6 Fed. Rep. 238), 632, 669.
United States v. Murphy (15 Fed. Rep. 589), 325, 729.
United States v. Murphy (44 Fed. Rep. 39), 671, 672.
United States v. Patterson (26 Fed. Rep. 509), 666.
United States v. Prescott (2 Biss. 325), 655, 665.
United States v. Rob Roy (1 Woods 42), 763.
United States v. Rogers (23 Fed. Rep. 658), 650, 652.
United States v. Rose (14 Fed. Rep. 681), 208.
United States v. Rider (163 U. S. 132), 804.
United States v. Shepard (1 Abb. U. S., 431), 649.
United States v. Snyder (8 Fed. Rep. 805), 665.
United States v. Stevens (44 Fed. Rep. 132), 665.
United States v. Sweeney (95 Fed. Rep. 434), 673.
United States v. Throckmorton (8 N. B. R. 309), 763.
United States v. Tilden (20 Wall. 251), 723.
United States v. Tureaud (20 Fed. Rep. 620), 649.
United States v. Union Pac. Ry. Co. (168 U. S. 505), 806.
United States v. Union Surety & G. Co. (9 Am. B. R. 114), 74, 361.
United States v. Young (94 U. S. 258), 798.
Upshur v. Briscoe (138 U. S. 365), 769, 772, 775, 783.
Upson, *In re* (123 Fed. Rep. 807), 302.
Upson, *In re* (124 Fed. Rep. 980), 786.
Upton v. Hansbrough (3 Biss. 417), 406.
Upton v. McLaughlin (105 U. S. 640), 361.

References are to pages.

Upton v. Tribilcock (91 U. S. 65), 406.
Uran v. Houdlette (36 Me. 15), 293.
Utt, *In re* (105 Fed. Rep. 754), 126, 363, 709, 812, 814

V.

Vaccaro v. Security Bank (103 Fed. Rep. 436), 157, 160, 167, 168, 247, 248, 250.
Vairin v. Edmonson (9 Ill. 120), 360.
Valentine, *In re* (4 Biss. 317), 327.
Valk, *In re* (3 Ben. 431), 644.
Vallandigham, *In re* (1 Wall. 243), 798.
Valligreete, *In re* (4 N. B. R. 307), 390.
Van Brovklin v. Tennessee (117 U. S. 151), 732.
Van Dyke v. Tinker (11 N. B. R. 308), 104.
Van Gunden v. Iron Co. (52 Fed. Rep. 838), 838.
Van Hook v. Whitlock (26 Wend., N. Y., 43), 759.
Van Nostrand v. Carr (30 Md. 128), 20, 23, 26, 27.
Vansant v. Gas Light Co. (99 U. S. 213), 822.
Van Tuyl, *In re* (1 N. B. R. 636), 625.
Van Wagenen v. Sewall (160 U. S. 369), 805.
Varick Bank, *In re* (119 Fed. Rep. 991), 168.
Vetterlein, *In re* (20 Fed. Rep. 109), 325, 729.
Vetterlin, *In re* (5 Ben. 7), 613.
Vetterlein, *In re* (5 Ben. 311), 256.
Vernia, *In re* (5 Fed. Rep. 723), 748, 749.
Veitch, *In re* (101 Fed. Rep. 251), 724, 728.
Vickery, *In re* (3 N. B. R. 696), 293.
Vider v. O'Brien (62 Fed. Rep. 326), 838.
Viele v. Ogilvie (2 Green., Ia., 326), 781.
Vietor v. Lewis (1 Am. B. R. 667), 89.
Vila, *In re* (No. 16941 Fed. Cas.), 117.
Virginia Commissioners, *Ex parte* (112 U. S. 177), 833.
Voetter, *In re* (4 Fed. Rep. 632), 311.
Vogel, *In re* (5 N. B. R. 303), 612.
Vogel, *In re* (5 N. B. R. 393), 623, 625, 667.
Vogel, *In re* (7 Blatch. 18), 370, 373, 374.
Vogler, *In re* (2 Hughes 297), 441.
Vogler v. Montgomery (54 Mo. 577), 436.
Voight v. Lewis (14 N. B. R. 543), 413.
Von Borcke, *In re* (94 Fed. Rep. 352), 201.
Von Roy v. Blackman (3 Woods 98), 205, 208, 210.
Voorhees v. Bonesteel (16 Wall. 16), 419.
Voorheis v. Frisbie (25 Mich. 476), 713.
Voyles v. Parker (4 Fed. Rep. 210), 565.
Vulliany v. Noble (3 Mer. 621), 315.

W.

Wadsworth v. Tyler (2 N. B. R. 316), 104.
Wager v. Hall (16 Wall. 599), 197, 386, 387, 570, 574, 575, 577, 578, 584, 590, 594.
Waggoner, *In re* (1 Ben. 532), 743, 752.
Wagner v. Smith (13 B. J. Lea, Tenn., 569), 391.
Wagner v. United States (104 Fed. Rep. 133), 88, 91, 96, 669.
Wagstaff, *Ex parte* (13 Ves. 65), 311.
Waite, *In re* (1 Low. 207), 152, 153, 163, 200, 249, 583, 590.
Wakeman v. Hoyt (5 Law Rep. 309), 10, 148, 751.
Walbridge v. Harroon (18 Vt. 448), 782.
Walburn v. Babbit (16 Wall. 577), 590.
Wald v. Wehl (6 Fed. Rep. 163), 200.
Walker, *In re* (96 Fed. Rep. 550), 616.
Walker, *In re* (1 Low. 237), 174, 176, 637.
Walker v. Brown (165 U. S. 354), 660.
Walker v. Jack (88 Fed. Rep. 576), 230.
Walker v. Robbins (14 How. 584), 208.
Wall, *In re* (13 Fed. Rep. 818), 668.

References are to pages.

Wall v. Cox (181 U. S. 244), 80, 607, 792.
Wall v. Cox (101 Fed. Rep. 403), 609.
Wallace, *In re* (Deady 433), 89, 366, 370.
Wallace v. Loomis (97 U. S. 146), 103.
Waller v. Best (3 How. 111), 10, 565.
Walsh, *In re* (104 Fed. Rep. 518), 625.
Walshe, *In re* (2 Woods 225), 690, 693.
Walther, *In re* (95 Fed. Rep. 941), 745.
Walther, *In re* (14 N. B. R. 273), 327, 340.
Walton, *In re* (1 N. B. R. 557), 285, 398.
Walton, *In re* (Deady 510), 330, 571.
Walworth v. Harris (129 U. S. 355), 21.
Ward, *In re* (12 Fed. Rep. 325), 283.
Ward, *In re* (104 Fed. Rep. 985), 74, 85, 94, 215.
Warder, *In re* (10 Fed. Rep. 275), 406.
Warford v. Noble (2 Fed. Rep. 202), 438.
Warner v. Cronkhite (6 Biss. 453), 767.
Warner v. New Orleans (167 U. S. 467), 806, 807.
Warren, *In re* (2 Ware 322), 261.
Warren v. Moody (122 U. S. 138), 384, 573, 575.
Warren v. Nat. Bank (10 Blatch. 493), 105, 575, 581.
Warren v. Warren Thread Co. (134 Mass. 247), 378.
Waring, *Ex parte* (19 Ves. 345), 299, 339.
Warwell v. Foster (31 Me. 558), 782.
Washburn, *In re* (99 Fed. Rep. 84), 188.
Washington & Georgetown R. R., *In re* (140 U. S. 91), 842.
Waterberry Furniture Co., *In re* (114 Fed. Rep. 255), 586.
Waterloo Organ Co., *In re* (118 Fed. Rep. 904), 86, 707, 708.
Waties & Co., *In re* (39 Fed. Rep. 264), 320.
Watkins v. Maule (2 J. & W. 237), 407.
Watkins v. Watkins (1896, Prob. 223), 290.
Watrous, *In re* (14 N. B. R. 258), 322.
Watson, *Ex parte* (4 Madd. 477), 285.
Watson, *In re* (4 N. B. R. 613), 174.
Watson v. Citizens Sav. Bank (2 Hughes 200), 370.
Watson v. Holiday (20 L. R. Ch. Div. 780), 319.
Watson v. McDuff (101 Fed. Rep. 241), 738, 753.
Watson v. Taylor (21 Wall. 378), 570.
Watts, *In re* (3 Ben. 166), 187.
Watts & Sachs, *In re* (190 U. S. 1), 29, 31, 32, 75, 77, 97, 98, 99, 135, 670, 676.
Waukesha Water Co., *In re* (116 Fed. Rep. 1009), 79.
Wauton v. DeWolf (142 U. S. 138), 837.
Waxelbaum, *In re* (97 Fed. Rep. 562), 175, 185.
Waxelbaum, *In re* (98 Fed. Rep. 589), 173, 176.
Waxelbaum, *In re* (101 Fed. Rep. 228), 121, 461, 462.
Way v. Howe (108 Mass. 502), 785.
Way, v. Sperry (60 Mass. 238) 782.
Wayne Knitting Mills Co. v. Nugent (104 Fed. Rep. 530), 101, 370.
Weatherall v. Gearing (12 Ves. 504) 401.
Weaton v. Woodcock (7 M. & W. 14), 402.
Weaver's Appeal (18 Pa. St. 307), 434.
Weaver, *In re* (9 N. B. R. 132), 152, 163, 249.
Webb, *In re* (2 N. B. R. 614), 261.
Webb, *In re* (6 N. B. R. 302), 397.
Webb, *In re* (4 Saw. 326), 262, 265, 270.
Webb v. Sachs (4 Saw. 158), 609.
Webb v. Ward (7 T. R. 296), 415.
Weber, *In re* (13 N. B. R. 529), 679, 683, 686.
Weber, *In re* (13 N. B. R. 559), 687, 693.
Webster v. Upton (91 U. S. 65), 406.
Weeks v. Fowler (35 Atl. 542), 609.
Wehl v. Wald (3 Fed. Rep. 93), 610.

References are to pages.

Wehl v. Wald (17 Blatch. 342), 106.
Weiner & Goodman Shoe Co., *In re* (96 Fed. Rep. 949), 323, 324.
Weinger-Bergman Co., *In re* (126 Fed. Rep. 875), 101, 370, 374.
Weitzel, *In re* (7 Biss. 289), 145, 227.
Welch, *In re* (100 Fed. Rep. 65), 657.
Welch, *In re* (5 Ben. 230), 441.
Welch v. Myers (4 Campbell 368), 397, 399, 400.
Welge, *In re* (1 Fed. Rep. 216), 138.
Welling, *In re* (113 Fed. Rep. 189), 408, 409.
Wells, *In re* (4 Fed. Rep. 68), 285.
Wells, *In re* (105 Fed. Rep. 762), 427, 428, 430.
Wells, *In re* (114 Fed. Rep. 222), 77, 94.
Wells, Fargo & Co. v. Oregon Co. (19 Fed. Rep. 20), 670.
Wentworth v. Whittemore (1 Mass. 471), 286.
Werder, *In re* (15 Fed. Rep. 789), 406.
Wesson, *In re* (88 Fed. Rep. 855), 95.
West, *In re* (39 Fed. Rep. 203), 257.
West, *In re* (108 Fed. Rep. 940), 161.
West, *In re* (116 Fed. Rep. 767), 431, 461.
West, *In re* (46 L. T. 823), 378.
West v. Brashear (14 Pet. 51), 843.
West v. Cabell (153 U. S. 87), 648.
West v. Irwin (64 Fed. Rep. 419), 837.
West v. Pryce (2 Bing. 455), 313, 314.
West Co. v. Lea (174 U. S. 590), 30, 31, 155, 156, 167, 168, 169, 196, 198, 224, 225, 226, 232, 250, 391, 393, 817.
Western Sav. & T. Co., *In re* (4 Saw. 490), 199.
Western Union Cold Storage Co. v. Hurd (116 Fed. Rep. 442), 769, 770.
Westfall Bros. Co., *In re* (8 Am. B. R. 431), 613, 615.
Westinghouse Air Brake Co. v. Christianson Engineering Co. (123 Fed. Rep. 632), 676.
Westlund, *In re* (99 Fed. Rep. 399), 726.
West Norfolk Lumber Co., *In re* (112 Fed. Rep. 759), 561, 602.
West Phila. Bank v. Dickon (95 U. S. 180), 387.
Wetmore, *In re* (102 Fed. Rep. 290), 380, 395.
Wheeler v. Bramah (3 Campbell 340), 397, 400.
Wheeler v. Cobb (75 N. C. 21), 174.
Wheeler v. Wheeler (28 Ill. App. 385), 780.
Wheelock v. Lee (10 B. R. 363), 368.
Whetmore, In re (99 Fed. Rep. 703), 657.
Whetmore, *In re* (16 N. B. R. 514), 350, 356.
Whipple, *In re* (11 N. B. R. 524), 680, 683.
Whipple, *In re* (2 Low. 404), 686, 687.
Whitaker v. Chapman (3 Lans., N. Y., 155), 772.
White, *In re* (103 Fed. Rep. 774), 542.
White, *In re* (109 Fed. Rep. 635), 428, 436, 494, 495.
White, *In re* (2 N. B. R. 590), 748, 749, 750.
White v. Bradley Timber Co. (116 Fed. Rep. 768), 238, 239.
White v. Cushing (30 Me. 267), 782.
White v. How (3 McLean 291), 783.
White v. Jones (6 N. B. R. 175), 413.
White v. Platt (5 Den., N. Y., 274), 774.
White v. Schloerb (178 U. S. 542), 71, 73, 76, 82, 84, 89, 93, 100, 101, 110, 360 370, 374, 792.
White v. Thompson (119 Fed. Rep. 868), 88, 92, 93, 810, 811.
White Star Laundry Co., *In re* (117 Fed. Rep. 570), 149, 150.
Whitehead, *In re* (2 N. B. R. 599), 432.
Whitehouse, *In re* (1 Low. 429), 636, 645.
Whitener, *In re* (105 Fed. Rep. 180), 71, 76, 82, 84, 101, 360, 374, 808, 816, 817, 818.
Whiting, *Ex parte* (2 Low. 472), 313.
Whitley Grocery Co. v. Roach (115 Ga. 918), 584.
Whitman, *Ex parte*, 397, 398.
Whitney v. Crafts (10 Mass. 23), 755, 782.

References are to pages.

Whitney v. Whiting (35 N. H. 457), 759.
Whitridge v. Taylor (66 N. C. 273), 710.
Whittington, *Ex parte* (Buck. 87), 401.
Whitworth v. Hall (2 B. & Ad. 695), 241.
Whyte, *In re* (9 N. B. R. 267), 322.
Wickelman v. Dick Co. (85 Fed. Rep. 851), 822.
Wicker v. Comstock (52 Wis. 315), 434.
Wickham v. Hull (60 Fed. Rep. 326), 97.
Wicks v. Perkins (1 Woods. 383), 710.
Wiggers, *In re* (2 Biss. 71), 637), 642, 643.
Wilbur v. Watson (111 Fed. Rep. 493), 729.
Wilcox, *In re* (94 Fed. Rep. 84), 257.
Wilcox, *In re* (109 Fed. Rep. 628), 630, 657.
Wild, *In re* (11 Blatch. 243), 300.
Wilder, *In re* (101 Fed. Rep. 104), 335, 338, 339.
Wiley, *In re* (4 Biss. 171), 597.
Wilkes, *In re* (7 Am. B. R. 574), 566, 568.
Wilkins v. Davis (2 Low. 511), 252, 262, 265, 270.
Wilkinson v. Waite (44 Vt. 508), 427.
Willey, *In re* (4 Biss. 214), 259.
Williams, *Ex parte* (10 L. R. Eq. 61), 687, 688, 698.
Williams, *In re* (99 Fed. Rep. 544), 174.
Williams, *In re* (105 Fed. Rep. 906), 813.
Williams, *In re* (120 Fed. Rep. 38), 33, 69, 87, 95.
Williams, *In re* (123 Fed. Rep. 321), 87, 614, 616, 629.
Williams, *In re* (2 N. B. R. 229), 203.
Williams, *In re* (3 N. B. R. 286), 160.
Williams, *In re* (2 Biss. 233), 636.
Williams, *In re* (6 Biss. 233), 643, 645.
Williams, *In re* (3 Woods 493), 256.
Williams, *In re* (14 N. B. R. 132), 192, 227.
Williams, *In re* (1 Low. 406), 227.
Williams v. Claflin (103 U. S. 753), 829, 830.
Williams v. Heard (140 U. S. 529), 420, 794.
Williams v. Merritt (103 Mass. 187), 366.
Williams v. Robbins (32 Me. 181), 779, 780.
Williams v. Thorn (70 N. Y. 270), 414.
Williams Bros. v. Savage (120 Fed. Rep. 497), 833, 834.
Williams & Leidig, *In re* (13 Fed. Rep. 30), 748.
Williamson, *In re* (114 Fed. Rep. 190), 461.
Williamson v. Dickens (5 Ired. Law., N. C., 259), 774.
Williamson v. Krohn (66 Fed. Rep. 662), 206.
Willis v. Cushman (115 Ind. 100), 780.
Willitts v. Waite (25 N. Y. 583), 377.
Wilmington Hosiery Co., *In re* (120 Fed. Rep. 180), 168.
Wilmot v. Mudge (103 U. S. 217), 694.
Wilson, *Ex parte* (114 U. S. 424), 664, 665.
Wilson, *In re* (101 Fed. Rep. 571), 444, 515, 516.
Wilson, *In re* (108 Fed. Rep. 197), 545, 546.
Wilson, *In re* (116 Fed. Rep. 419), 71, 96, 371, 631, 633, 668.
Wilson v. Atlantic, etc., R. Co. (2 Fed. Rep. 459), 405.
Wilson v. Brinkman (2 N. B. R. 468), 573.
Wilson v. City Bank (17 Wall. 473), 197, 570, 574, 575, 580.
Wilson v. McElroy (32 Pa. St. 82), 432.
Wilson v. Nat. Bank (3 Fed. Rep. 391), 284, 294, 311, 314.
Wilson v. Nelson (183 U. S. 191), 166, 167, 568, 792.
Wilson v. Parr (8 Am. B. R. 230), 99.
Wilson v. Penn. Trust Co. (114 Fed. Rep. 742), 306.
Wilson v. Wallani (5 Ex. Div. 155), 398.
Wilt v. Stickney (15 N. B. R. 23), 104.
Winchester v. Heiskell (119 U. S. 450), 795.
Windsor v. McLellan (2 Story 492), 368.
Winn v. Morse (59 N. H. 210), 427.
Winship, *In re* (120 Fed. Rep. 93), 93), 696.

References are to pages.

Winship, *In re* (7 Ben. 194), 619, 621.
Winslow v. Bliss (3 Lans., N. Y., 220), 312, 588.
Winslow v. Clark (47 N. Y. 261), 710.
Winslow v. Wallace (116 Ind. 317), 258.
Winson v. Kendell (3 Story 507), 588.
Winston, *In re* (122 Fed. Rep. 187), 192.
Winter v. Iowa, etc., R. Co. (2 Dill. 487), 18.
Winter v. Railway Co. (2 Dill. 487), 164.
Winthrop, *In re* (5 Law. Rep. 24), 642.
Wiseman, *In re* (123 Fed. Rep. 185), 288, 289.
Witkowski, *In re* (10 N. B. R. 209), 613.
Wittenberg Veneer & Panel Co., *In re* (108 Fed. Rep. 593), 575.
Wolf & Levy, *In re* (122 Fed. Rep. 127), 333, 585.
Wolf v. Stix (96 U. S. 541), 784, 794.
Wolf v. Stix (99 U. S. 1), 769, 770, 775, 784.
Wolff, *In re* (100 Fed. Rep. 430), 738.
Wolfskill, *In re* (5 Saw. 385), 751.
Wollaston v. Porter (122 Mass. 308), 299.
Wood, *In re* (98 Fed. Rep. 972), 395, 659.
Wood v. Akers (2 Esp. 594), 314.
Wood v. Owings (1 Cranch 239), 170, 390.
Wood v. Partridge (11 Mass. 488), 286.
Wood v. Vanderveer (55 N. Y. App. Div. 549), 778.
Wood M. & R. Co. v. Broke (9 B. R. 395), 373.
Woodard, *In re* (2 Am. B. R. 339), 584.
Woodard, *In re* (95 Fed. Rep. 955), 133, 137, 139, 423, 424, 441, 515, 528.
Woodard v. Herbert (21 Me. 358), 286.
Woodbury v. Perkins (5 Cush. 86), 293.
Woodford, *In re* (1 Cin. Law Bul. 37), 194.
Woodhull v. Wagner (Bald. 296), 20, 22.
Woodman v. Stowe (11 Bradw., Ill. Ap. Ct. 613), 695.
Woodruff, *In re* (96 Fed. Rep. 317), 430, 461, 462.
Woodruff v. Cheeves (105 Fed. Rep. 601), 85, 461.
Woods, *In re* (143 U. S. 202), 802.
Woods v. Oakman (116 Mass. 599), 368.
Woodside Coal Co., *In re* (105 Fed. Rep. 56), 149.
Woodward, *In re* (3 N. B. R. 719), 622.
Woodward, *In re* (12 N. B. R. 297), 115.
Woodward, *In re* (4 Ben. 102), 627.
Woodward, *In re* (8 Ben. 112), 232, 343, 619.
Woodward, *In re* (8 Ben. 563), 149.
Woodward v. Brown (13 Pet. 1), 836.
Woolfolk v. Murray (44 Ga. 137), 428 429, 434.
Wollock, *In re* (120 Fed. Rep. 516), 767.
Woolridge v. McKenna (8 Fed. Rep. 650), 106, 205.
Woolsey v. Cade (15 N. B. R. 238), 772.
Wooten, *In re* (118 Fed. Rep. 670), 134, 341.
Worcester County, *In re* (102 Fed. Rep. 808), 303, 728, 819, 821.
Worcester v. Clark (2 Grant, Pa., 84), 438.
Worden v. Searles (121 U. S. 14), 632, 669, 670.
Worland, *In re* (92 Fed. Rep. 893), 707, 709.
Worrell, *In re* (125 Fed. Rep. 159), 627.
Wright, *In re* (95 Fed. Rep. 807), 303.
Wright, *In re* (96 Fed. Rep. 187), 582, 584.
Wright, *In re* (1 N. B. R. 393), 346.
Wright, *In re* (2 N. B. R. 190), 570, 581, 751.
Wright, *In re* (2 Ben. 509), 760.
Wright, *In re* (3 Biss. 359), 113.
Wright, *In re* (6 Biss. 317), 320.
Wright v. Bird (1 Price 20), 149.
Wright v. Fairfield (2 B. & Ad. 727), 418.
Wright v. First Nat. Bank (8 Biss. 243), 418
Wright v. Rogers (3 McLean 229), 313.

References are to pages.

Wright v. Snell (5 B. & Ald. 350), 600.
Wright Lumber Co., *In re* (114 Fed. Rep. 1011), 162, 163, 574, 595.
Wronkow, *In re* (15 Blatch. 38), 684, 685.
Wulburn v. Drake (120 Fed. Rep. 493), 143.
Wyllie, *In re* (2 Hughes 449), 423.
Wyly, *In re* (116 Fed. Rep. 38), 585.
Wynne, *In re* (Chase 227), 709.
Wynne, *In re* (4 N. B. R. 23), 393.

Y.

Yale, *Ex parte* (3 P. W. 25), 266, 270.
Yates, *In re* (114 Fed. Rep. 365), 141, 185, 291.
Yates v. Sherrington (11 M. & W. 855), 314.
Yeatman v. New Orleans Savings Institution (95 U. S. 764), 368, 562, 597, 598, 731.
Yeaton, *In re* (1 Low. 420), 285, 398.
Yonge, *Ex parte* (3 Ves. & B. 31), 285.
York's Case (1 Abb., U. S., 503), 820.
York, *In re* (3 N. B. R. 661), 715.
Yost, *In re* (117 Fed. Rep. 792), 528.
Yost v. Heffner (69 Pa. St. 68), 434.
Young, *In re* (96 Fed. Rep. 606), 242, 301, 729.
Young, *In re* (111 Fed. Rep. 158), 83, 86, 811.
Young, *In re* (3 N. B. R. 440), 444.
Young v. Bank (1 Moore P. C. 150), 310.
Young v. Insurance Co. (29 Fed. Rep. 273), 57.
Young v. Upson (115 Fed. Rep. 192), 587.
Younghusband v. Gisborne (1 Coll. 400), 414.

Z.

Zacher v. Fidelity Trust & Safety Vault Co. (106 Fed. Rep. 593), 377.
Zahm v. Fry (9 N. B. R. 546), 581.
Zantzinger v. Ribble (36 Md. 32), 367.
Zarega's Case (4 L. R. 480), 756.
Zeltner, H., Brewing Co., *In re* (117 Fed. Rep. 799), 160.
Zeperink v. Card (11 Fed. Rep. 295), 770.
Ziegenfuss, *Ex parte* (2 Iredell, N. C., 463), 29.
Zimmer v. Schleehauf (115 Mass. 52), 318.
Zinn, *In re* (4 N. B. R. 370), 349, 356.
Zug, *In re* (16 N. B. R. 280), 259.
Zule v. Zule (24 Wend., N. Y., 74), 305.

GENERAL INDEX.

INDEX.

References are to pages.

Abatement—

Proceedings do not abate upon death or insanity of bankrupt, 146, 653.
Suits are not abated by death or removal of trustee, 654.

Abroad—

(See ALIEN, FOREIGN.)

Absconding debtor—

How to proceed against, 154.

Absence—

Judge's, in, case sent to referee, 130.
Referee's, effect of, 107.

Accounts—

Books of, destruction, concealment, etc., prevents discharge, 748.
Debts founded upon open, allowed, 301.
Notice to creditors of filing final, 734.
Partnership, insolvent, kept by trustee, 255.
Penalty for making false, 661.
Referee's punishment for refusing inspection of, 663.
Trustees to keep, 352.
file final, when, 718, 352.
punishment for refusing inspection of, 663.
referee to audit, 352, 717, 718.

Acknowledgment—

(See OATH.)

Act of 1800—

Administration of the estate, 9.
Commission of bankruptcy, 8.
Discharge, 9.
Dividends, 9.
What was an act of bankruptcy, 7.
When petition filed, 8.
Who might be adjudged bankrupt, 7.
Why and when repealed, 9.

Act of 1841—

Acts of bankruptcy, 10.
Assignee and his powers, 11.
Discharge, 11.
Objections to and repeal, 12.
When petition might be filed, 11.
Where proceedings were had, 11.
Who might be adjudged bankrupts, 10.

Act of 1867—

Appellate jurisdiction of supreme court, 27.
Objections to and repeal, 13.
Act printed in full, 1207.
Compared with act of 1898, 13.

References are to pages.

Act of 1898—
Compared with act of 1867, 13.
State laws superseded by, 25, 29.
When it went into effect, 23.

Actions—
(See SUITS.)
At law, what are, 104.

Acts of bankruptcy—
Admission in writing of inability to pay debts, 169.
by corporation, 169.
Assignments for the benefit of creditors, 30, 167.
Averred in petition, 199.
Computing time in respect to, 170.
Concealing or removing property, 160.
Creditors estopped to charge, when, 191.
Evidence of, not in petition inadmissable, 200.
Fraudulent transfer, 159. (See FRAUDULENT TRANSFER.)
intent of transfer only material, 160.
How committed by partners, 152.
Insolvency as an element of, 155, 168, 169.
None relating to the person, 154.
Of partnerships, 152.
Once committed can not be rescinded, 155.
Permitting preferences by legal proceedings, 164. (See PREFERENCES.)
Preferences by a debtor, 161. (See PREFERENCES.)
Question for jury, 230.
Receiverships, 167.
Removing or concealing property, 160.
Rescinded, can not be, 155.
Several acts may be charged in same petition, 200.
Support an involuntary petition, 195.
Voluntary petitions as, 169.
What are, 153, 195.
When committed must be, 152, 170.
Who may commit, 152.
Who may not complain of, 155.

Adjudication—
On creditors' petition, 233.
On debtor's petition, 184.
Partnership cases, in, 253.
Setting aside an, 234.
When referees may make, 111, 114.
When not made on debtor's petition, 184.

Administration—
Appointment of trustee, 348.
Arbitration, 698.
Composition with creditors, 677.
Costs of, entitled to priority, 725.
Distribution, dividends, etc., 717.
Exemptions, 422.
Expenses, 131.
Partnership property, 255.
Proving claims, 321.
Reducing estate to money, 701.
Settlement of the estate, 733.
Suits with reference to estate, 358, 605, 716.
Trustee's powers and duties, 351.
Trustee takes what property, 31, 365.

References are to pages.

Administrator—
Discharge does not release debts of, 773.
Proof of claims by, 324.

Admission of proofs—
(See EVIDENCE.)

Adverse claimants—
Jurisdiction over, 74.
Jury, when entitled to, 235.
Who are, 30, 105.

Advertisement—
(See NEWSPAPER.)

Affidavit—
Arrest of bankrupt for examination, for, 640.
Voluntary bankrupt, of, of inability to pay fees, 183.

Affirmation—
(See OATH.)

After-acquired property—
Bankrupt can not be examined as to, 416.
Does not pass to trustee, 415.
Protected by injunction, 417.
What constitutes, 416.

Agent—
"Creditor" includes, 189.
Intent of, in transfer, that of principal, 573.
May vote at creditors' meeting, 269.
Penalty for use in compositions false claims, as or by, 662.
Proof of claims by, 329.
Property in possession of, passes to trustee, 403.
Whether acting in fiduciary capacity to discharge debts, 772. 775.

Aggrieved person—
(See APPELLATE PROCEEDINGS.)

Alabama—
Exemption laws of, 445.
Territorial jurisdiction of courts in, 34.

Alaska—
Exemption laws of, 446.
Territorial jurisdiction and time of holding courts in, 35.
"States" include, 422*n*.

Aliens—
Domestic creditors preferred over, when, 722*n*.
May be bankrupts, 143.
(See also FOREIGN.)

Alimony—
Does not pass to trustee, 376.
Not affected by discharge, judgments for, 765.
Not a provable claim, 290.

References are to pages.

Allowance—

Claims of, against bankrupt's estate, 272, 340. (See PROOF OF CLAIMS.)
assignee to, 324.
preferred claims, of, 332.
review of, 346.
secured creditors, of, 331.
Debts, subject of, 281.
Widow and children to, fixed by state laws, 437.

Amendment—

Clerk's certificate of, 835.
Debtor's petition and schedule, of, 186.
must be verified, 186.
referee may allow, 187.
In involuntary cases, 199, 223, 237.
application for must be made within reasonable time, 238.
costs, 239.
discretion of court within, 238.
grounds of, 237.
referee may grant leave to, 239.
In voluntary cases, how made, 186.
Of proof of claim, 335, 338.
Of record on appeal, 835.
Petition to C. C. A. to supervise court of bankruptcy, of, 814.
Referee may allow, 186, 239.

Amount—

Appeal to U. S. supreme court, 796.
Bonds of referees, 109.
Bonds of trustees fixed by creditors, 278, 350.
Claims of creditors, who file involuntary petition, 193.
Debtor's debts denied in answer, 226.
Debts of petitioning creditors denied, 226.

Ancillary proceedings—

In other districts, 79, 86.

Answer—

Can not demur to, 230.
Defense of coverture, 227.
act of bankruptcy not committed, 225.
each must be separately stated, 224.
insufficient creditors' debt, 226.
insufficient indebtedness of bankrupt, 226.
infancy, 227.
insanity, 227.
payment, 227.
petitioner has not provable debt, 226.
solvency, 155, 161, 168, 169, 196, 225.
statute of limitation to creditors' debt, 227.
want of jurisdiction, 227.
Filed where and when, 228.
Oath to, 227.
Signature to, 227.
To an involuntary petition, 224.
Verification of, 227.
When to file, 223.
Where to file, 228.

References are to pages.

Apparel—
Unless exempt, passes to trustee, 403.
What included in, 405.

Appeal—
(See APPELLATE PROCEEDINGS.)

Appearance—
Can not be withdrawn, 221.
Effect of, 207, 221.
Of creditors to become parties, 219.
Of a nonresident creditor, 221.
Oppose discharge to, 740.
Waives citation, 832.

Appellants—
Who should be made, 823.

Appellate proceedings—
Allowance of claim from, 346.
Appeals in bankruptcy to supreme court of territories, 807.
Appeals to U. S. supreme court from supreme court of District of Columbia, 795.
Amendment of record, 835.
Appeal bond, 828. (See BOND.)
Assignment of errors, 827.
Bankrupt act does not affect appellate jurisdiction at law or in equity, 790.
Bond necessary to perfecting appeal, 836.
Bond not essential to taking an appeal, 822.
Briefs in appellate courts, 838.
Certifying questions of jurisdiction to supreme court, 804.
Certifying questions of law from C. C. A. to supreme court, 804.
Certiorari from supreme court, 797, *et seq.*
Citation, 830. (See CITATION.)
Citation necessary to perfecting appeal, 831, 836.
Courts which have appellate jurisdiction, 790.
Decree in, 839.
How to prepare record, 833.
How to review a case from a state court, 793.
Jurisdiction of C. C. A. of appeals in bankruptcy, 816.
Mandate, 842.
Parties, 823.
  who may prosecute, 823.
  who must join, 826.
  who must be made appellees, 826.
Perfecting an appeal, 836.
Perfecting an appeal confers jurisdiction on appellate court, 838
Petition for appeal, 827.
Practice in C. C. A. on appeal, 838.
Printing record on appeal, 838.
Proceedings for rehearings, 840.
Supervisory power of C. C. A., 808.
Taking an appeal deprives court of bankruptcy of jurisdiction, 836.
Time within which to appeal in bankruptcy to supreme court, 796.
Time within which an appeal to C. C. A. must be taken in bankruptcy, 820.
Time for appeal can not be enlarged, 821.
Twofold jurisdiction of C. C. A., 807.
What constitutes "taking an appeal," 821.
What must be done to "take an appeal," 821.

References are to pages.

Appellate proceedings (continued)—
When appeal lies to supreme court from C. C. A., 796.
When record not filed in time, 837.
When record must be filed in appellate court, 836.
When summons and severance is necessary, 825.
Who are necessary parties to an appeal, 823.
Writ of error to court of bankruptcy, 819.
Writs of certiorari, when issued, 797,*et seq.*

Appellees—
Who should be made, 826.

Application—
For discharge, 736.
For injunction to protect an estate, how made, 215.
To amend in involuntary cases, 237.
To protect estates, how made, 215.
To set aside an adjudication, 234.
To seize bankrupt's property, how made, 217.
To stay a suit, 89, *et seq.*

Appointment—
Arbitrators, 700.
Receiver for estate, 212.
Referees, 107.
Trustees, 273, 275, 348.

Apportionment—
Referee's, compensation of, 127.
Trustee's, compensation of, 362.

Appraisal—
Can not be sold for less than 75 per cent. of, 713.
Exempt property, 441.
Property for a sale, 712.

Approval—
Compromises, of, by court, 698.
Expenses of administering bankrupt estates, 725.
Sale, of property subject to, 713.
Trustee may prosecute suits already commenced, with, of court, 358.

Arbitration—
Application for, 699.
Controversies may be settled by, 698.
Choice of arbitrators, 700.
Effect of finding, 700.
Notice of, 699.
Referee may grant leave, 699.
Trustee may compound claims, when, 699.

Arizona—
Exemption laws of, 447.
Territorial jurisdiction and time of holding court in, 36.

Arkansas—
Exemption laws of, 448.
Territorial jurisdiction and time of holding courts in, 36.

References are to pages.

Arms, military uniforms, etc.—
Exempt by laws of United States, 422.

Army pensions—
Do not form a part of estate, 408.
When money passes to trustee, 408.

Arrest—
Contempt cases, in, 638.
Criminal cases, in, 637, 638.
Debts not released by discharge, for, 635, 638.
Extradition of bankrupt, 646.
Examination, detained for, 640.
proceedings for, 641.
Injunction, 643.
Proceedings upon arrest, 641.
Proceedings to release bankrupt from, 642.
application to be made in what court, 642.
Time during which protection extends, 636.
When bankrupt protected from, 635.
When bankrupt liable to, 638.
When in attendance on court of bankruptcy, 639.
When to remove bankrupt to another district, 647, 648.
When under, 637.
(See HABEAS CORPUS.)

Assets—
Individual, what are, 259.
Individual partnership, creditors sharing, 257.
Partnership, individual creditors sharing, 257.
Partnership, what are, 258.
Unexplained shrinkage of, 658.
Trustees to collect and distribute, 701.
What are firm and individual, 258.
What are generally. (See ESTATE.)

Assignee of claim—
May prove, when, 324.
May vote at creditors' meetings, 270.

Assignment—
Assets distributed under recovery of by trustee, 618.
Assignee not liable to trustee for distributing assets, 610.
Creditors estopped to charge, as act of bankruptcy, when, 191.
Errors on appeal, 827.
For benefit of creditors, an act of bankruptcy, 30, 153, 167.
For benefit of creditors may be set aside, when, 391.
For benefit of creditors, legality of, 29, 729.
In what court property to be administered, 31.
Services in, when entitled to priority, 729.
Title of assignee, 72.

Association—
(See PARTNERSHIP.)

Attachment—
Against insolvent prior to four months, etc., 563.
Against insolvent within four months, etc., 565.
Dividends not subject to, 731.
In foreign countries before trustee takes possession, 377.
Title of *bona fide* purchaser protected, 565.

References are to pages.

Attendance—
Bankrupt exempt from arrest while attending court of bankruptcy, 635.
Compulsory, of bankrupt and witnesses before referee or court, 617
Witnesses exempt from service of subpœna while attending a court of bankruptcy, 206.

Attestation—
(See CERTIFICATE and WRITS.)

Attorney—
Advise by, not contempt when, 670.
Affidavit by bankrupt may be taken by, when, 134.
Authority of, how to challenge, 203.
Authority of to be written, when, 135.
Bankrupt of, not to represent creditors, 134.
Contempt by, 135, 670.
"Creditor" includes, 269.
Creditor, may appear for, 220.
Creditors' meeting, may vote at, 269.
Disbarred for contempt, not, 675.
Examination of bankrupt, may attend, 620.
Fees of—
allowance of by referee, 135.
amount of, 139.
provided for in mortgage refused, 140.
creditors of involuntary bankrupt of, 137.
included in cost of administration, 135, 725.
lien of, for, 137.
priority of, 135, 725.
reasonable, must be, 135.
reasonable, what is, 137, 139*n*.
services rendered assignee before filing petition, for, 138.
services rendered debtor in preparing schedules for, 138.
taxed as costs, 139.
trustee, of, 137.
voluntary bankrupt, of, 136.
who entitled to, 135.
Fiduciary character, act in, 774.
Knowledge of, effect of, 788.
Notary may act as, 139.
Notice to, 135.
Payment or transfer to, by insolvent for services, etc., re-examined, 586.
Payment to on distribution, 718, 732.
Penalty for using false claim in composition, as or by, 661.
Power of, must be written, when, 135.
Privileged communications to, 627.
Proof of claim by, 329.
Referee can not practice as, 114.
Released by discharge, when debts of, 774.
Referee should be,, 107.
Represent bankrupt and creditor, not to, 134.
Represent both trustee and bankrupt, not good practice to, 134.
Represent creditors and trustee, when should not, 135.
Trustee, of, creditors may elect, 135.
Trustee may employ when necessary, 134, 138.
Verification by, 134, 201.
Witness may be summoned as, 627.
Witness not entitled to be attended by, 620.
Written authority of, necessary, when, 135.
(See also COUNSELOR AT LAW.)

References are to pages.

Attorney General—
Duty to lay statistical tables before Congress, etc., 133.
Officers to furnish statistical information to, 134.

Auction—
(See SALE.)

Audit—
Referee audits and allows trustee's reports, 717, 734.

Auxiliary proceedings—
In other districts, 86.

Award—
Effect of finding by arbitrators, 700.

B.

Bail—
Bankrupt on removal proceedings, of, 649.
Bankrupt about to depart, of, 642.
Sureties on bond, for, not discharged, 777.

Bailee—
Preferences created by pledge, 597.
Rights of a, 597.

Bank—
Designated as depositories, 353.
National, can not be bankrupts, 142.
State, can not be bankrupts, 142.
Territorial, can not be bankrupts, 142.

Bankers—
Private, may be bankrupts, 142.
corporation, can not be, 143.

Bankrupt—
Act of bankruptcy, by, consists of what, 153.
admitting inability to pay debts, 169.
general assignment, making, 167.
permitting preferences by legal proceedings, 164.
transferring, etc., property to defraud, etc., 159.
while insolvent, to prefer creditors, 161.
Alien may become, 143.
Answer to be made when, 222.
Arrested in civil cases, when, 638.
in criminal cases, 637, 638.
protected from being, when, 635.
Attend meetings, when, 274, 494, 631.
not required to, when, 274, 617.
Attorney of should not represent creditors, 134.
should not represent trustee, 134.
Bail, on removal proceedings, 649.
to secure release from custody, 642.
Bank, national can not be adjudged involuntary, 142.
Bond to secure property seized, 219.
Canal company can not be involuntary, 150.
Carriers can not be involuntary, 150.

References are to pages.

Bankrupt (continued)—
Claims against, allowance of, 272, 340.
disclose false to trustee, 633.
false, penalty for presenting, 661.
one bankrupt against another, 323.
proof, etc., of, 326.
Compositions—
application for confirming, 679.
accepted, must be in writing by majority, etc., 682.
consideration to be paid and costs deposited, etc., 682.
date and place of hearing, 685.
confirmation of, discharges from debts, 693.
conditions of confirmation, 692.
distribution of consideration, 695.
set aside for fraud, may be, 691, 697.
when may be offered by, 679.
must be examined and file schedule, 679.
Co-debtors' liability not affected by discharge, 776.
Compulsory attendance before court, referee, etc., 617.
Concealing property, penalty for, 660.
Corporations can not be adjudged voluntary, 141.
can be adjudged involuntary, when, 142, 146, 151.
Creditors, number, etc., to file petition against, 190, 192.
meetings of, 268.
to attend first, 272, 274, 631.
when not required to attend, 631.
expenses of attending paid, when, 631.
Death of, does not abate proceedings, 653.
Debts which may be proved, 193, 281, 761.
which have priority, 723.
not affected by discharge, 694, 760, *et seq.*
Deceased person can not be adjudged, 143.
Definition of, 631.
Detention for examination, 640.
may be kept in custody ten days, 640.
released on giving bail, 642.
Discharge, application for, 736.
hearing, bankrupt to attend, 631.
releases from what debts, 760, *et seq.*
when not granted, 754.
when revoked, 784.
Domicile of, claiming exemptions, 425.
Duties of, 272, 631.
claims, to examine, 272, 633.
disclose false, 633.
examination, to submit to, 634.
inform trustee of attempt to evade act, 633.
orders of court, to comply with, 631.
papers, to execute, 633.
schedules, to prepare and file, 178, 634.
Embezzlement of property of, penalty for, 655.
Estate of deceased person can not become, 143.
Estates (see ESTATE.)
Evidence against, can not be used in criminal cases, 625.
Examination of, 275, 612 (see EXAMINATION.)
Execute papers ordered by court, 633.
transfer to trustee of property, 634.
Exemption from arrest, etc., 635.
Exemptions of, under state laws, 445, *et seq.*
Expenses paid of attending meetings, when, 631.
paid of attending examination, when, 617.

References are to pages.

Bankrupt (continued)—
Extradition of, 646.
False claim against estate, penalty for presenting, 662.
bankrupt to disclose, 633.
False oath against estate, penalty for making, 661.
Farmers can not be adjudged involuntary, 141.
Fees, to deposit, 182, 202.
clerk's, 182, 202.
referee's, 182, 202.
trustee's, 182, 202.
voluntary, not required to pay, when, 183.
Habeas corpus to release from imprisonment, 643.
to testify as to his bankruptcy, 613.
Insane person, when may be, 145.
Insanity does not abate proceedings, 146, 653.
Involuntary, who may be adjudged, 141, 147.
who can not be adjudged, 142, 150.
Lists of creditors, to make, 178, 221.
Lunatic, when may be, 145.
Married woman, when may be, 146.
Meetings of creditors, to attend first, 274, 612, 631.
Misappropriating property of, penalty, 656.
Offenses of, 655. (See OFFENSES.)
Origin of the word, 4.
Partnership may be adjudged, 244, 246.
administration of estate, 255.
where all not bankrupts, 244, 255.
jurisdiction over one partner sufficient, 244, 251.
payment of debts, 255.
Petition to be filed in four months, 202.
bond to be accompanied by, to take property, 217.
liability for costs, 217.
counsel fees, etc., fixing of, 217.
defense of solvency, 155, 161, 168, 169, 196, 225.
burden of proof, 155, 232, 575.
involuntary, who may file, 189.
service of, manner of, 203.
voluntary, who may file, 172.
Property may be seized, when, 216.
bond of indemnity, 217.
bond to release, 219.
Protection of, 635.
Railroad company can not be involuntary, 150.
Released from imprisonment, how, 642.
Removal of, 647, 648.
Retains title to property, how long, 365.
Sale, may purchase at, 713.
Schedule of property, to prepare, 178, 221, 634.
make oath to, and file, 178, 221, 634.
voluntary, to file with petition, 178.
what to contain, 178, 634.
Secured creditors, rights of, 604.
Service of petition, 203.
Seizure of property, 216.
Solvency of, not ground for resisting voluntary petition, 141.
Steamship company can not be involuntary, 150.
Suits by and against, 77, 358.
appearance of trustee, 77, 358.
stay until adjudication, etc., 90.
time for bringing, by or against trustee, 361.
trustee permitted to prosecute suits commenced, 358.

References are to pages.

Bankrupt (continued)—
Title to property passes to trustee, 365.
revests in, on confirmation of composition, 693, 696.
Unincorporated company can be adjudged involuntary, 142.
Voluntary, who may be adjudged, 141.
Wage earners can not be adjudged involuntary, 141.
Widow and children, rights of, 437.
Who might be adjudged, under act of 1800, 7.
Who might be adjudged, under act of 1841, 10.
Who might be adjudged, under law of 1867, 1214.

Bankrupt act—
Act of 1800, 7.
Act of 1841, 10.
Act of 1867, 12, 1207.
Act of 1898, 1119.
Acts in England, 4.
Conflict of, with General Orders, 653.
Constitutionality of act of 1898, 17.
Construction, rule of, 69.
Congress has exclusive power to pass, 19.
Effect of a national, 19.
upon persons not subject to it, 28.
upon state assignment laws, 29.
upon state insolvent laws, 23.
Meaning of bankrupt and insolvent, 18.
Power of Congress to enact, 17.
states to enact, 20.
State laws suspended, not repealed, 23.
Time when act of 1898 took effect, 23.

Bankrupt laws, history of—
England, 4.
Europe, 2.
Romans, 1.
United States, 6.

Bankruptcies—
What is meant by "subject of bankruptcies," 17.

Bankruptcy—
Acts of, of what to consist, 153. (See Acts of Bankruptcy.)
Adjudication of, 233.
Courts of, what are, 33.
"In contemplation of," 571*n*.
Jurisdiction of courts of, 75.
Partners of, 243.
Proceedings in, plenary, 70.
distinguished from suits at law and in equity, 104.

Bankruptcy estate—
(See ESTATE.)

Bastard—
(See JUDGMENTS.)

Bidding—
(See SALE.)

Bill of exchange—
Pass to trustee, 407.

References are to pages.

Blanks for process—
Furnished to referees, 619.

Bona fide purchaser—
Title of, obtained by lien, etc., not affected, 565.
for value protected, 384.

Bond—
Appeal, 827.
amount of, 828.
appellate court may change amount, 829.
approved by judge, 828.
clerk, commissioner, etc., can not approve, 828.
cured in appellate court, when defective, 829.
necessary to "perfecting" an appeal, 828.
not necessary to "taking" an appeal, 822, 828.
operates as a supersedeas, when, 829.
payable to whom, 828.
trustee not required to give, 828.
Banks of, as depositories for money, 353.
Bankrupt, of, to recover possession of property, 219.
condition of, 219.
Error, on, trustee not required to give, 828.
Filed, to be in clerk's office, 109, 351.
Indemnify bankrupt, to, on seizing his property, 217.
condition of, 217.
Joint trustees, of, 350.
Petitioner to give, to hold property, etc., 217.
condition of, 217.
sureties of, 217.
Referee's, 109.
amount and condition of, 109.
failure to give, creates vacancy, 109.
filed in clerk's office, 109.
sued on, how and when, 109.
Release of property, by bankrupt to secure, 219.
Suits on, how and when brought, 109, 350, 361.
Sureties, corporations may be, 109, 350.
two necessary, 109, 350.
value of property, 109, 350.
Trustees', 350.
amount and condition, 350.
amount fixed by creditors or court, 278, 350.
approval of, by referee, 113.
failure to give, creates vacancy, 351.
joint or several, 350.
jurisdiction of, suit on, 74.
liability, 351.
not required to give, on appeal or for error, 828.
sureties on, 350.
title, certified copy of order approving, evidence of, 367, 371.
where filed, 350.

Books—
Account, of, destruction of, etc., prevents discharge, 748.
Account, of, proper to be kept, 748.
failure to keep, as evidence of concealment, 658.
Pass to trustee as a part of estate, 377.
Referees to keep separate, for each case, 124
to certify and file with papers in court, 125.
to compel witnesses to produce, 614.

References are to pages.

Briefs—
In appellate courts, 838.

Brokers—
(See AGENTS.)

Burden of proof—
Confirming compositions in, 687.
Discharge, opposing, 753.
Exempt property, 440.
Habeas corpus, in, 646.
In contested claims, 341, 344.
Of domicile, 426.
On bankrupt, 232.
On petitioning creditors, 231.
Partnership assets of, 257.
Preferences, in suits to set aside, 575, 609.
Solvency, as to, 155, 232, 575.

Business—
Principal place of, 175.

Buying and selling—
(See SALE.)

C.

California—
Exemption laws of, 450.
Territorial jurisdiction and time of holding court in, 37.

Canal companies—
As bankrupts, 150.

Cargo—
Vessels on high seas, 376.

Carriers—
Common, as bankrupts, 150.

Cash—
Passes to trustee as a part of estate, 403.

Certificate—
Contempt, of facts constituting, by referee, 671.
Judge's absence, etc., by clerk authorizing referee to act, 129.
Referee's record, of, 125, 735.
Transcript of record on appeal, 834.
U. S. circuit court, to, for jury trial, 230.
of bankruptcy proceedings when district judge disqualified, 101.
U. S. supreme court, to, question of jurisdiction, 804.
questions of law from C. C. A., 804.

Certified copies—
Composition, of order confirming, evidence of revesting title, 693, 697.
Referee, of proceedings before, as evidence, 113, 735.
papers when issued by clerk or referee, 735.
to transmit to clerk, by mail, when, 735.
Trustees' bond, of order approving, evidence of title, 367.
Authority to demand possession, 371.

References are to pages.

Certiorari—
Issued by supreme court, when, 797.
by C. C. A., when, 798.
Cure or complete records, 797, 835.
application for, 798.
issue and return, 799.
return by clerk, 799.
Removing case from C. C. A. to U. S. supreme court, 799.
application for, 801.
granted rarely, 802.
proceedings on, in supreme court, 803.
remand case to proper court of bankruptcy, 803.
time within which to apply for, 801.
when issued, 800.

Chattels—
Pass to trustee as a part of estate, 403.

Checks—
And notes, payment of, when a preference, 585.
Dividend, how drawn, 732.
Pass to trustee as a part of estate, 407.

Children—
Of deceased bankrupt, rights of, 437.

Choice—
Of new trustee, 358.

Choses in action—
Negotiable instruments a part of estate, 407.
Rights of actions on contracts pass to trustee, when, 417.
belonging to wife of bankrupt, 418.
for personal skill, 419.
involving personal injury, 419.
Tort—
for injury to person, 420.
for injury to property, 420.
Trustee must reduce, to money, 701.
proper party plaintiff, 418, 420.

Circuit courts—
Jurisdiction in bankruptcy, 75, 101, 790.
controversies certified to, 231.
criminal cases, 638.
depends on residence of bankrupt, 105.
of offenses under the act, 638, 663.
over what parties, 105.
suits at law and in equity, 103.
Jury trials in, when, 101.
Removal to, 102.

Circuit courts of appeals—
Appeals to, from judgments, 816.
adjudging or refusing to adjudge bankrupt, 817.
allowing, etc., debts of $500 or over, 818.
at law and in equity, 791.
cross-appeals, 819.
discharge, granting or denying, 817.
when appeal to be taken, 820.
writs of error, 819.

References are to pages.

Circuit court of appeals (continued)—
Appeals to United States supreme court from decisions of, 796.
amount is over $2,000, 796.
question is certified by supreme court justice, 796.
record, how made, 797.
time for taking, 797.
Appellate jurisdiction in bankruptcy, 816, *et seq.*
in law and equity cases, 790.
twofold, in bankruptcy, 807.
Certiorari, may issue writs of, 798.
Practice in, 838.
Supervisory power of, 808.
application for exercise of, 812.
decisions in exercise of, final, 816.
exercised only after action of court of bankruptcy, 809.
exercised only when no appeal lies, 809.
extent of, 809.
matters of law only, applies to, 810.
petition, 813.
proceedings on petition to review, 814.
time within which to file petition, 813.
Territorial jurisdiction and time and place of holding, 64.
Trustees not required to give bond on appeal or writ of error, 828.

Citation—
Appellate court may issue, 831.
Death of party, to whom directed, 832.
Issuance necessary, 831.
Mandamus not granted to compel judge to sign, 833.
Necessary when, 831.
Object of, 830.
Perfecting an appeal by, 831.
Returnable when, 832.
Service of, 832.
Signed by judge, 831.
Time within which, may issue, 831.
Waived by appearance, 832.
(See also NOTICE.)

Claimants—
Who are adverse, 30, 105.
(See also CLAIMS.)

Claims—
Adverse, what are, 30, 105.
jurisdiction over, 74.
jury trial, when entitled to, 235.
Against bankrupt, creditor may purchase, 194.
Allowance of, 272, 340.
Appeal from, 346.
burden of proof, 341.
defective, 340.
distinguished from proof, 334.
final, review of, 346.
fraudulent, 345.
objections, when usually made, 341.
objections, who may make, 340.
Amount necessary for filing involuntary petition, 193.
Averments as to, in petition, 199.
Bankrupt, to examine, 633.
Bankrupts, of, against each other, 323.

References are to pages.

Claims (continued)—
Contingent, proof of, 324.
when entitled to share in dividends, 720.
Debts which may be proved, 281.
which have priority, 723.
Discharge releases from what, 760.
does not release from what, 760, *et seq.*
Disputed, provided for in composition, 693.
Dividends payable on, allowed, 718.
False, penalty for presenting, etc., 661.
or using in composition, 661.
Filed after being proved in court or before referee, 337.
Hearing objections to, 343.
Infants and insane persons, rights of, 325.
Instrument of writing, founded upon, to be filed with proof of, 380.
statement of loss filed under oath with, 330.
Interest on, 289, 299.
Jurisdiction of courts of bankruptcy as to, 67.
Liquidation of, 282.
Payment of, after composition set aside, etc., 698.
Penalty or forfeiture, debt due as how far allowed, 730.
Preferred creditors, of, not allowed unless, etc., 332.
Priority, debts which have, 723.
Proof of, 326.
distinguished from allowance, 333.
when founded upon writing, 330.
time for proving, 325.
Purchase, 345.
Purchase, creditor may, 194.
to oppose composition, 690.
Reconsidered, may be reallowed or rejected, 342.
Re-examination of, 342.
application for, 342.
who must file, 342.
burden of proof, 344.
costs, 344.
default, 342.
evidence, preservation of, 344.
fraud, 345.
hearing, 343.
laches, 343.
notice of, 342.
recovery of dividend on rejection,, 346.
time, within what, 342.
where held, 342.
witnesses, 343.
Referee, filed before if case referred, 337.
Secured creditors, of, 331.
allowed for what sums, 283, 331.
individual undertaking, secured by, 332.
not entitled to vote at creditors' meetings, 270.
value of securities held by, how determined, 331.
Status of, when fixed, 282.
Time for proving, 326.
Unliquidated may be liquidated, etc., 282.
provided for in composition, 693.
Unscheduled, discharge no release from, 768.
unless creditors had notice, etc., 768.
Withdrawal from files, may be when, 338.
(See also DEBTS.)

References are to pages.

Clerk—
Account for fees, 130.
Certificate by, as to judge's absence, etc., authorizing referee to act, 130.
Certifies to transcript of record on appeal, 833.
Collect fees, 130.
Compensation of, 131.
Definition of the word, 129.
Deliver papers to referee, 130.
Docket of, 129, 182.
Duties of, 129.
Expenses of, 131.
may require indemnity for, 131.
Fees, 131.
account for, 130.
collect, of clerk, referee, trustee, 130.
except on affidavit of voluntary bankrupt of inability to pay, 130.
pay to referee and trustee, when, 130.
Indices of petitions and discharges to be kept by, 129.
Issue certificate of absence of judge, 130.
Notice of application for discharge given by, 736.
Of referee, hire of, 127.
Papers filed with, 103.
Pay fee to referee and trustee, 130.
Petition, copy of, to be filed for, 182, 201.
Process to be issued by, 129.
Refer cases, when to, 110, 114, 130.
Referee to call and receive papers from, when, 121.
transmit papers to, 121.
certified copies of, by mail 121.
Referee to employ, 115.
Schedule, copy of, to be furnished by bankrupt, 182.
Subpœna to be issued by, 203.
Writs generally to be issued by, 129.

Clerks—
Wages, debts having priority, 726.
Who are clerks entitled to priority, 726.

Close of bankruptcy—
When estate settled, 733.

Codebtors—
Judgment against discharged bankrupt with stay of execution, when, 777.
Liability of, not affected by bankrupt's discharge, 776.
May prove debt when, 324.
Stockholders and corporate officers' liability, as affected by discharge, 777.
Suit against one joint debtor on debt discharged as to others, 778.
Sureties on bonds not affected by discharge of principal, 777, 773.

Cognovit—
(See JUDGMENT LIENS.), 565.

Collection—
Of assets by trustee, 701.
referee should not, 111.

References are to pages.

Colorado—
Exemption laws of, 455.
Territorial jurisdiction and time of holding courts in, 38.

Commencement of proceedings—
Involuntary, 189, *et seq.*
Partnership, by or against, 253.
Voluntary, 172, *et seq.*
When jurisdiction attaches, 76.

Commissioner of deeds—
Referee may be, 108.

Commissioner, United States—
May administer oaths, 1136.

Commissions—
Referees', 126.
apportionment, 127.
Trustees', 362.
apportionment, 362.

Commitment—
Contempt, for, power of court, 666.
before referee, 666.
Referee can not exercise power of, 111, 116.

Companies—
Incorporated (see CORPORATIONS).
Unincorporated (see PARTNERSHIPS).

Compensation—
Attorneys', 135.
Clerks', 131.
Marshals', 132.
Referees', 126.
when reference revoked, 127.
when case transferred, 127.
Stenographers', 115.
Trustees', 362.
appointment of, 362.
withholding of, 362.

Compositions—
Accepted how, 681.
Application for confirmation to be filed when, 679.
accepted in writing by majority of creditors, etc., 682.
consideration to be paid and costs deposited, 682
date and place of hearing, 685.
debts having priority, must be secured before, 684
second, not usually allowed, 680.
what to contain, 684.
Certified copy of order confirming evidence of title, 693.
Collateral attack of, 697.
Confirmation of, a discharge from debts, 693.
can not be made by referee, 111.
conditions of, 692.
distribution of consideration, 695.
Consideration, of what to consist, 683.
Construction of provision relating to, 678.
Courts of bankruptcy to confirm or reject, 692.
Discharge, refusal of, as a bar, 680.

References are to pages.

Compositions (continued)—
Disputed claim, provided for, 693.
Distribution, 696.
Effect of, 693.
Failure to pay, revives debt, 695.
False claims, penalty for using in, 661.
Fraud vitiates, 691, 695.
Fraud presumed when, 690.
General nature of, 677.
Hearing of application, 685.
Majority of creditors in number and amount must agree to, 677.
Meeting of creditors to consider terms, 680.
notice of, 681.
petition for, 680.
who may vote at, 681.
Notice to creditors of hearing, etc., 685.
Offer of, when may be made, 679.
who may make, 679.
Opposing a confirmation, 685.
because against interests of creditors, 686.
because bankrupt not entitled to discharge, 688.
because obtained by fraud, 689.
burden of proof, 687.
evidence, 687.
hearing of objections, 691.
notice of hearing, 691.
trustee can not, 685.
Order of confirmation, 692.
appeal from, 693.
effect of, 693.
evidence as, 693, 697.
judge must make, 692.
operates as a discharge, 693.
referee can not make, 111.
Partnerships, by, 681.
Payments of claims accruing after set aside, 698.
Power of Congress to provide for, 67
Purchase of claims to oppose, 690.
Set aside, may be when, 697.
court, by what, 697.
on ground of fraud, 691, 697.
petition to, 697.
petition, when filed, 697.
trustee, elected when, 698.
Time within which confirmation may be made, 689.
when composition may be offered, 679.
Time revests in bankrupt on confirmation of, 693, 696.
Vote on terms, who may, 681.

Compounding claims—
(See COMPROMISE.)

Compromise—
Notice to creditors of proposed, 699.
Power to, 698.
Trustees may, with approval of court, 698, 716.

Computation of time—
(See TIME.)

References are to pages.

Computing number of creditors—
To join in involuntary petition, 190, 202.
interest may be added, 193.
Voting at creditors' meeting, 277.

Concealing—
Books of account, records of bankrupt, prevents discharge, 748.
what constitutes, 748.
Property, by bankrupt, 656 (see OFFENSES.)
Property of bankrupt with intent to defraud, etc., effect, 160.
document by trustee, 655.

Concurrent bankruptcies—
Order of proceeding, 228-9.

Conditional payment—
(See MORTGAGES AND TRANSFERS.)

Conditional sale—
May not pass title to bankrupt, 375.
Property sold on, passes to trustee, when, 404.

Conducting bankrupt's business—
By receiver, 211.

Confirmation of composition—
(See also COMPOSITION.)
Conditions of, 692.
Discharge from debts, a, 693.
Effect of, 693.
Judge must order, 692.
Referee can not order, 111.

Confusion—
Of goods in bankrupt's possession, 373.
Of trust property, 413.

Congress, power of—
Conferred by the constitution, 17.
English bankrupt laws do not limit, 17.
Establish to, courts of bankruptcy, 19.
Establish, to, system of bankruptcy, 17.
Exclusive to extent exercised, 19.
Limited to no class of persons, 17.
May adopt state laws, 19.
Modify obligation of contracts, 18.
Provide for composition to, 678.
Uniformity required, what, 19.
When exercised suspends state laws, 23.
When not exercised states may enact such laws, 20.

Connecticut—
Exemption laws of, 457.
Territorial jurisdiction and time of holding courts in, 38.

Consent—
Arbitrators chosen by, 700.
Case certified for trial to circuit court by, 101.
Defendant may be sued in what court by his, 80.
Involuntary petition can not be dismissed by, until notice, 239.
Voluntary petition can not be dismissed by, until notice, 187.

References are to pages.

Consideration—
Composition for, of what to consist, 683.
Proof of claim must be set forth in, 327.

Consolidation—
Of causes in bankruptcy, 228, 252.

Constitution—
Bankruptcy, provision relating to, 17.
Contravene, provision adopting state laws as to exemptions does
act of 1898 does not, 20.
as to mechanic's liens does not, 602.
as to validity of transfers does not, 394.
not, 19, 426.
compositions, for, does not, 678.
impairing obligation of contract does not, 18.
Does not prevent act applying to particular classes, 18.
Does not limit to bankruptcy as distinguished from insolvency, 18.

Construction—
Rule of, as to act, 69.
as to provision for composition, 678.

"Contemplation of bankruptcy"—
Meaning of, 571*n*, 750.

Contempt—
Acts which constitute, 666.
Answer of contemnor, 673.
Arrest of bankrupt for, 638.
Attorney, by, 135, 670.
Court of bankruptcy to punish for, 72, 666.
committed in another, 675.
to release contemnor, when, 674, 675.
Examination, during, 622.
Hearing, 674.
Nature of proceedings for, 670.
Practice, pleadings and procedure, 671.
Punishment for, 675.
Referee—
can not punish for, 111, 116.
certifies facts to judge, 116, 671.
Replevin property in state court, to, when, 374.
Relief of *habeas corpus*, 676.
Review, 676.
State court can not punish for, before referee, 623.
Who are guilty of, 666, *et seq.*

Contingent claims—
How proved, 324.
When entitled to share in dividend, 720.

Contract—
Bankruptcy does not discharge, 418.
Belonging to wife of bankrupt, 418.
Debts founded upon may be proved and allowed, 301.
Obligation of can be modified by Congress, 18.
can not be impaired by states, 21.
Trustee vested with title to rights arising upon, 417.
involving personal injury, 419.
for personal skill, 419.

References are to pages.

Consular officers—
Oaths, etc., may administer, 1136.

Controversies—
Arbitration of, 698.
Certified to circuit court for trial, 231.
to supreme court from C. C. A., 799.
Compromise by trustees of, 354, 698, 716.
Jurisdiction of appellate courts of, in bankruptcy proceedings, 790.
Notice to creditors of proposed compromise of, 699, 716.
What are, at law and in equity, 104.

Conveyances—
Act of bankruptcy, as an, 159.
Bankrupt to execute, to trustee of foreign property, 367.
Constitutes a preference, when, 571.
Fraudulent under the act, 385.
Set aside when fraudulent, 605.
Subsequent to act within four months to defraud, etc., void, 389.
Trustee to execute to purchaser, 713.
Within four months while insolvent, void by state laws, void under act, 393.
Within four months to prefer a creditor, 385.

Copartnership—
(See PARTNERSHIP.)

Copy—
Bankrupt to prepare, make oath to and file in triplicate, 182, 221.
claim for exemptions, of, 182, 221.
lists of creditors, etc., of, 182, 221.
schedule of property, of, 182, 221.
Claims allowed, withdrawn may be, on leaving, 338.
Order approving trustee's bond, of, certified, evidence of title, 367.
confirming or setting aside composition, of jurisdiction, etc., 693, 697.
Papers of, certified to be transmitted to clerk by referee, when, 123, 735.
Petitions in duplicate for clerk and bankrupt, 182, 201.
Referee, certified, of proceedings before, evidence, 113, 735.
Schedule of, bankrupt to furnish clerk, referee and trustee, 182, 221.

Copyrights—
Pass to trustee, 378.

Corporation—
Admission of inability to pay debts, 169.
Bankrupt, when to be judged involuntary, 146, 151, 169.
can not be adjudged voluntary, 141.
Debts owing by, to be adjudged involuntary, 141.
Definition of, 146.
Dissolved may be adjudged bankrupt, 151, 195.
Domicile of, 425.
Officers' liability, effect of discharge upon, 777.
"Person" includes, 172.
Private banker can not be, 143.
Proof of claim by, 322.
municipal, 322.
Punishment of agents of, by courts of bankruptcy, 68.
Service on, how made, 205.
Stockholders' liability, effect of discharge upon, 777

References are to pages.

Corporation (continued)—
Sureties on referees' bonds, 109.
Sureties on trustees' bonds, 350.
Trustees may act as, 349.

Costs—
Adjudication, in contested, 234.
Administration, of, entitled to priority, 725.
approved by court, 725.
include attorney's fee for bankrupt, 725.
attorney's fee for petitioners, 725.
expenses of officers, 725.
fees and mileage of witnesses, 725.
payment of, not a voidable preference, 561.
Amendment, 239.
Attorneys' fees taxed as, 139.
Contested adjudications, in case of, 234.
Depositions, of irrelevant, etc., 623.
Deposit for, 182, 202.
when none required, 183.
Exempt property, to be paid out of, 435.
Included as, what, 725.
Involuntary proceedings, in, 241.
Judgments for, courts of bankruptcy may render, 69.
on, rendered pending bankruptcy, 290.
Partnership proceedings in, 252.
Penalty, on recovery of, 730.
Poor person not required to deposit, when, 182, 202.
Preserving estate, of, entitled to priority, 729.
Provable debt, when, 301.
Referee's fees, 126.
Re-examination of claim, 344.
Removal of trustee, 357.
Revoking a discharge, 788.
Sale, of, 715.
Seizure of bankrupt's property, 217.
Set aside a discharge, 788.
Taxation of, by courts of bankruptcy, 69.
When clerk to pay out fees collected as, 130.

Counselor at law—
Fees of, included in cost of administration, 135, 725 (see FEES.)
payable by obligors of bond, 217.
Payments, transfers to, by insolvent, when re-examined, 586.
Referee can not practice as, 114.
(See also ATTORNEY.)

Counterclaim—
Allowed, when, 308, 310.
Of a preferred creditor, 317.
Provable debt, must be a, 315.
Waiver of, 314, 317.
When debt purchased as a, 310, 316.
(See also SET-OFF.)

Courtesy—
Exempt property, in, 433, 437.
Trustee takes subject to, 396.
Trustee takes bankrupt's right to, 395.

References are to pages.

Courts—
Appeals and writs of error, 790.
to supreme courts of territories, 807.
to U. S. circuit court of appeals, 816.
to U. S. supreme court, 795.
Arbitration of controversies, 698.
Creation of, of bankruptcy, 33.
Depositions, laws governing, 232, 344, 628.
Evidence, 232, 344.
Jurisdiction of, 67.
of appellate, 790, *et seq.*
of circuit courts, 101.
Jury trials, 231.
Newspapers, designation of, for notices, 269, 736.
Oaths and affirmations, administration of, 1136.
Rules, forms, etc., U. S. supreme court to prescribe, 845.
Suits by trustees, 358.

Courts of bankruptcy—
Adjudge person, etc., bankrupt, 67.
Appeal—
to supreme courts of territories, 807.
to U. S. circuit court of appeals, 816.
to U. S. supreme court, 795.
Arbitrator, appoint, when, 700.
Assets, collect and distribute, 96.
Bar to suits in other courts, proceedings in, 77.
Banking institutions, designate as depositories, 353.
Business of bankrupt, permit temporary transaction of, 211.
Claims, allow and reject, 76.
Confirm or reject compositions, 692.
Contempt, punish for, 72, 666.
Creation of, 33.
Costs, tax, 69.
Definition of, 33.
Discharge bankrupts, 754.
District, of bankruptcy, 67.
District of Columbia, supreme court of, 33.
Exemptions, determine, 428.
Extradite bankrupts, 646.
Jurisdiction of, 67, *et seq.*
attaches when, 76.
appellate, 790.
limited in their "respective districts," 78.
distinct from jurisdiction as district courts, 33.
supreme court of United States, 795.
U. S. circuit court of appeals, 816.
U. S. circuit courts, 101, 103.
bankruptcy, 101.
concurrent with courts of bankruptcy, 638, 663.
law and equity, 103.
Marshals, appoint to conduct business, 211.
Meetings of creditors, when to call, 279.
Newspapers to publish notices, designate, 269, 736.
Open at all times, 34.
Orders, make and enforce, 68.
Paramount to state courts, when, 97.
Petition, debtor's, in what court to file, 174.
creditor's, in what court to file, 197.
to supervise in C. C. A., 813.
Possession of, 100, 370.
Powers, 71.

References are to pages.

Courts of bankruptcy (continued)—
Powers unspecified, 69.
Proceedings of, continuous 34.
nature of, 70.
Punish bankrupts, 68.
Receivers, appoint, 72, 211.
Referees, appoint and remove, 107.
confirm, etc., records and findings, 68.
Reference after adjudication, 110.
Stay suits, 72, 77, 87, *et seq.*
Substitute additional parties, 68.
Terms of, 34.
Transfer cases, 228, 252.
Try bankrupts, 68.
Trustees, appoint, when, 72, 276, 349.
direct, to prosecute or defend suits, 77.
official or general, can not appoint, 349.

Coverture—
As a defense, 227.

Credit—
Mutual, and debt, 308.
Set-off, of new, by preferred creditor, 317.
(See also MUTUAL DEBTS AND CREDITS.)

Creditors—
Answer to voluntary petition, can not, 184.
Answer to petition by, 222.
Appearance of, 219.
by an attorney for, 220.
Attorney of, should not represent bankrupt, 134.
Claims, allowance of, 272, 274, 340.
filing after proof, 337.
hearing objections, 272.
lost or destroyed, how proved, 330.
of one bankrupt against another, 323.
penalty, due as how far allowed, 730.
preferred, not allowed unless, etc., 332.
proof of, 326.
when founded on instrument of writing, 330.
reconsideration of, 342.
rejected, dividend may be recovered, 346.
secured, of, allowed for what, 331.
claims not counted unless, etc., 270.
not entitled to vote at meetings, 271.
value of securities, how determined, 271.
secured by individual undertaking, how proved, 298.
subrogation to extent of creditors' rights, 298.
time for proving, 325.
of infants, etc., 325.
withdrawn, on leaving copy, 330.
writing when founded upon, how proved, 330.
Class, of same, 576.
Computing number of, to file petition, 190.
employees not counted, 192.
relatives not counted, 192.
Debts due as penalty, how far allowed, 730.
Definition of, 269.

References are to pages.

Creditors (continued)—
Dividends paid first to certain residents, 722*n*.
payment on allowed claims, 356, 718, 732.
recovery of, when claim rejected, 346, 356.
Entitled to share in distribution, 719.
Estopped from joining in petition, 191.
Foreign, effect of discharge upon, 756.
Include agents, attorneys, proxies, 269.
Individual sharing in partnership assets, 257.
Intervene in involuntary proceedings, may, 220.
in partnership proceedings, 253.
Involuntary petition, number, etc., necessary to file, 190, 202.
amount of claims, 192.
estoppel to file when, 191.
Joining in petition, 202.
Jury trial, not entitled to, 230.
Lists of, bankrupt to make, 178, 221.
referee to examine, 113.
to prepare and file when, 178, 221.
Meetings, first, held when and where, 268.
bankrupt to attend first, 272, 274, 631.
call of, by court, when, 279.
final, 280, 718, 734.
notice of, 268.
place of, 268.
presiding officer, duties of, 112, 273.
subsequent, 279.
to consider composition, 680.
voters at, 269.
(See MEETINGS OF CREDITORS.)
Notice to, of compromise of controversy, 699, 716.
dismissal of proceedings, 187, 239.
of petition, 187, 239.
dividends, of declaration and time of payment, 718, 720.
examinations of bankrupt, 617.
final account, of filing, 734.
final meeting, 718.
hearing, on application for confirmation, etc., 685.
meetings, of, 268.
petition for discharge, 736.
referee to give, 123.
sales of property, 703, 706, 707.
Number necessary to join in petition, 190, 192.
employees and relatives not counted, 192.
necessary for court to call meeting, 279.
to call meeting at designated place, 279.
to accept an offer of composition, 677, 681.
to pass a matter by, 277.
Oppose discharge, when, 740.
confirmation of compositions, how, 685.
Order for examination, may apply for, 616.
Partnership, may join in petition against individual, 245.
sharing in individual estates, 257.
Partnership and individual, 260.
Petition, averments as to, in, 198.
partnerships, against, 243.
number necessary to join in, 190.
who may join in, 189.
Preferred, who are, 560, *et seq.*
claims not allowed unless, etc., 332.
Present at meetings, 277

References are to pages.

Creditors (continued) —

Priority, entitled to, can not vote, etc., 270.
Proof of claims of, 321.
Proxy, included under, 269.
Referee to give notices to, 122.
Relatives not counted in petition when, 192.
Rights of, proving after dividends have been declared, 722.
Secured, defined, 604 (see SECURED CREDITORS.)
and prior, priority between, 730.
claims allowed for what sums, 331.
rights of, 604.
value of securities held by, how determined, 331.
Set-offs between bankrupt and, 307.
Share in estate, who are entitled to, 719.
Suits to set aside preferences, can not bring, 605.
Time for proving claims, 325.
Tort claimant, not, 189, 318.
Trustee appointed by, 274, 348.
bond of, fixed by, 278.
Who are, 190.
(See also MEETINGS OF CREDITORS, SECURED CREDITOR AND PREFERRED CREDITOR.)

Criminal proceeding—

Testimony of bankrupt can not be offered against him in, 504.

Crimes and offenses—

Concealing property while bankrupt, 656. (See OFFENSES.)
Contempt, 666, *et seq.* (see CONTEMPT.)
Courts of bankruptcy to punish for, 663.
Embezzlement by trustee, 655.
Extorting money, etc., 662.
False claims, presenting under oath, 661.
using in composition, 661.
False oath or account, making, 660. (See OFFENSES.)
Indictment or information, limitation of, 664.
Misappropriation of property, 655.
Practice and procedure, 664.
indictment, averments in, 665.
Receiving property from bankrupt with intent to defraud, etc., 662.
Referee acting when interested, 663.
purchasing property of bankrupt, 663.
refusing to permit inspection of accounts, etc., 663.
Trustee refusing to permit inspection of accounts, 663.
misappropriating, etc., property, 655.
secreting or destroying document, 655.
Who may be punished, 665.

Crops—

When a part of the estate, 402.

Custody—

Effect of, of a court not a court of bankruptcy, 96.
In a court of bankruptcy, 96.
Of bankrupt court, what constitutes, 100, 370.
Of court, jurisdiction over property in, 76.
Of state court, to get property from, 99.
what necessary to constitute, 100.

References are to pages.

D.

Damages—
Allowance of, on dismissing petition for seizure of property, 217.
Instituting proceedings against a debtor for, 241.

Death—
Bankrupt's, does not abate proceedings, 653.
Party's, appellate court, in, 840.
Party's, before appeal taken, 841.
Trustee's, does not abate suits, 358.
Widow's, and children's rights, 396.

Debt—
After acquired, 283.
Allowance against estate, 272, 340.
account or contract, founded on, 301.
costs taxable against involuntary bankrupt, plaintiff, 301.
interest, 289, 299.
mutual, and credits, 307, *et seq.*
objections to, 272.
provable, founded on, reduced to judgment after filing petition, 292.
provable, generally, 281.
rent, 304.
review of, final, 346.
torts, 318.
vote, to entitle creditor to, 271.
Amount necessary for involuntary proceedings, 190.
interest may be added, 193.
Any person owing, may become voluntary bankrupt, 141.
Barred by statute of limitations, 319.
Claims, proof and allowance of (see CLAIMS), 321, *et seq.*
Contingent demands and liability not, 286.
Contract, founded on, allowed, 301.
Conversion of joint into several and *vice versa*, 264.
Corporation owing $1,000 or over may be adjudged bankrupt, 142.
Created by fraud, 769.
Definition of, 283.
Discharge does not release from, what, 694, 760, *et seq.*
effect of on firm, 265.
Duty of bankrupt to examine, 633.
Equitable, what are, 285.
Firm, what are, 260.
Fixed liability, having, may be allowed, 287.
Fixed liability, what is, 284.
Individual, what are, 262.
Interest on, 289, 299.
Joint and several, what are, 262.
Judgments may be allowed, 289.
Liquidated, how, 282.
Meaning of, 283, 289.
Mutual, and credits, 307, *et seq.*
Open account, founded on, allowed, 301.
Payment of, having priority, 723.
accruing after composition set aside, etc., 698.
Penalty or forfeiture, owing as how far allowed, 730.
presenting false, 662.
Petitioning creditors', denied in answer, 226.
Priority, having, 723.
between lienors, 728.
costs of administration, 725.
approved by court, 725.
includes what, 725.

References are to pages.

Debt (continued)—
Priority (continued)—
costs of preserving the estate, 725.
expenses of recovering concealed property, 725.
filing fees, 725.
on setting aside composition, or revoking discharge, 730.
owing to person entitled to priority, 727.
assignment, services in, 729.
liens distinguished from, 727, 728, 730.
state insolvency laws, by 728.
penalty, due as, 730.
referee to direct trustee to pay, 730.
secured and prior creditors, between, 730.
secured creditor, 723.
taxes, 723.
United States, due to, 729.
subrogation of, 729.
wages, 726.
Proved, how, 327.
necessary to be, 321.
not until filed, 337.
preferred creditor, by, 332.
secured creditor, by, 295, *et seq.*, 331, 604.
Provable, discharge releases from, 760.
reduced to judgment, 290.
what are, 193, 281, 761.
Released from, by discharge, except, 760.
administrators, 773.
allowable, need not be, 760.
attorneys, 774.
claims not scheduled, 768.
codebtor's, 756, 776.
defalcation as officer created by, 774.
embezzlement, for, 769.
executors, 773.
false pretenses, etc., judgment in action for, 767.
fiduciary capacity, created while acting in, 770.
fraud, created by, 769.
guardians, 772.
judgments in actions for fraud, etc., 764. (See JUDGMENTS.)
liabilities for fraud, etc., 764. (See JUDGMENTS.)
misappropriation, etc., 775.
not scheduled, 768.
officers, 774.
provable, must be, 761.
taxes, 762.
sureties, 756, 776.
torts, 318.
trustees, 773.
Revived after discharge by a new promise, 779.
by failure to pay composition, 695.
Secured, how far provable, 283.
Set-offs allowed between bankrupt and creditor, 308.
Status of, when fixed, 282.
Statute of limitation, barred by, 319.
Taxes payable in advance of dividends, 723.
trustee credited with, on filing receipt, etc., 723.
Tort, 189, 318.
What is a, 189, 283, 289, 318, 765.
(See PROVABLE CLAIM.)

References are to pages.

Debtor—
Absconding, 154.
Petition against, 198.
Petition by, 176.
Petition by and against firms, 248.
Property of, seized, 216.
(See also BANKRUPT, INVOLUNTARY and VOLUNTARY PROCEEDINGS.)

Deceased insolvent—
(See DEATH.)

Declaration—
(See DIVIDENDS.)

Deeds—
Pass to trustee, 377.

Default—
Proceedings on, 236.

Defeasible—
Title of bankrupt prior to appointment of trustee, 365.

Defense—
Committed no act of bankruptcy, 225.
Jurisdiction, want of, 227.
Infancy, 227.
Involuntary petitions, 224.
Married woman, 227.
Non compos mentis, 227.
Payment, 227.
Solvency, 155, 161, 168, 169, 196, 225.
Trustee may be ordered to make, 358.

Definitions—
(See Sec. 1 of the Act.) 1119.

Delaware—
Exemption laws of, 459.
Territorial jurisdiction and time of holding courts in, 38.

Demand—
(See DEBT.)

Demurrer—
To answer not proper, 230.
To involuntary petition, 223.

Denial of bankruptcy—
As a defense, 155, 161, 168, 169, 196, 225.

Deposit—
Compositions, of consideration in case of a, 682
of money to costs and debts entitled to priority, 683.
Costs, 182.
except a poor person, 183.
Fees, to, with clerk, 182.
Trustee, to, funds of estate, 353.

References are to pages.

Depositions—
Involuntary cases, 232.
Notice of taking, 344, 629.
Prove claims, to, 327.
Referees, in proceedings before, 116, 344, 628.
Right to take, determined by U. S. laws, 232, 344, 628.

Depositories—
Bond to give, 353.
Designation by courts of banks as, for bankrupts money, 353.

Deputy Marshal—
Fees and expenses of, 133.

Detention—
Bankrupt, of, for examination, 640.
length of, 640.
Property of, on petitioner giving bond, 216.

Diplomatic officers of United States—
Oaths, etc., may administer, 1136.

Disability—
Infant's, etc., rights, 325.
Judge's, case certified to circuit court, 102.
Judge's certificate of, by clerk, 130.
Referee's effect of, 107.

Discharge—
Appeal from judgment allowing, 818.
Application for, 736.
by whom made, 736.
hearing of, 752.
hearing of, bankrupt to attend, 631.
how made, 736.
notice to creditors, 737.
published in newspaper, 737.
second, 738, 754.
when and where to make, 737.
Attachment, effect on, 756.
Books of account, concealing, etc., prevents, 748.
concealing, etc., what is, 748.
imputed, can not be, 749.
in contemplation of bankruptcy, 750.
intent, 750.
negligence in keeping, 749.
partnership, 749.
what are proper, 748.
Codebtor's liability not affected by, 756, 776.
Collaterally attacked, can not be, 785.
Composition, confirmation of, operates as, 693.
"Contemplation of bankruptcy," meaning of, 751.
Court will not seek grounds to defeat, 754.
what, determines effect of, 759.
Debts released by, 760.
Effect of, general, 755.
claims not scheduled, 768.
codebtor, upon liability of, 756, 776.
debts created by fraud, etc., 769.
proving does not release, 770.
created by misappropriation, 775.
discharge from which was formerly refused, 762.

References are to pages.

Discharge (continued)—
Effect of, debts (continued)—
not allowable, 760.
not scheduled, 768.
of a fiduciary character, 771.
officers, of, 774.
provable, must be, 761.
what are, 193, 281, 761.
determined by what court, 159.
firm and individual debts, 265.
foreign, to release domestic debts, 758.
foreign creditors, on, domestic, 756.
fraud, etc., liabilities for, 764 (see JUDGMENTS).
granted after appeal taken, 784.
granted after judgment rendered, 784.
judgments, on, 756, 764. (See JUDGMENT.)
liens, on, 755.
new promise waives, 779.
partnership cases, in, 265.
revoking, of, 788.
stockholders' and corporate officers, liability, 777.
surety, upon liability of, 756, 776.
taxes, 762.
torts, 318.
United States, debts due the, 752.
Fraud, may be revoked for, 784.
General nature of a, 755.
Granted when, 754.
when not granted, 754.
Grounds for opposing, 744.
Guarantor's liability not affected, 776.
Judgment after, 756.
Jurisdiction, lack of, ground for opposing, 746.
Misappropriation, debts created by, 775.
Must be pleaded, 782.
Offense punishable by imprisonment prevents, 747.
Officers, debts of, 775.
Oppose, appearance to, 740.
because of failure to keep books, etc., 748.
because guilty of an offense, 747.
estoppel, 753.
grounds to, 744.
hearing objections, 742, 752.
how to oppose a discharge, 739.
partners, how to oppose, 265.
pleading to objections, 739, 752.
specification of objections, 742.
who may, 738, 754.
Order granting, 754.
denying, 754.
Partners, from what debts, 254, 265.
Partnership cases, effect of, 265.
Payment of claims accruing after revocation, 789.
Pleading in bar, of suit on debt, 782.
Records, destroying, etc., prevents, 748.
Referee can not grant or deny a, 111.
Releases, what debts, 760 *et seq.*
Revoked or set aside, 784.
application, 785.
effect of, 788.
ground for, 787.

References are to pages.

Discharge (continued)—
Revoked (continued)—
judgment, 788.
laches, what is, 786*n*.
payment of claims after, 789.
proceedings, 787.
title vested in trustee, 789.
within what time, 785, 788.
Second application for, barred when, 738, 755.
Specifications of objections, 742.
amended when, 743, 753.
contain what, 742.
delay in filing, how pleaded, 752.
filed when, 742.
must be in writing, 742.
pleading to, 752.
verification of, 744.
Sureties, effect of, on, by, 756, 776.
Time to appear and file specifications, 740.
enlarging such time, 741.
Waiving, by new promise, 779 (see New Promise).
(See Debts.)

Dismissal—
Costs, fees, etc., allowed respondent on, of petition, when, 217, 234.
Notice to creditors of, involuntary petition, 239.
of voluntary petition, 187.
Petition of—
by judge, 233, 240.
by petitioners, 239.
by referee, 114.
involuntary, 239.
voluntary, 187.

Disobedience—
Of orders (see Contempt).

Distribution—
Composition set aside after, 698.
Consideration, of, on confirmation of composition, 695.
Contingently liable, claims of persons, 720.
Court of bankruptcy to make, 68.
Creditors having priority to be paid in full, when, 719.
between secured and prior, 730.
only one proves paid in full, when, 721.
proving after dividend declared, 722.
secured, to be paid how, 719, 723.
unsecured to be paid *pro rata*, 719.
Debts, which have priority, 723. (See Debts).
Dividends, disposition of unclaimed, 356, 733.
first, when declared, 718.
how declared, 720.
how paid, 732.
recovery of, by trustee, 356.
Firm and individual estate, 255.
Funds, when there are several, 720.
General scheme of, 717.
Irregular, effect of, 722.
Payment to attorneys, 718.
Rights of creditors, proving after dividends have been declared, 722.

References are to pages.

Distribution (continued)—
Settlement of estate, 733.
Time, 722.
Who are entitled to share, 719.

District—
Bankrupt may be adjudged in which, 67.
Involuntary proceedings, where instituted, 197.
Judicial, extent of, 34.
Partnership proceedings, where instituted, 251.
Proceedings, ancillary in other districts, 86.
Referee of, 107.
Removal of bankrupt to other, 647, 648.
Voluntary proceedings, where instituted, 174.

District courts of United States—
Courts of bankruptcy, 33, 67.
Jurisdiction of, in bankruptcy, 67.
at law, in equity, 80.
territorial, of, 33, 67.

District of Alaska—
United States courts in, made courts of bankruptcy, 33, 67.

District of Columbia—
Appeals in bankruptcy in the, 795.
Exemption laws of, 459.
Supreme court of, a court of bankruptcy, 33, 67.
Territorial jurisdiction and time of holding courts in, 38.

Dividends—
Attachment, not subject to, 731.
Checks, how drawn, 732.
Contingent claims on, 720.
Creditors receiving, not affected by proof of subsequent claims, 722.
entitled to receive, 719.
residing within United States entitled to preference, 722, *n*.
Declaration and payment on allowed claims, 718, 720, 723.
first, declaration of, 723.
subsequent, 723.
Final, time of, 722, 734.
First, when declared, 718.
Interest on contested claims not allowed, 721.
Judgment, on, pending in appellate court, 723.
Limit to right to collect, 721.
Lists of claims and, 721.
Minors may claim, when, 733.
Notice to creditors of declaration and time of payment, 718, 720.
Obtained from trustee, how, 731.
Payment of, when and how, 356, 718, 732.
Recovery of, when claims rejected, 346, 356.
Referees to declare, 122, 721.
deliver to trustees, sheets, 721.
Trustee to pay, when, 356, 732.
Unclaimed after six months, disposition of, 733.
after one year, 733.
of minors, 733.

Docket—
Of clerk, what to contain, 129.

References are to pages.

Document—
Bankrupt's estate, a part of, 377.
Definition of, 377.
Destroying or secreting, penalty for, 655.
Referee may require production of, 115.
Trustee vested with title to, 377.

Domicile—
Bankrupt's, what is the, 425.
Corporation, of, 425.
Exemptions governed by state of bankrupt's, 425.
Only one, at one time, 425.
Proceedings may be instituted in district of, 67.

Dower—
Estate of husband, wife's not a part of, 396.
Exempt, when, 433, 437.
contingent or inchoate right, 438.
Trustee takes bankrupt's right of, 395.
Trustee takes subject to, 396.
Sale of land free of, when, 438.
When widow entitled to claim, 396.

Drafts—
Pass to trustee as a part of the estate, 407.

Due—
Debt not, may be proven, 287.

Duplicate—
Petitions to be filed in, 182, 201.

Duties—
Attorney general's, 133.
Bankrupt's, 272, 631.
Clerk's, 129.
Creditors', at meetings, 272, 273.
Referee's, 122.
Trustee's, 351.

E.

Earlier acts of bankruptcy—
When amendments setting up allowed, 228.

Earlier acts of congress—
History of, 6, *et seq.*

Earnings—
After adjudication belong to bankrupt, 416.

Effect—
Act went into, when, 23.

Election—
Of trustee, 113, 275, 357.
To take encumbered property, 372, 704.

Eligibility—
Of referees, 107.
Of trustees, 349.

References are to pages.

Embezzlement—
Debts created by, not released by discharge, 769.
Penalty for, 656.

Employees—
Creditors, as, not counted in petition, 192.
Entitled to priority in payment, when, 726.

Encumbrances—
(See INCUMBRANCES.)

Endorser—
For bankrupt may prove, when, 295.
Not released by discharge of bankrupt, 776.

Enforcement—
Act, creditors should take steps for, 274.
Liens and preferences, valid, 561, 599.
dissolution of, when, 570.
effect of discharge upon, 755.
judicial, obtained prior to four months, 563.
judicial, obtained within four months, 565.
trustee, by, for benefit of estate, when, 569, 600.

English bankrupt laws—
History of, 4.

Enjoining suits—
(See STAYING SUITS.)

Entry—
Appearance, how made and what to include, 846.
Appearance in appellate court, effect of, 832.
Cases on docket, 845.

Equity—
Appeals taken as in cases in, 816.
Jurisdiction in, appellate, 790.
circuit courts of United States in, 103.
courts of bankruptcy, in, 80.
Law and, as distinguished from bankruptcy, 104.
Process served as in, 205.
Records of referees kept as in cases in, 124.
Rule 13 quoted, 205.

Error—
Appellate jurisdiction of matters of law, 808 (see CIRCUIT COURT OF APPEALS).
Referee, of, by review of judge, 112, 118.
Writ of, in bankruptcy, 819.
in law and equity cases, 790.

Estates—
Administration of, 717.
by three trustees, 356.
collection of, 761, *et seq.*
distribution, 717.
partnerships, 255.
Accretions to land by alluvium a part of, 395.
Acquired after adjudication not a part of, 415.
what is, 416.
before discharge revoked, 789.

References are to pages.

Estates (continued)—
Actions, contracts on, a part of, 417-420.
exceptions to rule, 419.
injuries to persons not a part of, 420.
injuries to property a part of, 420.
Bankrupt to examine claims against, 633.
Books, 377.
Claims, proof and allowance of, 326, *et seq.*
Contingent remainders not a part of, 395.
Conveyed by trustee when sold, 605, 713.
Costs of preserving, entitled to priority, 725.
Crops a part of, when, 402.
Courtesy and dower, 395, 396.
Custody, in, of the court, when, 370.
Debts which may be proved, 193, 281, 761.
which have priority, 723.
which can not be released, 760, *et seq.*
Depositories for money, 353.
Deteriorating, proceedings to protect, when, 216.
Devised property, a part of, 395.
Distribution, general plan of, 717 (see DISTRIBUTION and DIVIDENDS).
who may share in, 719.
after composition set aside, 698.
Dividends, declaration and payment, etc., 720, *et seq.* (see DIVIDENDS and DISTRIBUTION).
unclaimed after six months, paid into court, 733.
after one year, distributed, 733.
rights of minors, 733.
Dower, 395, 396.
Encumbered property—
redeemed, may be, 704.
sale of, free from lien, 706.
sale of, subject to lien, 705.
trustee may elect not to take, 372, 704.
value of encumbrance, determined how, 705.
Equitable interest in lands a part of, when, 396.
Equity of redemption a part of, 395.
Exempt property not a part of, 427, 429.
when it may become a part of, 428, 431.
Fee, subject to an easement a part of, when, 395.
Final settlement of, 733.
Firm and individual property, 258.
Fixtures, when a part of, 402.
Franchise, part of, when, 407.
Fraudulently conveyed, property a part of, 605.
purchased by bankrupt, when not a part of, 375.
Goods and chattels generally a part of, 403.
Good-will a part of, 402.
High seas, when property on, a part of, 376.
Individual, partnership creditors sharing, 257.
Information concerning, to be furnished by referee, 122.
Injunction to protect, 214.
Insurance policies, when a part of, 408.
bankrupt may keep on paying, value, 409.
exemption of, 410.
payable on death of bankrupt, 410.
to bankrupt, 409.
to third persons, 409.
Interference with, restrained, 215.

References are to pages.

Estates (continued)—
Inventory of, 371.
when to be filed, 352.
Lease a part of, 396. (see LEASE.)
contracts to lease, when a part of, 401.
Legacies, when part of, 403.
Levy, whether property subject, to, depends on state law, 394
Liens against, 560, 599.
dissolved, when, 570.
invalid, when, 562, 599.
judicial, 563.
mechanics', 601.
mortgages, 591.
pledges, 597.
rights of a lienholder, 604.
valid, when, 561, 599.
Memberships in exchanges a part of, 406.
Merchantable condition, trustee may put in, when, 702.
Money belonging to, how and where deposited, 353, 717.
Negotiable instruments a part of, 407.
Notice of sale of property, 703, 706, 707, 711, 712.
Orders to protect, 210.
Partnership, of, 258.
individual creditors sharing, 257.
interest of infant partner, part of, 404.
Pensions not a part of, 408.
Perishable property, sale of, 711.
Possession, when trustee entitled to, 370.
property in, of third parties vests in trustee, when, 373, 403.
Property of bankrupt, when may be seized, 216.
on which there is a valid lien, 562.
when released, 117, 219.
Property of husband or wife, when part of, 404.
Protection of, 210. (See PROTECTION.)
Real property a part of, 395.
Redemption of encumbered property, 704.
Referee should not collect, 111.
Restraining order to protect, 214.
Reopened, may be, when, 735.
Reversion, with rent incident thereto a part of, 395.
Sale of, 701, 712. (See SALE.)
Set-offs and counterclaims allowed, 308, 310.
Settlement of, 733.
Secured creditors may apply for sale, 708.
Separate property of wife, not part of, 419.
Shrinkage of, as evidence of concealment, 658.
Shares of stock a part of, 405.
Taxable, where, 724.
Temporary investment of funds of, 354.
Title to, when vests in trustee, 365.
when revests in bankrupt, 693.
where in dispute, 711.
Transfer restrained, 215.
Trust, property held by bankrupt in, not a part of, 411.
in which bankrupt has an interest is a part of, 414.
what is, 412.
Trustee may convey by deed, 605, 713.
may put in merchantable shape by repairs, etc., 702.
power to free from liens, 704, *et seq.*
power to sell encumbered property, 704.
power to sell unencumbered property, 703.

References are to pages.

Estates (continued)—
Trustee (continued)—
to report condition of, 352, 717, 734.
what kind of property passes to, as a part of, 365, *et seq.*, 376, 709.
what title to, passes to, 365, 708.
Wearing apparel, 405, 424.
What is, 71.
Wife's separate property, 419.
Estimate of value of security—
To allow creditor to vote, 331, 604, 705, 710.
Estoppel—
Creditor, of, to charge acts of bankruptcy, when, 191.
to oppose discharge, when, 739.

Evidence—
Acts of bankruptcy not in petition, inadmissable, 200.
Against bankrupt can not be used in criminal proceedings, 625.
Answers of witnesses unsatisfactory, proceedings, when, 622.
Burden of proof, *habeas corpus* proceedings, 646.
involuntary petition, 232.
suits to recover property, 609.
Certified copies of proceedings before referee as, 113, 735.
order approving trustee's bond, of title, 367, 371.
confirming or setting aside composition, of jurisdiction, etc., 693, 697.
confirming composition of revesting title, 693, 697.
papers issued by clerk or referee, as, 735.
Concealment of property by bankrupt, what is, of, 658.
Claims, proof of, 326.
instrument of writing to be filed with, 330.
when lost or destroyed, 330.
Compulsory attendance of witnesses by the court, 232.
Compulsory attendance of witnesses by referee, 115.
Criminal proceedings, testimony of bankrupt can not be offered in, against him, 625.
Depositions, in involuntary cases, 232.
notice of taking, 344.
prove claims, to, 327.
referees, in proceedings before, 344.
right to take determined by U. S. laws, 332, 344, 628.
Habeas corpus proceedings in, 644.
Indictment in extradition proceedings as, 649, 650.
Manner of introducing, 232.
Order confirming composition, as, 693, 697.
Referees, how taken before, 620.
may be used in civil cases to impeach witness, 626, 628, 630.
power to take, 115.
preserved by, when, 123, 124, 620.
record of, as, 735.
Testimony taken on examination before referee, 630.
Title of trustee, 367, 371.

Examination—
Adjourned, may be, 613, 621, 622, 623.
Answers unsatisfactory, when, 622.
Application for, how made, 616.
Arrest of bankrupt for, 614, 640.
Attorney may attend witnesses, when, 620.

References are to pages.

Examination (continued)—
Bankrupt, of, 612.
after-acquired property, not as to, 416.
compulsory attendance for, 640.
creditors to have notice, 618.
custody, when in, 613.
gratify malice, etc., not to, 613.
how often, 612.
judge or referee direct when, 612.
proof of claims, of, examine, 633.
second, when cause shown, 612, 616.
testimony of, may be rejected, 624.
upon what topics, 623.
when bankrupt can not be required to attend, 617.
witness fees, not entitled to, 617.
Certifying questions to judge from referee, 622.
Conducted by whom, 620.
Contempt, 622.
Degrading questions, may be compelled to answer, 626.
Deposition, by, 628.
Detention of bankrupt about to depart, for, 614, 640.
District, within what, 614, 616.
Expenses of, of administering estates, 725.
of bankrupt attending, when, 617.
Extradition for, 614.
Incriminating questions need not be answered, 625.
waiver of privileges, 626.
Manner of making a, 619.
Notice to bankrupt of his, 613, 618.
to creditors of bankrupt's, 618.
to creditors of application not required, 617.
to creditors of, of witness not required, 618.
to witnesses of, how given, 618.
Objections, who to decide, 621.
who may make, 621.
Order for, by whom application for made, 616.
by whom made, 615.
creditor may apply for, 616.
extract of record, 617.
trustee may apply for, 616.
Persons other than bankrupt, 614, 616.
Persons outside district, 628.
Privileged communications, 627.
Punish disobedience of subpœna, 619.
Referee may make, of bankrupt, 612.
may make, of witnesses, 115, 614, 616.
must note exceptions taken, 621.
of another district may make, when, 614, 616.
Refusal to answer, 622.
Service of notice for, 617.
of subpœna for, 618.
Stenographer may be employed, 620.
Time bankrupt may be detained for, 640.
within which bankrupt may be examined, 613.
Testimony upon, may be used when, 630.
Topics upon which, of bankrupt may be made, 623
upon which, of witnesses may be made, 626.
Wife of bankrupt, 614.
Witnesses of, 614.
privilege, 627.
summoned how, 618.

References are to pages.

Examination (continued)—
Witnesses of (continued)—
upon what topics, 626.
who may be subject to, 614, 616.

Exceptions—
How taken before a referee, 621.

Executors—
Debts of, not released by discharge, 773.
Proof of claims by, 324.

Exemptions—
Appraising exempt property, 441.
Burden of proof, 440.
Constitutionality of provision relating to, 426.
Construction of laws relating to, 423.
Claim for, bankrupt to prepare copies of, make oath to and file in triplicate, etc., 178, 432.
time of filing, 433.
who may claim if bankrupt fails to, 432.
Costs to be paid out of, 435.
Court of bankruptcy to determine claims for, 428.
Determined how, 428.
Crops, on exempt homestead, 424.
Domicile of bankrupt, 425.
Domicile of bankrupt, law of, governs, 423.
where domicile is changed, 425.
Dower, 433, 437.
contingent and inchoate right of, 438.
Fraudulent conveyance or encumberance, effect of, 435, 443.
waived by, when, 434, 435.
Insurance policies exempted by state law, 410, 424.
Laws governing, generally, 422.
Laws of the state of—
Alabama, 445.
Alaska, 446.
Arizona, 447.
Arkansas, 448.
California, 450.
Colorado, 455.
Connecticut, 457.
Delaware, 459.
District of Columbia, 459.
Florida, 460.
Georgia, 461.
Idaho, 464.
Illinois, 466.
Indian Territory, 468.
Indiana, 468.
Iowa, 469.
Kansas, 473.
Kentucky, 475.
Louisiana, 477.
Maine, 478.
Maryland, 480.
Massachusetts, 481.
Michigan, 484.
Minnesota, 487.
Mississippi, 491.
Missouri, 494.

References are to pages.

Exemptions (continued)—
Laws of the state of (continued)—
Montana, 497.
Nebraska, 499.
Nevada, 502.
New Hampshire, 505.
New Jersey, 507.
New Mexico, 510.
New York, 512.
North Carolina, 515.
North Dakota, 516.
Ohio, 520.
Oklahoma, 524.
Oregon, 526.
Pennsylvania, 528.
Rhode Island, 529.
South Carolina, 530.
South Dakota, 531.
Tennessee, 534.
Texas, 536.
Utah, 538.
Vermont, 542.
Virginia, 545.
Washington, 549.
West Virginia, 552.
Wisconsin, 554.
Wyoming, 557.
Liens on exempt property, 430.
Military uniforms, arms, etc., 422.
Mortgages on exempt property, 593.
Partnership property, in, 443.
Property purchased on eve of bankruptcy, in, 443.
Property subject to, does not pass to trustee, 376.
Schedules, should be claimed in, 429.
Set apart, how to, 439.
appraisement to, 441.
exceptions to, 440.
homestead, in kind, 442.
trustee to, 429.
Title to exempt property, 427.
Trustee has dominion over exempt property for what purpose, 428.
may pass to, when, 429, 431.
to set apart, 429, 439.
Waiver of, how made, 433, 437.
to pay certain creditors, 433.
Wearing apparel, 424.
What property generally is exempt, 422, 442.

Exhibits—
Attached to proofs may be withdrawn, when, 330.

Expenses—
Administering bankrupt's estate, of, 131, 725
Advanced by whom, 128, 131, 133.
Bankrupt, of, paid attending examination, when, 617.
paid attending meetings, when, 631.
Clerk, of, 131.
Involuntary proceedings, in, 241.
Marshal, of, 132.
Partnership bankrupt, of, how paid, 255.

References are to pages.

Expenses (continued)—
Referees, of, 126.
Witnesses, 619.

Expunging claims—
When examined and allowed, 342.

Extortion—
Punishment for, 662.

Extradition—
Bankrupt, of, 646.
Foreign country, from, 647.
Indictment as evidence in, 649, 650.
Jurisdiction of courts of bankruptcy in, 68.
Proceedings to remove bankrupt, 646, 648.
before commissioner, 648.
before judge for warrant, 650.
Removal of bankrupt, how made, 647.

F.

Factors—
Do not act in a fiduciary capacity for principals, 772, 775.

Facts—
Findings of, by arbitrators, 700.
Record on appeal, 796.
Reported by referee as to contempt, 671.
Reported by referee as to discharge, 851.

False account—
Penalty for making, 660. (See OFFENSES.)

False claims—
Bankrupt to disclose proof of, to trustee, 633.
Penalty for presenting under oath, 661.
using in composition, 661.

False pretenses—
Goods obtained by, do not pass to trustee, when, 375.
Judgments in actions for obtaining property by, not affected by discharge, 767.

False representations—
Judgment in actions for obtaining property by, not affected by discharge, 767.

Farmers—
Involuntary bankrupts, can not be adjudged, 142.
Who are, 143.

Federal court—
Suits stayed in, 87.
(See also COURT OF BANKRUPTCY, CIRCUIT COURT, CIRCUIT COURT OF APPEALS, and SUPREME COURT.)

References are to pages.

Fees—
Attorney's—
allowance of, by referee, 135.
amount of, 139*n*.
assignee of, 138.
creditors of involuntary bankrupt, of, 137.
included in costs of administration, 135, 725.
involuntary bankrupt, of, 135.
lien of, for, 137.
priority of, 135.
reasonable, must be, 135.
what is, 137, 139*n*.
services rendered assignee before filing petition, for, 138.
services rendered debtor in preparing schedule, 138.
taxed as costs, 139.
trustee, of, 137.
voluntary bankrupt, of, 136.
who entitled to, 135.
Bankrupt to deposit, 182.
Clerk's, 131.
Filing payment of, not a voidable preference, 561.
Marshal's, 132.
Ordered paid out of the estate, 112, 131.
Priority in payment of certain, 725.
Referee's, 126.
when reference revoked, 127.
when case transferred, 127.
Required on filing petition, 182.
Stenographer's, 115.
Trustee's, 362.
apportionment of, 362.
Voluntary bankrupt not required to deposit, when, 183.
may be required to pay later, 183.
Witnesses', included in costs of administration, 725.
first paid or tendered when, 619.

Fiduciary capacity—
Attorneys, 774.
Debt created while acting in, not affected by discharge, 771.
Executors, trustees, guardians, etc., 773.
Factor, agent, etc., not in, 772.
Meaning of, 771.

Filing—
Arbitrators' findings, 700.
Claims for exemptions by bankrupt, 181, 221.
Claims before referee or in court, 337.
Discharge, application for, 736.
application to revoke, 785.
Information, time of, 665.
Jury, of application for, 222, 226.
List of creditors by bankrupt, 180, 221.
by referee, when, 122.
Notice to take depositions with referee, 344.
Schedule of property, of, by bankrupt, 181, 221
by referee, when, 122.
Trustee's accounts, 718, 734.

Final—
Accounts of trustees, 734.
allowance of, 734.
notice to creditors of, 734

References are to pages.

Final (continued)—
Account of trustees (continued)—
oaths to, 734.
place for examining, 734.
Certiorari to C. C. A., when judgment, 800.
Meeting of creditors, 280.

Finding—
Arbitrators', effect, etc., of, 700.
Referees', transmitted with records to judges, when, 124.

Fines—
Orders of court enforced by, 68, 675.
Referee, of, acting when interested, 125.
purchasing property of estate, 125.
refusing inspection of accounts, 125.
Trustee refusing inspection of accounts, etc., 125.
(See also CRIMES and OFFENSES.)

Firm—
(See PARTNERSHIP.)

Fixtures—
When a part of bankrupt's estate, 402.

Florida—
Exemption laws of, 460.
Territorial jurisdiction and time of holding courts in, 39.

Foreign country—
Bankrupt to transfer property in, to trustee, 367.

Foreign creditors—
How affected by discharge in this country, 756.
When there are bankruptcy proceedings at home and abroad, 722*n*.

Foreign discharge—
Effect of, in this country, 758.
Effect as between states, 759.

Forfeiture—
Debts due as, how far allowed, 730.
Referee, by, of office, acting in case when interested, 125.
purchasing property while, etc., 125.
refusing inspection of accounts, 125.
Trustee, by, of office, refusing inspection of accounts, 125.

Forms—
Adjudication of bankruptcy, 912.
debtor is not bankrupt, 911.
and designation of newspaper, 913.
Affidavit. (See OATH.)
of lost bill or note, 946.
Ancillary order to pay funds of bankrupt to a trustee appointed in another district, 1035.
Answer, 887.
to creditors' petition, 889.
Appeal, petition for, 1057.
assignment of errors, 1060, 1065.
bond on, 1059.
citation on, 1060.
motion and order to dispense with printing record, 1096, 1097.

References are to pages.

Forms (continued)—
Appeal (continued)—
order allowing cross, 1059.
order extending time within which to file record in appellate court, 1095.
order granting, 1058.
petition for review in C. C. A., 1068, 1087.
writ of certiorari for diminution of record, 1099.
Appearance of United States in C. C. A., without citation, 1026.
Appointment, oath and report of appraisers, 920.
Appraisers, appointment, oath and report of, 920.
Assignee for creditors to account, order for, 1013.
pay funds to trustee, order that, 1012.
rule to show cause why he should not pay funds to trustee in bankruptcy, 1012.
rule to pay over money, response of, 1014.
Assignment of errors, 1060, 1065.
Attorney to creditor's petition, affidavit by, 883.
in fact, general letter of, 922, 924.
order allowing fee to, 949, 951.
Bankrupt, order for examination of, 930.
deliver assets to trustee, order that, 936.
examination of, 931.
Bill to recover a preference, 1037.
Bond on appeal, 1059.
of marshal, 899.
of referee, 916.
of trustee, 928.
Certificate by referee to judge, 1025, 1027, 1028, 1029.
of referee to record of proceedings, 993.
Certiorari for diminution of record, 1099.
petition to the supreme court for writ of, 1103.
return to writ of, 1101.
Citation on appeal, 1060.
Claim. (See DEBT.)
Composition, petition for meeting to consider, 994.
application for confirmation of, 997.
notice to creditors of meeting to consider, 996.
order for meeting to consider, 995.
order for hearing on petition to confirm, 999.
order to confirm, 1000.
order of distribution on, 1001.
Contempt, motion for rule to show cause against bankrupt, 1003.
rule to show cause against bankrupt, 1004
answer of bankrupt to rule to show cause, 1005.
affidavit of trustee that bankrupt has not obeyed order of referee, 1004.
order to take additional evidence on rule to show cause, 1006.
order finding that bankrupt has concealed assets, 1007.
order committing bankrupt for, 1008.
order of referee recommending commitment for, 1010.
commitment for, 1010.
order purging of, 1011.
Creditors' petition, 880.
answer to, 889.
order permitting creditor to join in, 896.
order to show cause upon, 885.
to join in petition, orders permitting creditors, 896.
notice of first meeting of, 918.
minutes of meeting of, 933.
notice of final meeting of, 988.
appointment of trustee by, 925.

References are to pages.

Forms (continued) —
Cross-appeal, order allowing, 1059.
Debt, affidavit of lost bill or note, 946.
by agent or attorney, proof, 944.
by agent, proof of, secured, 945.
by partnership, proof of, 943.
due corporation, proof of, 942.
order allowing attorney's fee, 949, 951.
order allowing claim of, 947, 948.
order expunging claim, 955.
order disallowing claim of, 948.
order disallowing and expunging claims, 954.
order reducing claim, 955.
petition to expunge claim, 951.
proof of secured, 940.
proof of unsecured, 938.
proved at first meeting, list of, 921.
Debtor's petition, 865.
Decree. (See JUDGMENT.)
Deed from trustee to purchaser, 1055.
Denial of bankruptcy, 887.
Deposition, examination of bankrupt or witness, 931.
Discharge, petition for, 1041.
clerk's memoranda of bankrupt's petition for, 1052.
notice of application for, 1044.
of bankrupt, 1053.
order referring petition to referee, 1048, 1049.
proof of publication, 1045.
referee's report on petition for, 1049.
specification of grounds in opposition to, 1045, 1047.
Dividend, notice of, 985.
Dividends, list of claims to be recorded by referee and delivered to trustee, 984.
Examination of bankrupt, order for, 930.
of bankrupt or witness, 931.
Exemptions, trustee's report of, 978.
Injunction, motion for, 903.
order denying, 906.
petition to enjoin disposing of bankrupt's estate, 900.
petition to stay pending suit, 904.
temporary restraining order, 903.
to stay suit, 905.
Judgment on review of order of referee by the judge, 1030, 1031, 1032, 1034.
for sale free from liens, 962.
on mandate, 1102.
Jury trial, order for, 888.
Lien, petition and order for redemption of property from, 959.
Mandate, final decree or judgment on, 1102.
Marshal, bond of, 899.
warrant to, 897.
Motion to correct journal entry, 1030.
Notice to creditors of meeting for composition, 996.
of application for discharge, 1044.
to attorney for bankrupt with reference to discharge, 1043.
of dividend, 985.
of filing petition for review in C. C. A., 1067.
of final account, declaration of dividends, etc., 983.
of final meeting of creditors, 988.
of petition for removal of trustee, 1040.
of petition to sell real estate, 968.
of petition and sale of chattels, 978.

References are to pages.

Forms (continued)—
Notice (continued)—
of sale of bank stock, 976.
of sale of uncollected accounts, 975.
of trustee's sale subject to lien, 970.
waiver of, 952.
Oath to Schedule A, 871.
to Schedule B, 876.
of appraisers, 920.
by attorney to creditors' petition, 883.
of bankrupt, final, 1050.
of referee, 916.
to final account of trustee, 981.
Order permitting creditor to join in creditors' petition, 896.
to show cause upon creditors' petition, 885.
of adjudication and designating newspaper, 913.
of reference, 914.
of reference in judge's absence, 915.
that bankrupt deliver assets to trustee, 936.
for choice of new trustee, 987.
for costs and confirming accounts, 986.
for jury trial, 888.
Partnership affairs, petition of administrator of deceased partner to settle, 895.
petition, 877.
Petition of administrator of deceased partner to settle partnership affairs, 895.
for appeal in bankruptcy, 1057.
creditors', 880.
partnership, 877.
affidavit by attorney to creditors', 883.
debtor's, 865.
answer to creditors', 889.
order to show cause upon creditors', 885.
for meeting to consider composition, 994.
for discharge, 1041.
to expunge claim, 951.
for receiver, 906.
for removal of trustee, 1039.
to stay pending suit, 904.
and order for redemption of property from lien, 959.
and order for private sale, 972.
and order for sale by auction of real estate, 957.
and order for sale of perishable property, 973.
and order for sale subject to lien, 967.
to enjoin bankrupt from disposing of property, 900.
to review order of referee, 1015, 1019, 1020, 1021, 1022, 1024.
to sell real estate free from lien, 960.
to sell portion of bankrupt's estate subject to lien, 969.
by assignee to review order of a referee on rule to pay over money to a receiver in bankruptcy, 1019
by trustee to review order allowing a claim, 1015.
for review in C. C. A., 1068-1087
for review in C. C. A., notice of filing, 1067
for writ of certiorari in supreme court, 1103.
Poor person, motion and order to dispense with printing record, 1096, 1097.
Preference, bill to recover a, 1037.
order to surrender before proving claims, 953.
Publication of notice of first creditors' meeting, affidavit in proof of, 919.
of proof of discharge, 1045.

References are to pages.

Forms (continued) —
Purchaser, deed of trustee to, 1055.
Receiver, petition for, 906.
order appointing, 908.
order refusing to appoint, 907.
order to put him in possession, 909.
marshal's return on order to put receiver in possession, 910.
Record in appellate court, order extending time within which to file, 1095.
certiorari for diminution of, 1099.
motion and order to dispense with printing, 1096, 1097.
order to send up exhibits, 1093, 1094.
praecipe designating parts of, 1091, 1092.
of proceedings before referee, 989, 990, 992, 993.
stipulation to omit parts in printing, 1097.
stipulation to use printed records, 1095.
stipulation reducing, 1090.
Referee, bond of, 917.
oath, 916.
appointment of trustee by, 926.
list of claims and dividends to be delivered to trustee by, 984.
record of proceedings on composition, 994.
record of proceedings—trustee appointed—assets distributed, 990.
record of proceedings—no trustee—no assets, 989.
to record of proceedings, certificate of, 993.
to judge, certificate by, 1025, 1027, 1028, 1029
order confirming order of, 1030.
order reversing, 1031.
on petition to discharge, report of, 1049.
Reference, order of, 914.
in judge's absence, order of, 915.
Sale, petition and order for private, 972.
of bank stock, notice and report of, 976.
of unmanufactured stock, report of trustee of, 977.
of perishable property, petition and order for, 973.
of uncollected accounts, order for, 974.
of uncollected accounts, notice of, 975.
of real estate, petition and order for, 957.
of real estate, notice of petition for, 968.
of real estate free from lien, petition for, 960.
of real estate free from liens, decree for, 962.
subject to lien, petition and order for, 967.
subject to lien, notice of trustee's, 970.
Schedule A, 867.
Schedule B, 872.
Specification of grounds in opposition to discharge, 1045, 1047.
in opposition to discharge, order referring to referee, 1048, 1049.
State court, order that trustee apply to be made party to suit in, 937.
to pay to trustee funds in court, order that, 937.
Stay suit, injunction to, 905.
pending suit, petition to, 904.
Summons to witness, 932.
and severance, order of, 1058.
Subpœna to bankrupt, 886.
Supreme court, petition for writ of certiorari in, 1103.
Trustee by creditors, appointment of, 925.
appointment by referee, 926.
bond of, 928.
order approving bond of, 929.

References are to pages.

Forms (continued)—
Trustee (continued)—
notice of appointment of, 927.
order for choice of new, 987.
order that none be appointed, 929.
petition for removal of, 1039.
notice of petition for removal of, 1040.
order for removal of, 1040.
account of, 980.
deed of, 1055.
order allowing account and discharging, 982.
to review order allowing a claim, petition by, 1015.
apply to be made party to suit in state court, order that, 937.
order of state court to pay funds to, 937.
of sale subject to lien, report of, 971.
oath to final account, 981.
in bankruptcy, order that assignee for creditors pay over funds to, 1012.
order that bankrupt deliver assets to, 936.
report of no assets, 979.
report of exempt property, 978.
Warrant to marshal, 897.
Witness, examination of, 931.
summons to, 932.

Forms of procedure—
United States supreme court to prescribe, for courts of bankruptcy, 845.

Franchises—
Pass to trustee, when, 407.

Fraud—
Books of account concealed, etc., by, prevents discharge, 748.
Composition after confirmation set aside for, 697.
Concealing of property by, punishment, 660.
Debts created by, not affected by discharge, 769.
Discharge revoked when obtained by, 784.
Judgment in actions for, not affected by discharge, 767.
Lien sought and permitted, in, of bankrupt act, dissolved, etc., 570.
Trusteee vested with title to property transferred in, 351, 381.

Fraudulent transfer—
As an act of bankruptcy, 159.
intent of transferor only material, 160.
As a preference, 385, *et seq.*
Suits to set aside, 605.
who to bring, 383.
Void against trustee, 381.
by laws other than bankrupt act, 382
under the bankrupt act, 381.
to prefer creditors, 385, *et seq.* (See PREFERENCES.)
essentials of, 387.
to hinder, delay and defraud creditors, 389.
essentials of, 390.
general assignments, 391.

Fraudulent sales—
Rescinding, 375.

Further credit—
When claim for, may be set-off, 317.

References are to pages.

G.

Georgia—
Exemption laws of, 461.
Territorial jurisdiction and time of holding courts in, 39.

General assignment—
An act of bankruptcy, 30, 153, 167.
Assets distributed under, recovery of by trustee, 610.
Assignee not liable to trustee for distributing assets, 610.
Creditors estopped to charge as an act of bankruptcy, 191.
In what court property to be administered, 31.
Legality of, 29, 729.
May be set aside when, 391.
Services in, when entitled to priority, 729.
Title of assignee, 72.
Validity of, as affected by the national act, 29, 729.

General orders—
Abbreviations and interlineations in petitions and schedules forbidden (Order 5), 847.
Accounts of marshal (Order 19), 853.
referee (Order 26), 857.
trustee (Order 17), 852.
Amendments of petition and schedules (Order 11), 850.
Appeals (Order 36), 706.
from circuit courts of appeals (Order 36), 862.
courts of bankruptcy (Order 36), 862.
supreme court of District of Columbia (Order 36), 862.
supreme court of territory (Order 36), 862.
to circuit courts of appeals (Order 36), 862.
supreme court of territory (Order 36), 862.
supreme court of United States (Order 36), 862.
Application for approval of composition (Order 12), 850.
discharge of bankrupt (Order 12), 850.
form of (Order 31), 860.
Appointment and removal of trustee (Order 13), 851.
Arbitration (Order 33), 860.
Assignment of claims before proof (Order 21), 854.
Attorney, conduct of proceedings by (Order 4), 846.
execution of letter of (Order 21), 854.
Checks for money deposited (Order 29), 858.
Circuit courts of appeals, appeals from (Order 36), 862.
to (Order 36), 862.
Claims, assignment of, before proof (Order 21), 854.
compounding of (Order 28), 858.
of persons contingently liable (Order 21), 854.
proof of (Order 21), 854.
re-examination of (Order 21), 854.
Clerk, compensation of (Order 35), 861.
indemnity for expenses of (Order 10), 849.
indorsement of papers by (Order 2), 846.
Compensation of clerk, referee and trustee (Order 35), 861.
Composition, approval of (Order 12), 850.
opposition to (Order 32), 860.
Compounding of claims (Order 28), 858.
Conduct of proceedings (Order 4), 846.
Consolidation of petitions (Order 7), 848.
Costs in contested adjudications (Order 34), 861.
Courts of bankruptcy, appeals from (Order 36), 862.
Creditors, special meeting of (Order 25), 857.
Debtor, imprisoned (Order 30), 859.

References are to pages.

General orders (continued)—
Debts, proof of (Order 21), 854.
Deposition before referee (Order 22), 856.
Discharge of bankrupt, application for (Order 12), 850.
opposition to (Order 32), 860.
petition for (Order 31), 860.
Districts, petitions in different (Order 6), 847.
Docket (Order 1), 845.
Duties of referee (Order 12), 850.
trustee (Order 17), 852.
Examination of witnesses (Order 22), 856.
Expenses of clerk, marshal or referee, indemnity for (Order 10), 849.
allowance of (Order 35), 861.
Fees of clerk (Order 35), 861.
referee (Order 35), 861.
trustee (Order 35), 861.
Filing of papers (Order 2), 846.
after reference (Order 20), 854.
Finding of facts by referee (Order 12), 850.
Forms (Order 38), 863.
Frame of petitions (Order 5), 847.
General provisions (Order 37), 862.
Habeas corpus of imprisoned debtor (Order 30), 859.
Imprisoned debtor (Order 30), 859.
Indemnity for expenses of clerk, marshal or referee (Order 10), 849.
Injunctions of proceedings of courts or officers (Order 12), 850.
Interlineation and abbreviation in petitions and schedules forbidden (Order 5), 847.
Inventory by trustee (Order 17), 852.
Involuntary bankruptcy, costs in (Order 34), 861.
schedule in (Order 9), 849.
Judge to hear application for approval of composition (Order 12), 850.
discharge of bankrupt (Order 12), 850.
injunction (Order 12), 850.
removal of trustee (Order 13), 853.
review by (Order 27), 857.
Jurisdiction of two petitions in different districts (Order 6), 847.
Marshal, accounts of (Order 19), 853.
indemnity for expenses of (Order 10), 849
Meeting of creditors, first (Order 12), 850.
special (Order 25), 857.
Moneys deposited, payment of (Order 29), 858
Notices to creditors (Order 21), 854.
Opposition to discharge of composition (Order 32), 860.
Order of reference (Order 12), 850.
Orders of referee (Order 23), 856.
Papers, filing of (Order 2), 846.
after reference (Order 20), 854.
Partnership cases, proceedings in (Order 8), 848.
Payment of moneys deposited (Order 29), 858
Perishable property, sale of (Order 18), 853
Petition and schedules, abbreviations and interlineations in, forbidden (Order 5), 847.
amendments to (Order 11), 850.
for discharge (Order 31), 860.
Petitions, frame of (Order 5), 847.
in different districts (Order 6), 847.
two or more against common debtor (Order 7), 848
Poor bankrupts, payment of fees in cases of (Order 35), 861

References are to pages.

General orders (continued)—
Practice and procedure (Order 37), 862.
Priority of petitions (Order 7), 848.
Proceedings, conduct of (Order 4), 846.
Process (Order 3), 846.
Proof of debts (Order 21), 854.
Property, redemption of (Order 28), 858.
sale of (Order 18), 853.
Proved claims, transmission of, to clerk (Order 24), 857.
Record of clerk (Order 1), 845.
referee (Order 1), 845.
on appeal to supreme court of United States (Order 36), 862.
Redemption of property and compounding of claims (Order 28), 858.
Re-examination of claim (Order 21), 860.
Referee, accounts of (Order 26), 857.
certificate of, to judge (Order 27), 857.
compensation of (Order 36), 862.
duties of (Order 12), 850.
finding of facts by (Order 12), 850.
indemnity for expenses of (Order 10), 849.
indorsement of papers by (Order 2), 846.
orders of (Order 23), 856.
proceedings before (Order 12), 850.
record of (Order 1), 845.
to notify trustee of his appointment (Order 16), 852.
to transmit list of proved claims to clerk (Order 24), 857.
Reference, order of (Order 12), 850.
papers filed after (Order 20), 854.
Removal of trustee (Order 13), 851.
Review by judge (Order 27), 857.
Sale of property (Order 18), 853.
Schedule, abbreviations and interlineations in, forbidden (Order 5), 847.
amendments to (Order 11), 850.
in involuntary bankruptcy (Order 9), 849.
Special meeting of creditors (Order 25), 857.
Subpœna (Order 3), 846.
Summons (Order 3), 846.
Supreme court of District of Columbia, appeals from (Order 36), 862.
territory, appeals to (Order 36), 862.
from (Order 36), 862.
the United States, appeals to (Order 36), 862.
Testimony, taking of (Order 22), 856.
Transmission of proved claims to clerk (Order 24), 857.
Trustee, appointment of (Order 13), 851.
compensation of (Order 36), 862.
duties of (Order 17), 852.
no official or general, to be appointed (Order 14), 851.
not appointed in certain cases (Order 15), 851.
notice to, of appointment (Order 16), 852.
removal of (Order 13), 851.
Witnesses, examination of (Order 22), 856.

Gift—
Included in the word "transfer," 571.

Good faith—
Liens given in, etc., valid, 591.
Purchases made in, valid, 565.

References are to pages.

Good will—
When a part of bankrupt's estate, 402.

Guarantors—
Debts of, not released by discharge, 776.

Guardian—
Debts of, not released by discharge, 773.

H.

Habeas corpus—
Application for, 643.
Burden of proof, 646.
Evidence admissible, 644.
To produce bankrupt for examination, 613.
To release bankrupt from imprisonment, 642.
To release bankrupt held for removal, 653.
To release contemnor, 676.

Hearing—
Bankrupt to attend, on application for discharge, 631.
Claims, of objections to allowance of, 340.
Confirmation of composition, application for, 691.
notice to creditors, 691.
Contempts, for, summary, 671.
Discharge, of application for, 752.
notice to creditors, 737.
Insolvency, on question of, 230.
Involuntary proceedings in, 230.
Petition, voluntary, of, 184.

"Hinder, delay or defraud"—
Act of bankruptcy, when, 153.
Preference to transfer property to, 389.

Hire—
(See WAGE EARNER.)

Holder of lien—
Trustee subrogated to rights of, when, 569, 600, 606.
(See also SECURED CREDITOR.)

Holidays—
Not counted, 203.
What are, 203.

I.

Idaho—
Exemption laws of, 464.
Territorial jurisdiction and time of holding courts in, 41.

Identity—
Of bankrupt to be established before extradition, 649, 650.
Of person proving claim, when, 855.

Illinois—
Exemption laws of, 466.
Territorial jurisdiction and time of holding courts in, 41.

References are to pages.

Imprisonment—
Bankrupt not protected from, 637.
Bankrupt subject to, for what offenses, 655, *et seq.*
Bankrupt in custody of marshal for examination not to be subjected to, 640.
Contempt punishable by, 675.
Courts of bankruptcy to enforce orders by, 68.
Discharge prevented by offense punishable by, 747.
Offenses punishable by, 665, *et seq.*
Referee can not exercise power of, 111.
Trustee subject to, for what offenses, 655.

Inability—
Of judge to act, when to certify to circuit court, 102.
Of judge to act, when to certify fact to referee, 117.
Of referee to act, judge may act or appoint another referee, 107.

Inconvenience—
Place of creditors' meeting may be fixed to avoid, 268.

Incumbrances—
Included in "transfers," 571.
Subsequent to act, etc., within four months, to defraud, etc., void, 389.
Within four months, void under state laws, void under act, 393.
(See also LIENS, MORTGAGES, PREFERENCES.)

Indebtedness—
Amount of, to petitioning creditors to begin involuntary proceedings, 189.
Total, of bankrupt to subject him to involuntary proceedings, 194.

Indemnity—
Bond of, by petitioner, on seizure of bankrupt's property, 217.
For expenses of clerk, 131.
of marshal, 132.
of referee, 128.

Indexes—
Clerks of, 129.
open to inspection, 130.

Indiana—
Exemption laws of, 468.
Territorial jurisdiction and time of holding courts in, 42.

Indian Territory—
Exemption laws of, 468.
Territorial jurisdiction and time of holding courts in, 42.
United States courts in, made courts of bankruptcy, 33, 67.

Indictments—
Averments in, 665.
Criminal proceeding instituted by, 664.
Evidence in extradition proceedings, 649, 650.
Limitation of time as to finding, 665.

Individual—
Assets, 259.
Debts, 262.
(See also PARTNERSHIP.)

References are to pages.

Infants—
Adjudged bankrupts, when, 144.
Claims against bankrupts, time for proving, 325.
Defense of infancy, 227.
Unclaimed dividends, time for claiming, 733.

In forma pauperis—
Involuntary cases, not in, 202.
Voluntary cases, when, 183.

Information—
Criminal proceedings begun by, when, 664.
Limitation of time as to filing, 665.
Referee to furnish, 122.
Trustees to be furnished with, 633.
to furnish, 353.

Injunction—
To protect after-acquired property, 417.
To protect estate, 211, 214.
application for, 215.
dissolution of, when, 216.
To stay suits, 77, 87.

Injuries—
Actions for, to person do not pass to trustee, 420.
to property pass to trustee, 420.
Discharge does not release judgments in actions for willful, to person or property, 768.

Insane person—
Claims against bankrupts, time for proving, 325.
Insanity as a defense, 227.
May be a bankrupt, when, 145.
When bankrupt becomes an, proceedings not abated, 146, 653.

Insolvency—
Admission of, in writing an act of bankruptcy, 169.
Burden of proving, 155.
Essential to an act of bankruptcy, when, 155, *et seq.*, 161, 168, 169.
to create a preference by transfer, 573.
to dissolve a judicial lien, 570.
to maintain involuntary proceedings, when, 196, 225.
Evidence of, 158.
How to determine, 156.
Involuntary proceedings, in, material when, 225.
Meaning of, 156, 196, 574.
Presumption as to, 158, 575.
Question of fact for jury, 575.
may be contested, 196.
Partnership, of, 157.
Trial by jury, when, 157, 196.
application for trial by jury, when made, 196.
right to, confined to debtor, 157.

Insolvent—
Filing petition against, when, 196.
Jury trial, entitled to, 196, 230.
Laws, effect of national upon state, 23, 29, 728.
meaning of, 18.
states may pass, when, 20.

References are to pages.

Insolvent (continued)—
Laws (continued)—
suspended, not repealed, by national act, 23.
Meaning of, 156.
Reasonable cause to believe, 570*n*.

Inspection—
Docket open to public, 129.
Penalty against referee and trustee refusing, of accounts, 671.
Trustee's accounts and papers open to, 353.

Instrument of writing—
Debts evidenced by, allowed, etc., 293.
Filed with proof of claim, 330.
Lost or destroyed, statements, etc., to be filed with claim under oath, 330.
(See also DOCUMENT.)

Insurance—
Companies as bankrupts, 150.
Policies of, effect of state laws exempting, 410, 424.
bankrupt may keep on paying value, 407.
part of estate of bankrupt, 408.
payable on death of bankrupt, 410.
payable to bankrupt, 409.
payable to third persons, 409.
Property of bankrupt, on, 118, 213.

Intent—
Of transferee determines preference, 576.
In act of bankruptcy by legal proceedings, 165.
by preference, 161, 162.
by transfer, 160.

Interlineations—
When not allowable, 198.

Interest—
Dividends on, when allowed, 721.
Judgments as debts proved and allowed, include, 290.
May be added in computing amount of debts, 193.
Party in, who is a, 739.
Penalty, on recovery of, 730.
Provable debt, when, 289, 299.
Referees, of, in case disqualifies, 114.
Trustees to account for and pay, 354*n*, 717.
Usury, recovery of by trustee, 368.

Interlocutory orders—
Protection of the estate, 210.
to conduct business by receiver, 211.
to restrain transfer, 211.
to stay proceedings in state court, 211.
to sell perishable property, 711.
to seize debtor's property, 212.
(See also ORDERS.)

Intervenors—
Appearance of, 221.
Creditors appearing to join in or oppose petition, 219, 222.
Rights of, 220.
Who may be, 220.

References are to pages.

Inventory—
Schedule furnished by bankrupt, 221.
Trustee to prepare, 352.

Investment—
Of money belonging to estate, 354.

Involuntary proceedings—
Adjudication, order of, 233.
proceedings subsequent to, 242.
setting aside, 234.
Against whom proceedings may be begun, 194.
Amendments, 199, 223, 237.
application for, must be made within reasonable time, 238.
discretion of court, within, 238.
grounds of, 237.
costs, 239.
referee may grant leave to, 239.
Answer to petition, 224.
Bankrupts, who may be adjudged, 141.
Commenced how, 189.
Costs on adjudication, 234.
of proceedings, 241.
Court in which petition filed, 197.
Creditors appearing to be parties, 219.
computing number of, 190, 202.
number of, required, 190.
who may join in petition, 190, 202.
Damages, instituting, grounds for, 241.
Default, proceedings on, 236.
Defenses to petition, 224, *et seq.*
Demurrer to petition, 223.
Dismissing petition, 239.
Hearing or trial, 230.
Insolvency, how far essential, 196, 225.
Instituted how, 189.
Jury trial, when, 223, 226.
Motion to make more definite, etc., 223.
to dismiss, 223.
Number of petitioning creditors required, 190, 196.
Oath to petition, 200.
Order of adjudication, 233.
appointing receiver, 211.
authorizing business to be conducted, 211.
proceedings, of, when several petitions filed, 228, 229.
restraining disposition of estate, 211.
reference, of, 235.
seizure of debtor's property, 216.
staying suits in state courts, 211.
Partnerships, proceedings peculiar to, 243.
Petition, form of, 198.
may be filed against whom, 194.
service of copy of, 203.
two against same debtor, 197.
who may join in, 190.
Pleading to petition, 222.
Referee, reference to, by judge, 110.
reference to, by clerk, 110.
Reply to answer, 229.
Schedules, 221.
Seizure of debtor's property, 216.
Staying suits against debtor, 211.

References are to pages.

Involuntary proceedings (continued)—
Subpœna, when necessary, 204.
service of, 203.
Subsequent to adjudication, 242.
Time within which to file petition, 201, 202.
Trial, 230.
What is necessary to institute proceedings, 192.
Who may be adjudged bankrupt in, 141.
Who may institute proceedings, 189.

Iowa—
Exemption laws of, 469.
Territorial jurisdiction and time of holding courts, 43.

Issues—
Discharge, on opposing a, 744.
Involuntary petition, 222.
acts of bankruptcy denied, 225.
by answer, 224.
determined by judge, 233.
determined by jury, 231.
general denial, 225.
solvency, 225.
Referee, issue of fact referred to, when, 110.
Supervisory petition, no issue of fact allowed on, 815.

J.

Joint and separate debts—
Of partners, what are, 262.

Joint and separate property—
Of partners, what is, 258.

Joint stock company—
(See CORPORATIONS.)

Joint trustees—
Bonds of, joint or severable, 350.
Concurrence of two necessary to validity of act, 356.
Creditors or court may appoint three, 348.
Death of one does not abate suits, 358, 654.

Judge—
Absence of, in, clerk to send case to referee, 114, 130.
Adjudication, regularly makes, 184.
Appoints referees, 107.
Appoints trustees, when, 349.
Disqualified, may certify proceedings to circuit court, 102.
Jury trial, presides at, 158.
May order an examination, 616.
May order fees paid out of the estate, when, 112, 131.
May refer cases, when, 110.
Referee may exercise certain powers of, on issuance of certificate by clerk, etc., 130.
must not be related to, 108.
powers subject to review by, 112, 114, 118.
transfer of cases by, from one referee to another, 110.
To take possession of and release bankrupt's property, 117.

References are to pages.

Judicial liens—
When invalid, 562.

Judgments—
Alimony, for, not released by discharge, 765.
Attaches as a lien, when, 564, 567.
Confession by, 570*n*.
Court, how far will go behind, 292.
Discharges, effect of, on, against debtor, 764.
actions for frauds, 767.
actions for obtaining property by false pretenses, 767.
alimony, for, 765.
contempt, for, 765.
entered after discharge, 766.
entered after filing petition, 766.
fines, 765.
judicial liens, 756.
malicious prosecution, 768.
penalties, 765.
seduction, 765.
support of child, 765.
Lien, created by, within four months, etc., when dissolved, 565.
preserved for estate, when, 569.
Preference, when deemed to create, 563.
Provable debt, when, 289.
Verdict not a, 765.

Jurisdiction—
Ancillary, 79, 86.
Answer, challenged in, 227.
Appellate, 790.
Attaches when, 76.
Attorney not admitted to practice in court, 134.
Bankruptcy, of court of, 67, *et seq.*
in, exclusive, 75.
in, general, 70.
includes what, 71.
Certified copy of order confirming composition, etc., evidence of, 693.
Circuit courts, in bankruptcy, 101.
law and equity, 103.
suits between trustees and adverse claimant, 103.
Circuit courts of appeals, appellate, in bankruptcy, 816.
appellate, at law and equity, 790.
to superintend and revise proceedings of courts of bankruptcy, 808.
Concurrent, between circuit courts and courts of bankruptcy of offenses, 638, 663.
Consent to, 80.
Contested, when, 747.
Contempt, to punish for, 666.
Courts of bankruptcy, of, 67, *et seq.*
conferred on existing courts, 33.
Criminal proceedings, of, 663.
Debtor's petition, to hear, 174.
Depends on United States laws, 61.
Determine title to disputed property, to, 372, *et seq.*, 711.
Discharge, to determine effect of, 759.
Enjoin suits begun after bankruptcy, 89.
Enforce mechanic's lien, 603.
Examine witnesses, 614, 616.
Exempt property, of, 428, 430.

References are to pages.

Jurisdiction (continued)—
General powers of a court of bankruptcy, 69.
Law and equity, of suits at, 80.
Liens, to enforce, 707.
Limitation to exercise of, 78.
Limited to district, 78.
Mechanic's lien, to enforce, 603.
Over adverse claimants, 74, 80.
Persons subject to the act, extends only to, 78.
Partnership, of courts of bankruptcy, over one member sufficient, 251,
Persons over, court must have, 176.
Petitions, when, filed in different districts, 228.
Plenary suits in, against adverse claimants, 80, *et seq.*
suit to set aside preference is, 608.
when necessary, 85, 668.
Possession of property, to obtain, 96.
Property in possession of state court, over, 97.
in district, 209.
Publication, by, 209.
Punish for offenses, to, 663.
Referee's, 109.
State court, of, of suits by trustees, 80.
perjury, 623.
Stay suits, to, 72, 77, 87, *et seq.* (See STAY.)
Summary, extent of, 73, 96, 668.
Supreme court, appeals in bankruptcy, 795.
appellate at law and in equity, 790.
appellate from state courts, 793.
certiorari to C. C. A., 799.
Suits to set aside preferences, etc., 80, *et seq.*, 607.
on trustees' bond, 44.
against third persons, by trustee, 80, *et seq.*
Territorial, of each court of bankruptcy, 33.
When two or more petitions are filed, 228.

Jury—
Act of bankruptcy, question for, 230.
Adverse claimant entitled to, 235.
Application for, when to be filed, 222, 226.
Circuit court, case certified for trial by, to, 101.
Damages in suits to recover, a question for the, 611.
Insolvent entitled to trial by, 230.
Issues, court to determine without, when, 233.
submitted to, 231.
Offenses, for, right to trial by, 664.
Right to, absolute, 231.
adverse claimant of, 235.
confined to bankrupt, 226, 230.
discretion of court, not in, 231.
on question of act of bankruptcy, 230.
on question of solvency, 157, 196.
on question of ownership of property, 361.
Solvency a question for, 196, 226.
Special, summoned if one not in attendance, 231.
Trial, nature of, 75.
United States laws as to trials, applicable in criminal proceedings, 664.
Verdict directed, when, 233.
judgment contrary to, 231.
setting aside a, 231, 233.
Waiver of right, 223, 226.

References are to pages.

Justice of the peace—
Referee, may be, 108.

K.

Kansas—
Exemption laws of, 473.
Territorial jurisdiction and time of holding courts, 44.

Kentucky—
Exemption laws of, 475.
Territorial jurisdiction and time of holding courts, 45.

L.

Labor claims—
Priority of, 726.
amount, 726.
assigned, 726.
for what time, 727.
labor contract can not be apportioned, 726.
rendered by minor, 726.
where priority is given by state law, 727.
What are, 726.

Laches—
Discharge, in filing application to set aside, 786*n*.

Law and equity—
Distinguished from bankruptcy, 104.
Jurisdiction of court of bankruptcy, at, 80.
of circuit courts at, 103.
circuit courts of appeals, 791.
U. S. supreme court, 791.

Law and fact—
Conclusions and findings to be separately stated, when, 796, 797.

Lease—
Bankrupt's estate, when a part of, 396.
Contract to, passes to trustee, when, 401.
Covenants in, 306.
Surety on, liability of, 401.
Trustee takes, subject to equities, 400.
may elect not to take, 305, 306, 397, *et seq.*
surrender of, by, 400.
waste, by, 400.

Legacies—
Pass to trustee, when, 403.

Legal proceedings—
Act of bankruptcy created by, when, 153, 164.
Meaning of, 166.

Letter of attorney—
Necessary for agent, etc., to prove claims, 269.
Necessary for agent, etc., vote, 269.
Oath to, administered by whom, 1136.

Levies—
Obtained against insolvent within four months, etc., void, 565.

References are to pages.

Liability—

Debts which are a fixed, allowed, etc., 287.
Discharge does not affect codebtor's, guarantor's or surety's, 776.
Petitioner's bond, on, to hold property, 217.

Liens—

Admiralty, how enforced, 603.
Attorney, of, for fees, 137.
Common law, what are, 600.
Created by statute, 600.
Created by suit within four months of filing petition, to be dissolved by adjudication in bankruptcy, 570.
if defendant was insolvent, 570.
believed to be insolvent, 570.
permitted in fraud of bankrupt act, 570.
trustee subrogated to rights of holder, 569.
Conveyance, incumbrance, etc., by bankrupt after act and within four months, etc., to defraud, etc., void, 389.
except as to purchasers in good faith for consideration, 389.
property assets, and passes to trustee, 389.
void under state law, void under bankrupt act, 393.
property passes to trustee to be recovered for creditors, 393.
Discharge, effect of, on, 755.
Dissolution of, 570.
Distinguished from priorities, 727, 728, 730.
Enforcement of, in state court, 709.
in bankruptcy court, 76, 710.
Equitable, what are, 600.
Exempt property, on, 430.
marshaling of, 432.
where enforced, 431.
General nature of, 560.
Given or accepted in good faith for consideration not affected, etc., 591.
Invalid, when, 562, 599.
Mechanics', 601. (See Mechanic's Lien.)
Mortgage, 591, 601.
Obtained through legal proceedings against insolvent within four months, etc., void, 565.
obtained prior to four months, 563.
property passes to trustee as part of estate, 565.
unless court otherwise orders, 565.
insolvency essential, 565, 567.
court may order conveyance, 565.
bona fide purchaser for value protected, 565, 569.
when execution has issued, 567.
Part of property on, 708.
Preferences, classification of, as to, 600.
Preserved for benefit of estate, when, 569, 607.
Sale of property, subject to or free from, 601, 605, 704, *et seq.* (See Sale.)
Trustee subrogated to rights of creditor, 569, 600.
may redeem from, 704.
Unrecorded claims not, when, 599.
Valid, when, 561, 599.
When created, 564, 567.
determined by state laws, 566.

Life insurance policies—

(See Insurance.)

References are to pages.

Limitations—
Actions, of, on bond of referee, 109.
of, on bond of trustee, 351.
by or against trustees, 361.
Application for discharge, 737.
Claims, time for proving, 320, 325.
rights of infants, etc., 325.
Examination of bankrupt, 613
of third persons, 615.
Indictment, of finding, for offenses, 665.
Information, of filing, etc., 665.
Prosecution, of, for offenses, 665.
Revoking a discharge, on, 785.
Statute of, as a defense, 227.
bankruptcy stops running, 320.
debts barred by, not provable, 319. (See STATUTES OF LIMITATION.)

Limited partnerships—
When corporations, 146.

Louisiana—
Exemption laws of, 477.
Territorial jurisdiction and time of holding courts in, 46.

Lists of creditors—
Bankrupt, involuntary, to prepare and file in triplicate, 221.
voluntary, to prepare and file in triplicate, 178.
Proving claims and voting at first meeting, 276.
Referee to examine, 122.
to prepare and file, when, 122.
to prepare, entitled to dividends, 122, 721.
(See also SCHEDULES.)

Lost bill or note—
How proven, 330.

Lunatics—
May become bankrupt, when, 145.
Proceedings do not abate when person becomes, 146. (See INSANE PERSON.)

M.

Mail—
Expense of sending notices by, how paid, 128, 131.
Notices sent by, 123.
Penalty envelope may be used, 123.
Referee to transmit certified copies of papers by, to clerk when, 123.

Maine—
Exemption laws of, 478.
Territorial jurisdiction and time of holding courts in, 47.

Majority—
Minors, time to claim dividends, 733
Number and amount of creditors necessary to validity act, 277.
Place of meeting may be designated by, 279.
Trustees, of three, to concur, 356.
Voter's, what constitutes a, of, 277

References are to pages.

Mandamus—

To compel allowance of appeal, 822.
To compel clerk to produce transcript, 833.
To compel obedience to mandate, 842.
Will not lie to compel judge to sign citation, 833.

Mandate—

Court of bankruptcy bound by, 842.
may decide matters left open by, 842.
Mandamus lies to compel obedience to, 842.
Supreme court, of, on certiorari, 803.
To whom directed, 839.
When issued, 842.

Manufacturing corporation—

What are, 147.
When, may be a bankrupt, 147.

Married women—

When, may be bankrupts, 146.

Marshaling assets—

Insolvent partnership, of, 255.

Marshals—

Bankrupt held for examination by, when, 640.
Compensation of, 132.
Conduct bankrupt's business, when, 211.
Duties of, 132.
Expenses of, 132.
Fees of, 132.
"Officer" includes, 132.
Property in possession of, can not be disturbed by process from other courts, 100.
Return to writ of subpœna by, 207.
Service of subpœna, 205.
Warrant issued to, to seize property when, 217.
execution of, by seizing property not debtor's, 217.

Maryland—

Exemption laws of, 480.
Territorial jurisdiction and time of holding courts in, 47.

Massachusetts—

Exemption laws of, 481.
Territorial jurisdiction and time of holding courts in, 47.

Master in chancery—

Referee may be a, 108.

Maturity of debt—

Not necessary to make it provable, 287.

Mechanic's lien—

Created by statute, 601.
Enforce, how to, 602.
Jurisdiction to enforce, in court of bankruptcy, 603.
Trustee should be a party to suit to enforce, 602.
Valid, when, 601.

References are to pages.

Meetings of creditors—
Appearance of no creditor and no assets, 277.
Assignee of claim may vote, when, 270.
Attorney, agent, etc., may vote, when, 269.
Bankrupt to attend first, 272, 274, 631.
examination of, 275.
when not compelled to attend, 631.
expense of attending, paid, when, 631.
Compositions, to consider, 680.
Conduct of first, how to, 273.
Court to call, when, 279.
to fix place of first, when, 268.
Creditors, effect of disallowing claim of after voting, 273.
entitled to vote, what, 269.
fail to attend first, 273.
Final, called when, 280.
proceedings at, 734.
First, allowance of claims at, 274.
bankrupt to attend, 273, 631.
conduct, how to, 273.
court may fix place, when, 268.
creditors fail to attend, when, 273.
how to call, 268.
notice to creditors, 268.
organizing, 273.
place of holding, 205.
referee to preside, 112, 274.
time of holding, 268, 273.
trustee appointed at, 275.
vote at, who entitled to, 269.
Majority necessary to valid act of, 277.
Notice of first, 268.
of subsequent, 279.
Objections to allowance of claims at first, 272.
Other than first, when held, 279.
Present, who are considered, 277.
Proving and allowing claims, 274.
Referee to preside at first, 112, 274.
preside at subsequent meetings, need not, 280.
Secured claims, holders of, not entitled to vote, 269, 270.
Subsequent, time and place, 279.
Trustees appointed at, 275.
to lay detailed statements before final, 734.
Voters at, 269.

Memberships in exchanges—
Pass to trustee, 406.

"Mercantile pursuits"—
What are, 150.

Michigan—
Exemption laws of, 484.
Territorial jurisdiction and time of holding courts in, 47

Minnesota—
Exemption laws of, 487.
Territorial jurisdiction and time of holding courts in, 48

Mileage—
Bankrupt entitled to expenses, when, 617.
Witnesses before referees, of, when to be first paid or tendered, 619.

References are to pages.

Military uniforms, arms, etc.—
Exempted, 422.

Minors—
Unclaimed dividends, time for claiming, 733.
(See also INFANTS.)

Misappropriation—
Debts created by, not affected by discharge, 775.
Offense by trustee, of property, 655.

Misdemeanor—
(See OFFENSES.)

Mississippi—
Exemption laws of, 491.
Territorial jurisdiction and time of holding courts in, 49.

Missouri—
Exemption laws of, 494.
Territorial jurisdiction and time of holding courts in, 49.

Moneys—
Depositories designated for, 353, 717.
Investment of, belonging to estate, 354.
Trustee to collect, deposit, etc 353, 717.
to disburse, how, 732.

Montana—
Exemption laws of, 497.
Territorial jurisdiction and time of holding courts in, 51.

Mortgages—
Actual loan, valid to extent of, 592.
Avoided if invalid under state law, may be, 595.
Court will uphold valid, 591.
Enforced in state courts, when, 709.
in bankruptcy court, 710.
Essentials to invalidity of, 593.
Exchange of securities, 593.
Exempt property, valid on, 593.
Foreclosure not allowed in bankruptcy court, when, 595.
Future advances, valid for, 593.
Individual property to secure firm debt, 594.
Pre-existing debt, invalid to secure, 594.
Preference, when, created by, 591, *et seq.*
Prior promise, when valid to secure, 592.
Renewal valid, 592.
Sale of property subject to or free of, 704, *et seq.* (See SALE.)
States, on property in two, 593.
laws of, followed, 595.
Third person in trust for creditor to, 595.
Trustee may redeem from, 704.
Unidentified part of mass, to, 595.
Valid if not made within four months, 592.
to secure *bona fide* loan, 592.
by state law, must be, 595.
unless reasonable cause to believe a preference was intended, 592.
Voidable, when, 593.

References are to pages.

Motion—
Dismiss petition, to, 223.
Proper method of objecting to irregularity of service, 209.
Receiver, for, 211.
Seize bankrupt's property, to, 216.
Set aside adjudication, to, 234.
Strike out answer, to, 229.
Temporary injunction, for, 215.

Mutilate—
(See CONCEALING.)

Mutual debts and credits—
Debts acquired by purchase to be set off, 316.
Meaning of, 309.
Must be in same right, 313.
exceptions, 315.
preferred creditors, 317.
Mutuality required, 311.
deposits for specific purpose, 312.
deposits with power to sell, 313.
intention not necessary, 312.
nature need not be same, 312.
preferred creditors, 317.
Partnership, 315.
Payable at different times, 311.
Preferred creditors, 317.
Provable debts may be set off, 307, 310, 315.
costs, 316.
Waiver, 314, 317.
What are, 309.

N.

National bank—
Involuntary bankrupt, can not be adjudged, 141.

Nebraska—
Exemption laws of, 499.
Territorial jurisdiction and time of holding courts in, 51

Ne exeat—
(See BANKRUPT, DETENTION FOR EXAMINATION.)

Negotiable instruments—
Notice of dishonor, 407.
Pass to trustee, 407.
Payment of, a preference, when, 585.

Nevada—
Exemption laws of, 502.
Territorial jurisdiction and time of holding courts in, 51

New credit—
When claim for, may be set off, 317.

New Hampshire—
Exemption laws of, 505.
Territorial jurisdiction and time of holding courts in, 51.

New Jersey—
Exemption laws of, 507.
Territorial jurisdiction and time of holding courts in, 51.

References are to pages.

New Mexico—

Exemption laws of, 510.
Territorial jurisdiction and time of holding courts in, 52.

New promise—

Declaration on old debt, 779.
Discharged debt revived by, 779.
May be made when, 781.
May be made to whom, 780.
Must be in writing, when, 779.
Not negotiable, 781.
Pleading, 779, 782.
What is necessary to constitute, 780.

Newspaper—

Notice of application for discharge published in, 737.
Notice of first creditors' meeting published in, 269.

New trustee—

When appointed, 348, 358, 789.

New York—

Exemption laws of, 512.
Territorial jurisdiction and time of holding courts in, 52.

Notes, promissory, etc.—

Pass to trustee, 407.

North Carolina—

Exemption laws of, 515.
Territorial jurisdiction and time of holding courts in, 53.

North Dakota—

Exemption laws of, 516.
Territorial jurisdiction and time of holding courts, 54.

Notary—

Attorney may act as, 134.

Notice—

Adjudication in voluntary cases, none before, 184.
Amendment of, not required, 187.
Application for receiver, 212.
Application for removal of trustee, 356.
Arbitrate or compromise, of hearing of application to, 699.
Attorney, to, 135.
Bankrupt, to, of his examination, 618.
Composition, certified copy of order confirming imparts, when, 696.
Creditors, to (see 58*a* of act).
compromise, of hearing of petition to, 699, 716.
composition, of meetings to consider terms of, 681.
of hearing of objections to, 685.
petition to set aside, 697.
discharge, of application for, by mail, 736.
publication of order of notice of, 736.
dismissal of involuntary petition, 239.
of voluntary petition, 187.
dividend, declaration of, 718, 720.
payment of, 720.

References are to pages.

Notice (continued)—

Creditors (continued)—
examinations of bankrupt, 617.
of application for, not required, 617.
of witnesses, not required, 618.
final meeting, 718.
final reports and closing estate, 734.
first creditors' meeting, of, 268.
meeting, of first, 268.
subsequent to first, 279.
to consider terms of composition, 680.
publication of, of first meeting, 269.
redeem property, of application to, 705.
referees to give, 122.
sale of disputed property, 711.
encumbered property, 706, 707.
perishable property, not required, 712.
unencumbered property, 703.
Depositions, of taking, 344.
Discharge, of application for, 736.
does not release from unscheduled claims unless creditor had, 768.
petition, of, to set aside, 787.
Dishonor of negotiable instruments, 407.
Filing petition, how far, 366.
Given by referee, 123.
Hearing of, 230.
How far bankruptcy proceedings are, 70.
Newspaper, of application for discharge published in, 736.
of first meeting published in, 269.
Partner to, of petition, 250, 253.
Petition, how far, 366.
Petition involuntary, not dismissed without, 239.
voluntary, not dismissd without, 187.
Preference was intended, what is, 577.
Protest, of, to whom given, 407.
Reasonable, what is, 618.
Receiver, application for, 212.
Re-examination of claim, of, 342.
Referee gives, by mail, 123.
Sales, generally, 703, 706, 707, 711, 712.
of pledge by pledgee, 598.
Service, 253.
Trial, of, 230.
Trustee's bond, certified copy of order approving, recorded imparts, 367.
Trustee, of his appointment, 278.
of his acceptance, 278.
of application for removal, 356.
Witnesses, to, for examination, 618.

Number—

Arbitrators, of, 700.
Creditors, of, who may file involuntary petition, 190, 202.
employees can not be counted, 192.
nor relatives within third degree, 192
necessary for majority at creditors' meeting, 277
Referees, of, to be appointed, 107.
Trustees, of, 348.

References are to pages.

O.

Oath—

Administered by whom, generally, 177, 201, 330.
by referee, 115.
Affirmation included in, 177.
Answer to, 227.
Attorney, verification by, 134.
Bankrupt to make, to schedule of property, list of creditors and claims for exemptions, filed, etc., 177.
Claim founded on lost writing, proof of, under, 330.
presenting false, under, penalty, 661.
Creditors' petition, to, 200.
by whom made, 201.
Debtor's petition, to, 177.
False, penalty for making, 611. (See OFFENSES.)
Proof of claims, to, 330.
Referee, of, 109.
Schedule to be made under, 178.
Trustee's final report to be under, 718, 734.
Verification by attorney, 134, 201.
of answer, 227.
of petition, 200.
petition for discharge not necessary, 736.
specifications in opposition to discharge, 744.

Obedience of orders—

(See CONTEMPT.)

Objections—

Adjudication, how plead, against, 223.
Claims, to, proof of, 340.
Confirming compositions, 685.
Discharge, how to make, to granting, 740.
grounds of, to granting, 744.
Referee must note, in depositions,, 623.
Sale, how and when to raise, to, 714.
Service of subpœna, to make, to, 209.

Obligation of contracts—

Congress may modify, 18.
States can not impair, 21.

Offenses—

Bankrupt act, under, 655.
Concealing property, 656.
friend, payment to, 658.
husband, by, 657.
imputed, not, 657.
includes what, 656.
knowingly and fraudulently, must be, 656.
omission from schedules, 657, 658.
penalty, 660.
proof of, 659.
property which passes to trustee, must be, of, 657.
receivership, after, 657.
relatives, payment of debts to, 658.
secret trust, 657.
shrinkage of assets unexplained, 658.
transfer, not a, 656.

References are to pages.

Offenses (continued)—
Contempt, 666.
acts which constitute a, 666, *et seq.*
answer of contemnor, 673.
attorney, by, 135, 670.
courts, power of, to punish for, 666, 669.
committed in another court, 675.
power to release contemnor, 674, 675.
hearing, 674.
nature of proceedings, 670.
petition or motion for commitment, allegations of, 671.
practice pleading, etc., 671.
punishment for, 675.
relief by *habeas corpus*, 676.
review, 676.
Embezzlement, 655.
penalty for, 656.
Extorting money for forbearing to act, 662.
punishment for, 662.
False oath or account, making, 660.
evidence of, 660.
examination on, by bankrupt, 660.
indictment, allegations in, 661.
knowingly made, must be, 660.
penalty for, 661.
who may be guilty of, 661.
False claims, presenting under, 661.
penalty for, 662.
using in compositions, 661.
who may commit, 661.
Indictment, averments in, 665.
Information, 664.
Jurisdiction to punish for, what court has, 663.
Jury trial, right of, 664.
Misappropriation by trustee, 655.
penalty for, 656.
Misdemeanors, are not felonies, but, 655.
Obtaining goods by false pretenses, 655.
Practice and pleading to punish for, 664.
court which may entertain proceedings, 663.
indictments, averments in, 665.
information, when employed, 664.
time for instituting criminal proceedings, 665.
Punished, who are liable to be, 665.
Receiving property from bankrupt, 662.
penalty for, 662.
Referee, acting when interested, 125, 663.
purchasing property of bankrupt, 125, 663.
refusing to permit inspection of accounts, 125, 663.
Trustee refusing, etc., inspection of accounts, 663.
misappropriation by, 655.
United States laws applicable as to jury trials for, 664.
(See also CRIMES.)

Offer—
Composition, of, when made, 679.

Office—
Referee can not hold any other, except, etc., 108.
must have, in, or be resident of district, 108
term of, 108.
Trustee must have, in, or be resident of district, 349.

References are to pages.

Officers—
Attorney-General, 133.
Clerk, 129.
Debts of an, not released by discharge, when, 774.
Definition of, 134.
Marshal, 132.
Oaths, authorized to administer, 177, 206, 330, 1136.
Receiver, 134.
Referee, 107.
Trustee, 348.

Official bonds—
(See BONDS.)

Official trustee—
Can not be appointed, 349.

Ohio—
Exemption laws of, 520.
Territorial jurisdiction and time of holding courts in, 54.

Oklahoma—
Exemption laws in, 524.
Territorial jurisdiction and time of holding courts in, 55.

Onerous property—
Trustee not bound to take, 371, 378, 397, 406, 411, 417.

Open account—
May be proved against estate, 301.

Operation of law—
Title of bankrupt vests in trustee by, 365.

Opposition—
Composition, to confirmation of, 685.
Discharge, to granting, 739.
grounds of, 744.

Order—
Adjudication, of, on debtor's petition, 184.
on creditor's petition, 233.
conclusiveness of, 234.
Certified copies of, as evidence, 735.
approving trustee's bond, 367.
confirming, etc., composition, 693, 697.
Composition, of confirmation of a, 692.
Court to enforce, 68, 632.
what is an, of, 632.
when a person is subject to, of, 632.
Discharge, denying a, 754.
granting a, 754.
Examination, for an, 616.
Proceduce, as to, United States supreme court to prescribe, 845.
Prisoner, of court to release, 646.
Proceedings, of, when petition is filed in different districts, 228.
when several petitions are filed in same district, 229.
Protect, to, the estate *pendente lite*, 210.
state officers in releasing prisoner, 646.
Reference, of, 235.
Referees, of, 112.
subject to review by judge, 112.

References are to pages.

Order (continued)—
Setting aside composition, 697.
discharge, 784.
preference or conveyance, 610.
Transferring cases in bankruptcy, 228, 252.
Trustee, vesting title in, 367.
for removal of, 357.
Warrant for removal of bankrupt to another district, 652.

Orders in bankruptcy—
(See GENERAL ORDERS.)

Oregon—
Exemption laws of, 526.
Territorial jurisdiction and time of holding courts in, 55.

P.

Papers—
Bankrupt to execute and deliver, 633.
Certified copies of, before referee as evidence, 113.
Penalty for refusing inspection of, by referee and trustee, 125, 663.
Referees to receive from clerks, 123, 130.
to endorse, how, 124.
secure return of, 123, 125.
transmit to clerks, 122, 125.
to judge, 122.
Trustee, of, open to inspection, 125.
pass to, what, 377.

Parties—
Additional, courts may substitute in bankruptcy proceedings, 68.
Appeal, to an, in bankruptcy, 823.
Creditors may appear to become, 219.
Discharge, "parties in interest" may oppose a, 739.
Evidence to be preserved by referee on application of, 122.
Referee to furnish information to, 122.
Trustee to furnish information to, 353.

Partners—
Acts of bankruptcy by, 172.
Administration of property of, 255.
Contesting voluntary petition, 184.
Discharge on, effect of a, 2[illegible]5.
of one, effect on others, 776.
Petition by or against individual, 244.
Proceedings peculiar to, 247.
Rights of partner who refuses to join in petition, 250.
Surviving, may be adjudged bankrupt, 247.
(See PARTNERSHIPS.)

Partnerships—
Acts of bankruptcy by, 152, 200, 246, 249.
by less than all the partners, 249.
Adjudication, 233, 253, 254.
Administration of estate of, 255.
general rule waived, when, 258.
when all are not bankrupt, 244, 255.
Bankrupt, when, may be adjudged, 244, 246.
may be adjudged involuntary, 141.
may be adjudged voluntary, 141
not after death of partner, 247.
surviving partner may be adjudged, 247

References are to pages.

Partnerships (continued)—
Books of, destroyed, effect of, 749.
Business, settlement of when all are not bankrupts, 245.
Claims, proof of, against a, 329.
proof of, by a, 244, 322.
by a solvent partner against, 285.
of, against individual estate, 244.
Commence proceedings by or against, how to, 248.
Composition, who may vote on, offered by, 681.
Creditors of, appoint trustee, 270.
when, may vote for trustee of individual estate of partner, 270.
Death of partner before bankruptcy, 247.
Debts of, what are, 260.
how paid, 255.
joint and separate, 262.
Discharge, from what debts; 254, 265.
effect of, 265.
of one partner, effect of, 776.
Dissolution, may be adjudged bankrupt after, 247.
Equitable principles followed, 243.
Estates, firm and individual, 255.
individual, partnership creditors sharing, 257, 720.
Exemptions in property of, 443.
Expenses of administration, 255.
Firm creditors may share in individual estate, when, 256, 720.
Firm property, what is, 258.
In general, 243.
Individual, petition by or against, 244.
discharge in, effect of, 245.
partnership assets only administered, 245.
partnership creditor may join, 245.
resisted by other partners, may be, 250.
when no firm assets, 246.
Individual property, what is, 259.
Infancy of one partner, effect of, 248.
Insolvent, when, 157.
Jurisdiction of one partner sufficient, 244, 251.
Limited, when corporation, 146.
Mutual debts and credits, 315.
Payment of debts of, 255.
Petition against, by creditors, 249.
by all partners, 248.
by less than all partners, 184, 244, 250.
filed by partners, 243.
filed in what court, 251.
filed in several districts, 251.
form of, 252.
must charge what act of bankruptcy, 200.
partners should all be named in, 251.
when partner will not join in, 250.
Payment of debts of, order of, 255.
Proceedings peculiar to, 243.
Proof of claim against a, 329.
by a, 244, 322.
Reference, 253.
Schedules, 252.
Settlement of business when all are not bankrupts, 245.
Several adjudged bankrupt, 256.
Surplus of property, 255.
Surviving partner may be adjudged a bankrupt, 247.
Transfer of cases against different members of, 252.

References are to pages.

Partnerships (continued)—
Trustee, accounts of, 255.
administers firm and individual estate, 255.
appointed by partnership creditors, 244, 255.
who may vote for, 270.
What is firm and individual property, 258.

Patents—
Trustee invested with title of, 378.

Payment—
Attorneys, to, in contemplation of insolvency, re-examination of, 586.
Debts, of, which have priority, 723.
order of, 725.
Defense, as a, to petition against debtor, 227.
Dividends, of, on allowed claims, 732.
notice to creditors of, 718, 720.
unclaimed dividends, 733.
Preference created by, 584, *et seq.*

Penalties—
Concealing property, 660.
Debts, 284.
due as, how far allowed, 730.
Document, for secreting or destroying, 656.
Embezzlement, 656.
Extorting money, etc., 662.
False oath, making, 661.
False claims, presenting, 662.
Receiving property from bankrupt, to defeat act, 662.
Refusing inspection of books by referee or trustee, 125, 663.
(See also OFFENSES.)

Pennsylvania—
Exemption laws of, 528.
Jurisdiction and time of holding courts in, 56.

Pensions—
Do not pass to trustee, 408.

Perishable property—
May be sold without notice to creditors, 711.

Perjury—
Jurisdiction of state court, 623.

Permitting or suffering—
A lien, by legal proceedings, 105.
void as a preference, when, 565.

Personal property—
Not to be sold for less than 75 per cent. of appraised value, 713, 714.
Schedule of, 181.
Passes to trustee, 394, 403.

Persons—
Definition of, 141.
Involuntary bankrupts, who may be adjudged, 141.
Voluntary bankrupts, who may be adjudged, 141

References are to pages.

Petition—
Act of bankruptcy, filing a, 169.
Allegations of a, 142*n*, 147, 198.
Amendment of, 186, 199, 223.
Appeal, for an, 827.
Arrest of bankrupt, for, 641.
Bar to subsequent proceedings in state court, not, 77.
Composition, to set aside, 697.
Compromise debts, to, 716.
Creditor's petition against debtor, 198.
against whom filed, 194.
by whom filed, 189.
court in which filed, 197.
number of copies filed, 201.
number of, may be filed, 197.
service of, 203.
time for filing, 201.
what to contain, 142*n*, 147, 198.
where filed, 201.
Debtor's, 176.
amended when may be, 186.
by whom filed, 172.
court in which filed, 174.
filing of, and schedule, 182.
Discharge, for, 736.
dismissal of—
involuntary dismissal of, 239.
voluntary, 187.
Filed by and against whom, 194.
how to file, 201.
in what court, 174.
number of copies to be, 182.
where, 182.
Involuntary, must state what, 142*n*, 147.
Multifarious, 200.
Partnership by and against, 184, 243, *et seq.*
Procedure when filed in different districts, 228.
when several, filed in same district, 229.
Redeem, to, encumbered property, 705.
Rehearing in appellate court, 840.
Sale, for, 703, 706, 711.
Service, 203, 208.
Summons returnable when, 204.
Supervisory, in C. C. A., 813.
To review ruling of referee, 118.
what to contain, 119.
where filed, 119.
Two against same debtor, 197, 228, 229.
in partnership proceedings, 252.
Verification, 200.
Voluntary, 176.
Who may join in, 202.

Petitioners—
Bond, by, on taking property, 217.
Who may be, in involuntary cases, 189.
Who may be, in voluntary cases, 172.

Place—
Business, of, meaning of, 175.
Courts of, holding, 33, *et seq.*
Creditors' meeting, of, 268.
when bankrupt required to attend, 272, 274, 631.

References are to pages.

Pleading and practice—

Appeal at law and in equity, 790.
bankruptcy in, to circuit courts of appeal, 816.
to territorial courts, 807.
to U. S. supreme court, 795.
bond, 828.
citation, 830.
death of party, 840.
how to take an, 821.
mandate issued when, 842.
parties to an, 823.
perfecting an, and filing record, 836.
petition, 827.
proceedings after, taken, 838.
record on, 833.
amendment of, 835.
supervisory proceedings, 808, 812.
time within which to take an, 820.
Appellate courts, 790.
Arbitration of controversies, 698.
Arrest of bankrupt, on, 641.
Compositions, 677.
application for confirmation, 682.
bankrupt may offer terms of, when, 679.
confirmation of, effect of, 693.
objections to a, 685.
order of, 692.
proceedings after, 695.
creditors' meeting to consider terms, 680.
hearing of objections to confirmation, 691.
objections, 685.
order of confirmation, 692.
effect of, 693.
pleaded in bar, must be, 695.
proceedings after confirmation, 695.
setting aside a, 697.
Criminal proceedings, in, 664.
Discharge—
application for, 736.
when and where filed, 737.
grounds for opposing a, 744, *et seq.*
hearing of objections, 752.
objections to, how made, 739.
pleading a, to suit on debt, 782.
to a specification, 739, 752.
revoke a, how and when to, 787.
effect of, 788.
specification of objections, 742.
pleading to, 739, 752.
waiver of, by new promise, 779, 782.
who may plead, 783.
Distribution of the estate, 717.
dividends, declaration of, 718, 720.
manner of paying, 732.
unclaimed, 733.
order of payment of claims, 725.
settlement of the estate, 733.
Equity practice, rules of applied, 230*n*.
Evidence against bankrupt not used in criminal proceedings, 625.
answers of witnesses not satisfactory, 622
burden of proof, habeas corpus proceedings, 640

References are to pages.

Pleading and practice (continued)—
Evidence (continued)—
involuntary proceedings, 231, 232.
suits to recover property, 609.
compulsory attendance of witnesses, 115.
depositions in involuntary cases, 232.
notice of taking, 344.
prove claims to, 327.
right to take, 232, 344, 628.
manner of introducing, 232.
referees, how taken before, 620.
power to take, 115.
preserved by, when, 122.
record of, as, 735.
Forms prescribed by supreme court, 865.
Fraud, where a discharge is set up as a defense, 771.
Involuntary cases, 189.
adjudication, 233.
against whom petition filed, 194.
amendments, 199, 223, 237.
answer, 224.
bankrupt to file list of creditors and of property, 178, 221.
default proceedings on, 236.
deposit for costs, 202.
dismissing proceedings, 18.
hearing on trial, 230.
order of adjudication, 233.
of proceedings, 228.
petition, involuntary, 198.
allegations necessary, 142*n*, 147, 198.
dismissal of, 239.
filed where, 197.
multifarious, 200.
pleading to, 222.
service of, 205.
verification of, 200.
pleading to a petition, 222.
proceeding subsequent to adjudication, 242.
reference, order of, 235.
referee, case referred to, 110, 235.
reply, 229.
seizure of debtor's property, 216.
service of subpœna and petition, 203.
return of, 207.
subpœna, 203.
time to plead, 222.
verification of petition, 200.
Issue, how made, 223.
none permitted on petition to supervise, 815.
Jury trial. (See JURY.)
Limitations, statute of, 361.
Merits, pleading to, waives formal defects, 223.
Multifariousness, 200.
New promise, after discharge, 779, 782.
Notices. (See NOTICE.)
Oaths and affirmations. (See OATHS.)
Orders of reference, 114, 184, 235.
protect, to, estate pending adjudication, 210.
referees, subject to review, 112.
Petition, involuntary, must contain what allegations, 142*n*, 147.
Rulers, orders, etc., prescribed by supreme court, 845.

References are to pages.

Pleading and practice (continued)—
Suits by or against trustees, 358, 605, 716.
Voluntary cases, 172.
amendments, 186.
court in which to file, 174.
dismissing proceedings, 187.
deposit for costs, 182.
how and when to file petition, etc., 182.
order of adjudication and reference, 184.
petition, 176.
filing, 182.
verification of, 177.
proceedings subsequent to adjudication, 188.
schedules, 178.
filing, 182.

Pledge—
Fraudulent, when not, 597.
Enforcement of, 598.
Negotiable paper, redelivery for collection, 599.
Prior promise, given in pursuance of, 597.
Preference when, 597.
Redeemed by trustee, 598.

Plenary suits—
(See JURISDICTION.)

Policies of insurance—
When pass to trustee, 408, *et seq.*
(See also INSURANCE.)

Possession—
Bankruptcy court, of, can not be disturbed by process from other court, 100.
Bankrupt's property, of, pending hearing, etc., 216.
petitioner to give bond, 217.
power of bankrupt court to take, 96.
when bankrupt is neglecting property, etc., 216.
petitioner to give bond of indemnity, 217.
bankrupt to give bond to release, 219.
Exempt property of, by trustee, 429.
Referee to take, when, 112, 117.
Trustee to take, of bankrupt's property, 370.

Powers of appointment—
Pass to and vest in trustee, when, 379.

Power of attorney—
Must be written, when, 135, 269.

Powers of congress—
(See CONGRESS.)

Powers of courts—
(See JURISDICTION.)

Powers of referee—
(See REFEREE.)

Powers of trustee—
(See TRUSTEE.)

References are to pages.

Preference—
As an act of bankruptcy—
created by the debtor, 161.
examples, 162.
intent necessary, 162.
voidable by trustee, need not be, 162.
what necessary, 161.
created by legal proceedings, 164.
insolvency necessary, 164, 165.
intent not necessary, 164.
legal proceedings, what are, 166.
must be acquired when, 167.
suffered or permitted, 165.
voidable by trustee, need not be, 166.
what constitutes, 164.
Costs of preserving estate, payment of not avoidable, 561.
of administration, payment of not avoidable, 561.
when committed, 165.
Create, what is necessary to, 387.
Creditors, of, residing in United States, 722*n*.
must be to, 573.
Filing fees, payment of not avoidable, 561.
Foreigner, given to a, 573.
Four months, must be within, 581.
when within, 582.
General nature of, 560.
Given within four months, 581.
Insolvent, must be by, 574.
Intent of transferee, 576.
Insolvency essential, 574.
Invalid, when, 562.
Judgments and transfers, 563.
attachments, levies, etc., 563.
obtained prior to four months, 563.
obtained within four months, 565.
Lien, as a, 599.
Attaches when a, 564, 567.
court may preserve a judicial, when, 569.
valid, 561.
Mortgage, when a, 591. (See MORTGAGES.)
Payment, when a, 584, *et seq.*
Pledge, when a, 597.
Property transferred to prefer creditors passes to trustee, 385.
"Reasonable cause to believe," 570*n*, 577.
Return of goods purchased on credit, 591.
Sale, when a, 589, *et seq.*
Suits to set aside a, 605.
bankruptcy proceedings, not, 608.
burden of proof, 609.
bona fide purchaser protected, 610, 611.
damages, where property has been sold, 611.
decree, 610.
demand, not necessary, 609.
failure to contest claim, not a bar, 609.
in what court, 607.
in what district, 608.
order, 610.
order of bankruptcy court, trustee need not obtain, 609.
petition, allegations in, 609.
pleading and practice, 608.
plenary, are, 608.
trustee, must bring, 606.

References are to pages.

Preference (continued)—
Suits (continued)—
trustee represents general creditors, 606.
trustee subrogated to right of creditors, 606.
Surrender, what constitutes a, 334.
when necessary, 332, 581.
whether it must be voluntary, 336.
Taxes, payment of, not a voidable, 561.
Time begins to run, when, 582.
four months' limit, 581.
Transfers by, 571.
to one who has cause to believe it a, 577.
voluntary or by threat, 573.
Valid, when, 561.
Voidable, when, 572.
Voluntary or by threat, 573.
Wages, payment of not a voidable, 561.

Preferred creditors—
Claims of, not allowed unless, etc., 332.
Prove claims, 324.
Set-off of further credit by, 317.
When preference voidable, 560.
Who are, 560, *et seq.*
(See also CREDITORS.)

Preliminary injunction —
To protect the estate, 211, 214.
(See INJUNCTION.)

Presumption—
As to solvency, 158, 575.
As to intent to prefer, 158.
As to fraud in compositions, 690.
Knowledge of attorney, from, 788.

Priority—
Debts which have. (See DEBTS.)

Principal place of business —
What is, 175.

Procedure—
United States supreme court to prescribe rules, etc., 845.
(See PLEADING AND PRACTICE.)

Proceedings—
Dismissal of, 187, 239.
Nature of, 70.
Subsequent to adjudication, 188, 242, 268.
When commenced, 70.
Where instituted, 174, 197.

Process—
Bankrupt exempt from arrest upon civil, 635.
Issued by clerk under seal of court, 846.
Service of, 203.
(See WRITS.)

References are to pages.

Proof, burden of—
Confirming compositions, 687.
Discharge, opposing, 753.
Exempt property, 440.
In contested cases 341, 344.
Habeas corpus, in, 646.
On bankrupt, 232.
Of domicile, 426.
On petitioning creditors, 231.
Partnership assets, of, 257.
Preferences in suits to set aside, 575, 609.
Solvency, as to, 155, 232, 575.

Proof of claim—
Administrators, executors, receivers, etc., by, 324.
Affidavit in, what to contain, 327.
Allowance of claims, 272, 340.
burden of proof, 341.
defective, 340.
distinguished from proof, 334.
final, review of, 346.
fraudulent, 345.
objections, when usually made, 341.
objections, who may make, 340.
Amendment of, 335, 338.
Appearance to, effect of, 221.
Assignee of claim, by, 324, 329.
for creditors, by, 323.
Attorney may act as notary, 134.
may make, 322.
Change of, 339.
Consideration to be stated, 327.
Contingent claims, 324, 720.
Corporation, by a, 322.
Filing, 337.
Form of proof, 327.
Founded on a writing, 330.
How to make, 326.
assignee, by, 329.
attorney or agent, by, 329.
consideration, 327.
exhibits, 330.
forms of, 327.
founded on instrument in writing, 330.
founded on open account, 329.
partnership against, 329.
payments must be stated, 326.
security must be stated, 326, 329.
signed by creditor, must be, 326, 330.
under oath, must be, 326, 330.
Necessity of, 321.
Notary, attorney may act as, 134.
Oath to, 330.
Objections to allowance, 340.
Open account, in, 329.
Partners, by, 322.
Partnership, against a, 329.
by a, 244, 322.
Petitioning creditors must make, 321.
Preferred creditors must make, 324.
how to make, by, 332.
surrender of preference, 338.

References are to pages.

Proof of claim (continued)—
Preferred creditors (continued)—
surrender, what constitutes, 334.
Receivers, by, 324.
Re-examination of, 342. (See CLAIMS.)
Review of final action on, 346.
Scheduling not sufficient, 321.
Secured creditors must make, 321, 331.
amendment, 335.
how to make, by, 295, *et seq.*, 331, 604.
Solvent partner by, 285.
surety, by, for principal, 296, *et seq.*
Time within, may be made, 325.
by person prevented by fraud, 326.
Trustee of bankrupt, by, 323, 355.
United States, by, 324.
Who may prove, 322.
examples, 323.
Withdrawal, 338.
(See CLAIMS, CREDITORS.)

Property—
After-acquired, what is, 415.
Concealing, embezzling, etc., penalty for, 656, *et seq.*
Custody, in, of court other than court of bankruptcy, 96.
can not be taken by process from another court, 76.
Encumbered trustee not bound to take, 371.
Foreign countries conveyed in, by bankrupt, 367, 376.
personal in, 377.
Individual, what is, 259.
Insured, may be ordered, 118, 213.
Judgments in actions for willful injuries to, not released, etc., 768.
Partnership of, administration of, 253.
Partnership, what is, 258.
Passes to trustee, what, 365, *et seq.*, 376.
Possession, of, of bankrupt, when taken by creditors, 216.
when taken by referee, 112.
when taken by judge, 117.
when taken by trustee, 370.
in, of third persons, how collected, 96, 605, 716.
Receiving from bankrupt with intent to defraud, 662.
Referee purchasing when interested, penalty, 663.
to take possession and release when, 117.
Seizure of, 216.
Sold, can not be, for less than 75 per cent. of appraised value, 713, 714.
conditionally, 375.
Title to, vests in trustee when, 365.
Transferred before adjudication, 366.
between adjudication and appointment of trustee, 365.
revests in bankrupt, when, 369, 693, 696.
Third persons, of, in possession of bankrupt, 372, 668.
contempt to replevin in state court, 374.
fraudulent sales, 374.
Trustee to convey, sold, 713.
secreting or destroying, 655.
title to, vests in when, 365.
title to what, vests in, 365, *et seq.*, 376.
turned over to, by bankrupt, 668.
(See also ESTATES.)

References are to pages.

Prosecution—
(See OFFENSE.)

Protection—
Bankrupt, of, from arrest, 635. (See ARREST.)
Estate, to, mode of proceeding for the, 210.
applications for, how made, 212.
appoint receiver, etc., 211.
injunction for, 211, 214.
seizure of property of, 216.

Protest—
Notice to whom given, 407.

Provable claims—
Assignee, 324.
Assignee, expenses of, 286.
Bankrupt is endorser, etc., where, 294.
Contingent demands and liabilities, 286, 288.
Contracts, founded upon, 301.
contingent, 303.
contract may be oral, 302.
contract must have been made prior to proceedings, 302.
covenants in lease, 306.
examples, 302.
illegal consideration, 304.
must arise in one year, 302.
need not be owing, 301.
quasi contract, 303, 319.
Costs, 301.
Counter claims, 308.
Damages to persons, 318.
Debts "absolutely owing," 288.
due at a future date, 289.
evidenced by a writing, 293.
evidenced by a judgment, 289.
founded on contract, 301.
founded on open account, 301.
Equitable debts, 285.
Expenses of administration, 285.
Fixed liability, what is a, 284.
How to prove, 321.
Interest, 299.
amount of, 300.
rebate of, 300.
stops on filing petition, 300.
usury dependent on state laws, 300.
Judgments pending bankruptcy, 292.
prior to bankruptcy, 290.
appealed, 291.
going behind, 291.
must be for a "debt," 290.
obtained within four months, 291.
Liens barred by limitation, 320.
Liquidated, must be, 281.
Mutual debts and credits, 307, *et seq.* (See MUTUAL DEBTS AND CREDITS.)
what are, 309.
Penalties, 284, 730.
Preferred creditors, rights to set-offs, 317.
Principal and surety both bankrupts, 298.
Proved within one year, must be, 320, 325.

References are to pages.

Provable claims (continued)—
Rent, 304. (See RENT.)
Secured claims, 283.
Set-offs and counter claims, 308, 310, 315.
acquired by purchase, 310, 316.
Surety for bankrupt, 295, *et seq.*
amount for which principal creditor may prove, 297.
amount for which surety may prove, 296.
Statute of limitations, what are barred by, 319.
Stockholders' liability, 282*n*.
Torts 318.
What are, 193, 281, 761.
(See DEBT.)

Proxy—
Penalty for using false claim in composition, as or by, 662.
Vote at creditors' meeting, when may, 269.

Publication—
Application for discharge of, 737.
Notice of first creditors' meeting. of, 268.
Service, by, when permitted, 208.
partnership proceedings, in, 253.

Punishment—
(See OFFENSES.)

Purchaser—
Bankrupt may be a, at sale, 713.
Bona fide, for value, etc., title by levy, lien, etc., not impaired, 565.
for present consideration protected, 384.
Referee can not become a, 125, 663, 713.
Trustee can not become a, 713.
attorney or agent of, can not be, 713.

Q.

Qualification—
Referees, of, 107.
Trustees, of, 348.
Vote to, at creditors' meetings, 269.

R.

Railroad companies—
Can not be adjudged bankrupt, 150.

Real estate—
Included in schedule, 178, 221.
Not to be sold for less than 75 per cent. of appraised value, 713, 714.
What passes to trustee, 395.

Reallowance of claims—
When may be made, 342.

Reasonable attorney fee—
(See ATTORNEYS.)

References are to pages.

Reasonable cause to believe—
That preference has been given, 570*n*, 577.

Receivers—
Ancillary, 213.
Application for, 212.
notice of, 212.
Appointment of, an act of bankruptcy, 153, 167.
Appointment of by bankrupt court, 211, 212.
Business of bankrupt may be conducted by, 211.
Compensation of, 214.
Courts of bankruptcy to appoint, 211.
Judge to appoint, 212.
Objections to report of, 214.
Officer to include, 134.
Powers of, 213.
Proof of claims by, 324.
Referees may appoint, 117, 212.
Reports of, objections to, 214.
Sell, may, when, 702.

Reconsideration of claims—
(See RE-ALLOWANCE OF CLAIMS.)

Record—
Appeal—
amendment of, upon, 834, 835.
failure of appellant to file, 837.
filed, when must be, 836.
printing, 838.
what must consist of, 833.
Bankrupt's destruction of, prevents discharge, 748.
Decree of adjudication, of, 367.
Inspection of, refused by trustee or referee, 125, 663.
Notice imparted by, of order confirming composition, 696.
trustee's title, of, is, 367.
Referee's—
dividends, to contain, 721.
how made, 122, 124.
to be made by, 122, 735.
transmitted to judge with findings by, when, 122.
Time after, only counted in four months' limitation, 170.

Recovery—
Dividends, of, on reconsidered claims, 356.
Fraudulent conveyances, of, 360, 384, 390, 605, 716.
Property, of, transferred to attorney, 355, 586.

Redeeming—
Encumbered property from liens, etc., 704.

Re-examination—
Claims, of, 342. (See CLAIMS.)
Payments, of, made to attorneys, 355, 586.

Referee—
Absence or disability of, 107.
Accounts, penalty for refusing inspection of, 125.
Accounts of trustee, to audit, 352, 717, 718.
Acts only after reference, 110.
Administrative duties of, 122.

References are to pages

Referee (continued)—
Adjudication, reference after, 110, 114, 184, 235.
to make when, 111, 114.
Administration of oaths by, 115, 177, 201, 330, 642.
Allow attorney's fees, 135.
Amendments, may allow, 187, 239.
Appointment of, 107.
Attendance of witnesses before, 115.
Attorney—
bankrupt cases, can not act as, in, 114.
should be, 107.
Bond of, 109.
amount of, 109.
failure to give, creates a vacancy, 109, 350.
filed of record in clerk's office, 109.
sureties on, 109, 350.
value of property, 109.
suits on, how and when brought, 109.
Books containing record, etc., to keep, 124.
certify and transmit to court, 124, 735.
Certified copies of proceedings before, evidence, 113, 735.
Claim for exemptions, bankrupt to file copy of, for, 181, 221, 429, 433, 439, 634.
Claims filed before, when case referred, 337.
Clerk hire of, 128.
Clerk to collect fees, 130, 182.
except when, 183.
pay when, 130.
referee to employ, 115.
Collect estate of bankrupt, should not, 111.
Commissioner of deeds, may be, 108.
Commissions on dividends, 126.
Commitment, can not exercise power of, 111, 116, 614, 674.
Compensation of, 126.
none except that expressly authorized, 126.
when case transferred, 127.
when reference revoked, 127.
Compositions, can not approve, 111, 682, 692.
Contempt before, 111, 116, 343, 666, *et seq.*, 747.
proceedings to punish for, 116, 671.
Copies of proceedings before, 113.
Counselor at law can not act as, in bankruptcy cases, 125.
Court may act as, 107.
Creditors' lists, to make and file, when, 122.
Deposition, notice to take, filed with, 344.
Disability, effect of, 107.
Discharges, can not determine, 111.
may report the facts on, 753.
Districts of, court to designate, 107.
Dividends, to declare, 122, 717, 721.
Dividend sheets, to prepare for trustee, 122, 721.
Duties of, 122.
Encumbered property, may order sale of, 704.
Evidence, to preserve when, 123, 124, 344, 620.
to make up record embodying, etc., 125.
Examination—
bankrupt, of, power to regulate, 612.
may conduct an, to be used in another district, when, 616.
may order, 615.
Expenses of, 126, 127.
must keep accurate account of, 128.

References are to pages

Referee (continued)—
Expenses (continued)—
may require indemnity for, when, 128.
Fees of, 126.
apportionment of, 127.
claim for must be passed upon by court, 128.
clerk to collect, 131.
may be ordered paid by judge, 128.
Fined, for what offenses, 125, 663.
Findings, to transmit, etc., to judges when, 124.
Fix time and place of acting upon matters before them, may, 110.
Forfeit office, when, 125.
Government penalty envelopes, may use, 123.
General powers of, 109.
Information to furnish, when, 122.
Inspection of books, etc., must allow, when, 663.
Interested, penalty for acting, when, 125, 663.
Jurisdiction of, 109, *et seq.*
administer oaths, 115.
clerk, employ, 115.
consider petitions, 114.
examine witnesses, 115, 116.
stenographers, employ, 115.
take possession of and release property, 117.
Jury trial, should not preside at, 158.
Justice of the peace, may be, 108.
Limitation of action on bond, 109.
List of creditors, bankrupt to file copy, for, 178.
when to prepare and file, 113.
Marshal, may appoint, 117.
Master in chancery, may be, 108.
Meetings of creditors—
calls first, 268.
presides at first, 112, 273.
Notices to creditors, given by, 122, 123.
to take depositions, filed with, 344.
Number of, 107.
Oath of office by, 109.
to administer, 115, 177, 201, 330, 642.
not in court, 115.
Offenses—
acting when interested, 125, 663.
purchasing property while, 125, 663.
refusing inspection of accounts, etc., 125, 663.
Office, can not hold, except, 108.
must be in district, unless resident of, 108.
term of, 107.
Officers of court, are, 107.
Orders of—
subject to review by judge, 112.
what should be recited in, 112.
Papers to receive from clerks when, 123, 130.
penalty for refusing inspection of, 125, 663.
to be endorsed how, 124.
to transmit to clerk, when, 125.
Parties in interest, to furnish information to, 122.
Payment of fees to, by clerk, 131.
Penalty for offenses by, 125, 663.
Persons holding office under a state or the United States not eligible, except, 108.
Petition, to consider, etc., 114, 184, 236.

References are to pages.

Referee (continued)—
Possession of bankrupt's property, to take, when, 112, 212.
Powers of, 109, *et seq.*
Powers denied to, 111, 113.
Property surrendered to trustee, may order, 118.
Preserve evidence, when, 123, 124.
Punishment for contempt before, 116, 671.
for offenses by, 125, 663.
Purchaser, can not be, of bankrupt's property, when, 125, 663, 713.
Qualifications, 107.
Receivers, may appoint, 117.
Records—
certified by, 124.
penalty for refusing an inspection of, 125, 663.
to keep and transmit to clerks, 122, 124.
to make up and send to judges, 122, 124, 735.
what to include in, 124, 275, 717, 735.
Reference—
cases of, after an adjudication, 110, 184, 235.
voluntary cases, 184.
when and by whom cases are referred to, 110.
Related to judges of courts, etc., can not be, 108.
Release property of bankrupt, when, 117, 212, 219.
Remove, court, may, 107.
Resident of, must be, or hold office in district, 108.
Review, powers subject to, 112, 118.
Ruings of, may be reviewed by judge, 118, *et seq.*
Sale, can not bid at, 125, 663, 713.
Stay proceedings of other courts, have no power to, 112.
Schedule, to examine, and amend, 122, 179, 186.
copy of, to be filed for, 178, 634.
to prepare and file, if bankrupt neglects, etc., 122.
Stenographer, to employ, 115, 344, 620.
Subpœnas should not be issued by, 111.
Term of, 107.
Time of bringing suit on bond, 109.
Transfer of cases to, 110, 228, 252.
apportionment of fees, 127.
Trustees—
appointment of, by, in certain cases, 113.
approve the bond of, may, 113.
discharge, when may, 734.
notify trustees of appointment, to, 113, 359.
removal of, 113.
Vacancy, filling, 107, 109.
failure to give bond creates, 109, 350.
Warrant for detention of bankrupt, no power to issue, 111.
Who may conduct proceedings before, 116.
Witnesses—
attendance before, 115, 343, 616.
may compel to produce books, 614.
may examine, 115.
may summon, 115.

Reference—
Absence of judge, 110, 114, 130.
Adjudication, after, 110, 184, 235.
Involuntary cases, in, 235.
Order of—
to be served on referee, 186.
Partnership cases, in, 253.

References are to pages.

Reference (continued)—
Proceedings after, 185, 268.
Voluntary cases, in, 184.
When made, 130, 185.

Rehearing—
In appellate cases, 840.

Relationship—
Computing, 192.

Relative—
Creditor, of bankrupt, can not be counted in petition, etc., 192.
Referee, not to be, of judges of United States courts, etc., 108.

Release—
Bankrupt's property of, giving bond, 117, 219.
Referee, by, of property, when, 117, 212, 219.
What debts discharge. (See DISCHARGE.)

Removal—
Bankrupt, of, from one district to another, 646-652. (See EXTRADITION.)
Cases to circuit court, 102.
Property of bankrupt, of, with intent to defraud, etc., effect, 153, 159, 160.
Referee, of, 107.
Trustee, of, effect, 356, 654.
by judge only, 113, 357.
on hearing and notice, 356.
(See TRUSTEE.)

Rent—
As a provable debt, 304.
after adjudication, 305, 400.
apportionment, 305.
before adjudication, 305.
covenants in lease, 306.
election by trustee, 305, 306, 397, *et seq.*
lien for, 401.
surety for, liability of, 401.

Replevin—
Action of, will not lie in state court, when, 374.

Reply—
When necessary, 229.

Report—
Annual, of Attorney-General, 133.
Officers, by, of expenses of administering estates, 128.
Trustee, by, of condition of estate, when, 352, 717, 721.
final, when, 734.

Representations—
Judgment in action for false, not released by discharge, 766, 767.

Residence—
Banking institutions, depositories, etc., to be convenient to trustees, 353.
Departure of bankrupt from, cause for detention, 614, 640.

References are to pages.

Residence (continued)—
Dower fixed by law of bankrupt's, 396, 437, 653.
Expenses of bankrupt, attending examination from, 617.
List of creditors filed by bankrupt to show, 178, 180, 221.
Persons adjudged bankrupt, of, 144, 172, 197, 198, 206, 224, 247, 251, 425.
Referee's, in district, etc., 108.
Sureties on bond when property seized, 217.
Taxes of, bankrupt not released from, by discharge, 762.
Trustees, in district, etc., 349.

Respondent—
Costs, counsel fees, etc., allowed on dismissal of petition, 234.

Restraining orders—
To protect an estate, 214.

Return—
Subpœna, 207.

Revesting—
Of title in bankrupt, when, 369, 693, 697.

Review—
By circuit court of appeals, 808, *et seq.* (See CIRCUIT COURT OF APPEALS.)
Contempt proceedings, of, 676.
Final allowance or rejection of a claim, 346.
Referee, of action of, 112, 118, *et seq.*

Revivor—
On death of party, in appellate court, 840.

Revocation—
Discharge of bankrupt, of, when may be made, 784.
Title vested in trustee on, of discharge, 369, 789.

Rhode Island—
Exemption laws of, 529.
Territorial jurisdiction and time of holding courts in, 56.

Rules—
Amendment of, by supreme court of United States, 845.
Supreme court of the United States to prescribe in bankruptcy proceedings, 845.

Salary—
Persons receiving, of $1,500 can not be involuntary bankrupt, 112.

S.

Sale—
Advertising, as to, 712.
Application for, who may make, 705, 708.
Appraising property before, 712.
Approval of court, 713.
Auction, usually by, 712.
Bankrupt, may purchase at, 713.
Conditional, to bankrupt may not pass title, 375.
Conducted how, 712.

References are to pages.

Sale (continued)—
Confirmation of, when, 713, 714.
Costs of, 715.
Encumbered property, of, 601, 605, 704.
application for, how made, 706.
should be made when, 706.
free from encumbrance, 706.
petition for, 706.
proceeds, how dealt with, 707.
purchase by lienor, 708.
subject to encumbrance, 705.
trustee represents whom, 705.
Fraudulent, to bankrupt may not pass title, 375.
Grounds for setting aside a, 714.
Mortgage or lien, subject to or free of, 705, 706.
Must be for 75 percent of appraisement, 713, 714.
Notice to creditors of, 703. 706. 707.
Order of court, should be by, 702.
must be strictly followed, 712.
Perishable property, 711.
Power of trustee to make a, 701.
Preference created by a, 589, *et seq.*
Price, inadequacy of, ground for setting aside, 714.
Private, or public, 703, 706, 707, 712.
Property, to be conveyed by trustee, 713.
Property in dispute, 711.
Receiver, by, 702.
Referee can not bid at, 125, 663, 713.
purchasing at, penalty for, 125.
Setting aside a, 714.
Title of bankrupt only, transferred, 713.
Trustee can not bid at, 713.
Unincumbered property, of, 703.
Who may bid at, 713.

Schedule—
A, 180.
amendment of, 186.
B, 181.
Bankrupt to make oath to and file, when, 634.
Composition can not be offered before filing, 679.
Copies in triplicate to be filed by bankrupt, 178, 221.
Discharge does not release from unscheduled claims, 768.
unless creditors had notice, 768.
Filed in involuntary cases, 201, 221, 634.
in voluntary cases, 182, 634.
when bankrupt absent, 221.
Form of, 178.
Referee to examine and amend, 122, 179.
prepare and file when, 122.
Signed, each sheet should be, 179.
Voluntary bankrupt to file, with petition, 182, 634.
What to contain, 178.

Seal of court—
Authentication of record, necessary to, 834.
Process issued under, 846.

Secured creditors—
Allowance of clams, for what sums, 331.
Claims secured by individual undertaking, 332.
subrogation of obligor discharging, 332.

References are to pages.

Secured creditors (continued)—
Definition of, 604.
Enforcement of security by, 76, 709.
Meetings of creditors, not entitled to vote at, 270.
claims not counted, etc., unless, etc., 189.
Paid in full, when, 719.
Pay costs of sale, to whom, 715.
Priority of, as to prior creditors, 730.
Prove deficiency and rely on security, 604.
how to, claims, 331.
Rights of, 604.
Sale of property on application of, 708.
Security, may rely on, and not prove, 604.
enforcement of, 76, 709.
must be stated in proving claims, 329.
value of, how determined, 331, 604, 705, 710.
Surrender security and prove claim, may, 604.
Vote, entitled to, when, 271.
Trustee may elect not to take encumbered property, 372, 704.
(See also CREDITORS and PREFERRED CREDITORS.)

Seduction—
(See JUDGMENTS.)

Seizure—
Bankrupt's property, of, 216.
application for, 217.
Proceedings where property not bankrupt's is taken, 218.
Redelivered, when and how, of property, 219.
Referee may order, when, 117, 217.

Servant—
Wages due, etc., have priority, 726.

Service—
Notice of examination, of, 617.
to take depositions, of, 344.
to testify without district of his residence, 344, 617.
upon bankrupt, 618.
Partnership proceedings, in, 253.
Petition of, with subpœna for involuntary bankrupt, 203.
manner of, 203.
Subpœna of, etc., 203, 205.
How to object to irregularity of, 209.
Manner of, 205.
Publication by, 208.
Return of, 207.
Waived by appearance, 207.
(See also NOTICE and SUBPOENA.)

Set-off—
Allowed between creditor and bankrupt, when, 308, 310, 315.
not between debtor and bankrupt, when, 312.
Preferred creditor, by, giving further credit, etc., 317.
Waiver of, 314, 317.
(See MUTUAL DEBTS and CREDITS.)

Setting aside—
Confirmation of a composition, 697
Discharge, order granting, 784.
Preferences and fraudulent conveyances, 605.

References are to pages.

Settlement—
Controversies of, by arbitration, 698, 716.
Estate, of the, 733.

Shrinkage of assets—
Evidence of concealment, 658.

Sickness—
Judge of, referee's powers when exercised, 117.

Solicitor—
(See ATTORNEY.)

Solvency—
Burden of proof as to, 155, 232.
Defense, a complete, when, 155, 161, 168, 169, 196, 225.
Jury, trial by, as to, 196, 226.

Solvent debtor—
Can not give a preference, 574.

South Carolina—
Exemption laws of, 530.
Territorial jurisdiction and time of holding courts in, 56.

South Dakota—
Exemption laws of, 531.
Territorial jurisdiction and time of holding courts in, 57.

State banks—
Can not be adjudged involuntary bankrupt, 142.

State courts—
Bankrupt may be released by *habeas corpus* issued by, 642.
Bankruptcy proceedings, can not enjoin, 173.
Contempt before referee, can not punish for, 623.
Decisions of, bankruptcy courts will follow, when, 724.
Determine effect of discharge, when, 759.
Enforce mortgage or lien, when, 709.
Perjury before referee, can not punish for, 623.
Suits in, may be stayed, 77, 87.
United States supreme may revise decision of, when, 793.

State laws—
Adopting, as to exemptions, constitutional, 426.
as to mechanics' liens, constitutional, 602.
as to validity of transfers, constitutional, 294.
Assignment, effect of national act upon, 29.
Bankrupt or insolvent, may be enacted when, 20.
Can not discharge debtor from existing contracts, 21.
debts owing to nonresident, 21.
impair obligation of contract, 21.
Dower of widow fixed by, 437.
Effect of repeal of national act on, 20.
Exemptions governed by, 422.
Insurance policies, exemption of, by, 410.
Insolvency, 728.
Liens, time of attaching governed by, 566.
Superseded only when congress acts, 19.
Transfers void under, void in bankruptcy, 393.

References are to pages.

State officer—
Will be protected in obeying order of court of bankruptcy, 646.

Statement—
Bankrupt to file, of his assets and debts, 634.
Trustee to lay detailed, before final meeting of creditors, 718, 734.
(See also SCHEDULES.)

Statistics—
Attorney-general to lay tables of, annually before congress, 133.
Officers to furnish, to attorney-general on request, 134.

Statutes of limitation—
Bankruptcy stops running of, 320.
Debts barred by, not provable, 319.
Defense, as a, 227.
Liens barred by, 319.
Time for claiming dividends, 733.
proving claims, 320, 325.
taking appeals, 820.

Statutes of United States (quoted)—
Act of March 3, 1891, Secs. 5 and 6, 790, 791.
Bankruptcy act of 1898, 1119.
Bankruptcy law of 1867, 1207.
Equity rule 13, 205.
R. S. Sec. 601, transfer proceedings to circuit court, 102.
R. S. Sec. 709, revising decision of state court in supreme court, 793.
R. S. Sec. 1007, supersedeas, 829.
R. S. Sec. 1014, extradition, 647.

Stay—
Application for, of suits in state court, 89, 112.
who may make, 90.
how made, 90.
what to contain, 90.
Begun after bankruptcy, 89.
Effect of, of suits, 95.
Founded on debt discharged, of suits only, 88.
In different district, 95.
Judge and not referee may, suits, 91.
Length of, 90, 94.
May be had at any stage, 88.
Suits, power to, 72, 77, 87.
in federal court, 87.
in state court, 88, 211.
When granted, 92.
When two or more petitions are filed, 228.

Steamboat companies—
As bankrupts, 150.

Stenographer—
May be employed, 115, 344, 620.

Stock, shares of—
Fictitious person, in name of, 405.
Pass to trustee, 405.
Transfer on books to trustee, 405.
Trustee may recover unpaid subscriptions, 406.
may elect not to take, 405.
may vote, 405.

References are to pages.

Stockholders—
Liability on discharge of corporation, 777.

Subpoena
Disobedience of, how to punish, 619.
How issued, 204.
May run into other districts, 115.
Necessary, when, 204.
Return of, by marshal, etc., 207.
Service of, 203, 205.
when personal, can not be made, 206.
when served without district, 619.
Should not be issued by referee, 111, 115.
Witness, to, to testify before referee or court, 618.

Subrogation—
Claims secured by individual undertaking, of person discharging, 296.
Trustee, of, to rights of creditor or holder of lien, 569, 600, 606.
of, to rights of creditors to recover property, 356.

Suits—
Bankrupt, by and against, 358, 365.
appearance of trustee, 358.
commenced by, prior to adjudication, 358.
stay of, against, 72, 77.
Bonds of referees and trustees, on, 74, 109.
in name of United States, etc., 109.
limitation of action on, 109.
Equity, where, in, 109.
Expense of, to recover concealed property entitled to priority, 725.
Injury to property, right to bring for, passes to trustee, 420.
to person, right to bring for, does not pass to trustee, 420.
Instituting bankruptcy proceedings as grounds for, 241.
Law and equity, may be brought in court of bankruptcy, 80.
what are, 104.
Lien created pursuant to, etc., when dissolved, 570.
Measure of damages in, to recover property sold, 611.
Mechanics' lien, to enforce, 602.
Plenary, against third persons, 80, 668.
Prosecuted after discharge, may be, when, 756.
Referee, on bond of, 74, 109.
can not stay, 110.
Review, how to, at law and in equity, 790.
Set aside, to conveyances, 605.
bankruptcy proceedings, not, 608.
burden of proof, 609.
bona fide purchaser protected, 610, 611.
damages, where property has been sold, 611.
decree, in, 610.
demand not necessary, 609.
failure to contest claim not a bar in, 609.
in what court, 607.
in what district, 608.
order in, 610.
order of bankruptcy court, trustee need not obtain, 609.
petition, allegations in, 609.
pleading and practice, 608.
plenary, are, 608.
trustee must bring, 606.
trustee represents general creditors in, 606.
trustee subrogated to right of creditors, 606.

References are to pages.

Suits (continued)—
Staying suits in state court, 72, 77, 87, 211. (See STAY.)
Trustee, on bond of, 351.
by, brought in what courts, 81, 360.
death or removal not to abate, 358, 654.
not bound by price of sale, when, 611.
time of bringing, by or against, 361.
on bond of, 351.

"Suffered or permitted"—
Meaning of, 165.

Summary proceedings—
(See JURISDICTION.)

Summons—
(See SUBPOENA.)

Summons and severance—
When necessary, 825.

Sunday—
In computing time, 171.

Supersedeas—
Appeal does not operate as, 829.
How obtained, 829.

Supervisory power—
Circuit courts of appeal may exercise, 808.
How invoked and exercised, 812.
(See also APPELLATE PROCEEDINGS.)

Supreme Court District of Columbia—
Appeals from, 795.
A court of bankruptcy, 33, 67.
Jurisdiction of, 67.

Supreme court of a territory—
Created an appellate court, 790.
Practice and procedure in, 807.

Supreme court of United States—
Appeal in bankruptcy lies to, from C. C. A., when, 796.
from C. C. A. not in the exercise of supervisory powers, 816.
from supreme court of District of Columbia, 795.
Appellate jurisdiction at law and equity from federal courts, 790, 791.
from state courts, 793.
Certifying questions of jurisdiction to, 804.
of law to, 804.
Certiorari to correct record in, 797.
to remove cases from C. C. A. for review, 799.
practice in, 802.

Sureties—
Bankrupt, for, may prove, when, 296.
Effect of discharge on, 756, 776.
discharge of principal, 776.
Liable for covenants in lease, when, 401.
Proof of claim of principal, when, 332.
Referee, on bond of, 109.

References are to pages.

Surrender—
Value of insurance policies, 410.
What constitutes a, of preference, 335.
Whether it must be voluntary, 336.

T.

Taxation of costs—
By courts of bankruptcy, 69.
(See COSTS.)

Taxes—
Discharge of bankrupt not to affect, 762.
Payment of not a voidable preference, 561.
Priority in payment of, 723.

Tennessee—
Exemption laws of, 534.
Territorial jurisdiction and time of holding courts in, 57.

Terms—
Courts of bankruptcy, of, 34.
Referee's office, of, 107.

Territorial jurisdiction—
Courts of bankruptcy in each state, 33.
Court's, limited to its respective district, 78.

Territories—
District courts of, made courts of bankruptcy, 33.
Jurisdiction of, 67.
appellate, of supreme courts, 807.
States include, 422*n*.

Testimony—
Bankrupt to give, as to estate, 634.
Criminal proceeding, in, can not be offered against bankrupt, 625.
Manner of introducing, 232.
Person denying insolvency to give, 232.

Texas—
Exemption laws of, 536.
Territorial jurisdiction and time of holding courts in, 59.

Temporary injunction—
To protect the estate, when granted, 214.
(See INJUNCTION.)

Time—
Accounts, by trustee, of filing, 352, 718, 734.
Actions, of bringing, by and against trustees, 361.
on bonds of referees, 109.
on bonds of trustees, 351.
Adjudication should be made, 233.
Answer, to, 228.
Appeal in bankruptcy can not be extended, 821.
to circuit court of appeals, 820.
to supreme court of territories, 807.
to supreme court of United States, 797.
Application for jury must be made within what, 223.
Bankrupt may be examined within what, 613.

References are to pages.

Time (continued)—
Bonds of referees, of giving, 109.
of trustees, of giving, 350.
Certiorari to remove case from C. C. A., of application for, 800.
Citation may be issued, within which a, 831.
Claims, of proving, 325.
hearing objections to, 343.
Composition, of filing application to set aside, 697.
may be made within what, 689.
Computation of, as to acts of bankruptcy, 170.
as to filing petition, 202.
as to creating preferences, 584.
Creditors' meetings, of, 268, 279.
Discharge, of application for, 737.
of appearance to oppose, 740.
to oppose may be enlarged, 741.
specifications, to be filed, 742.
Dividends, of declaring, 720.
of paying, 356, 718, 732.
unclaimed dividends, 733.
Examination may be made, within which, 613.
Exemptions should be claimed, when, 433.
Holding courts, 34, *et seq.*
Involuntary petition, to file under act, 201.
Jury trial, of filing application for, 223.
Notice to creditors, of giving. (See NOTICE.)
Petition against insolvent, of filing, 201.
Pleading to petition, of, 222.
Preference created, within which, 581.
when, begins to run as to, 582.
Record, of filing, in appellate court, 836.
Referees fix, and place of acting, 110.
Subpœna, of return of, 207.
Trustees, when to give bond, 350.
account, to file final, 718, 734.
limitation of actions by and against, 361.
on bond, 351.
report, to make final, 718, 734.
Voluntary petition, to file under act, 182.

Title—
Between adjudication and appointment of trustee, 365.
Confirmation of composition, on, 369, 693, 697.
Discharge, upon revoking a, 369, 789.
Estate, prior to appointment of trustee, 365.
when no trustee is appointed, 365.
Exempt property, to, 427.
in bankrupt, when, 427.
in trustee, when, 428.
Foreign property, to, 367.
Proof of vesting of, in trustee, 367.
Revests in bankrupt, when, 693.
Trustee to convey, 605, 713.
Vests in trustee, 365.
when composition set aside, 369, 693, 696.

Torts—
Debts, not, 189, 318.

Trade marks—
Vest in trustee, 378.

References are to pages.

Trading corporations—
May be involuntary bankrupts, 147.
what are, 148.

Transfer—
Act of bankruptcy, when, 159.
intent of transferor only material, 160.
Attorneys, to, re-examination, etc., when, 586.
Bankrupt to execute, to trustee of foreign property, 367.
Before adjudication, 366.
Cases, of, by court of bankruptcy, 228.
when petition filed against member of partnership, 252.
Definition of, 571.
Fraudulent, what constitutes a, 381. (See FRAUDULENT TRANSFERS.)
"Hinder, delay or defraud," to, 389.
Mortgage, by, 591. (See MORTGAGES.)
Payment, by, 584.
Preferences, when given by, 571. (See PREFERENCES.)
insolvent person to creditor, by, 573.
creditor must receive a greater percentage than others of same class, 576.
reasonable cause to believe a preference intended, 577.
within four months, must be, 581.
Sales, by, 589.
Solvent debtor, by, effect of, 575.
Subsequent to act, within four months, etc., void, 389.
Suits to set aside, 605.
Within four months, void under state laws, void under act, 393.

Traveling expenses—
(See EXPENSES.)

Trial—
Involuntary petition on, 230.
Solvency, of question of, 157, 226.

Triplicate—
Schedules, copies of, filed, 182, 221.

Trust—
Companies may be trustees, 349.
Courts to settle what is trust property, 413.
Property held by bankrupt in, does not pass, 411.
in which bankrupt has an interest passes, 414.
whether bankrupt has interest, how determined, 414.

Trustees—
Acceptance of appointment by, 278.
Accounts, etc., open to inspection, 353.
objection to, 734.
partnership cases, in, 255, 352.
referee to adult, 352, 717, 718.
sale of, 704.
to keep, 352.
to file final, when, 718, 734.
Accretions to land by alluvion pass to, 395.
Actions on contracts, right of, pass to, 417.
injury, for, to property pass to, 420.
to persons do not pass to, 420.

References are to pages

Trustees (continued)—
Adjudication, decree of, must file, 353.
After-acquired property does not pass to, 415.
Alimony does not pass to, 376.
Appeal bond, not required to give, 828.
Appointment of, 273, 275, 348.
creditors to make, when, 275, 357.
judge or referee, to make, when, 276, 349.
new, after removal, 358.
upon setting aside composition, 698.
upon revoking discharge, 789.
by referee, 113, 349.
setting aside, 273, 348.
when no assets and no creditors appear, 277, 349.
who are qualified for, 349.
Arbitration, trustee to submit controversies to, 354, 699.
Assigned for benefit of creditors, property passes to, 391, *et seq.*
Attorney of, should not represent bankrupt, 134.
creditors may elect, 135.
may employ when necessary, 134, 138, 354.
Bankrupt, to inform, of attempt to evade act, 633.
may be adjudged, 142.
Banks as depositories, to deposit money in, 353.
Bid at sale, can not, 713.
Bonds of, 350.
amount, 278.
creditors to fix, 278, 350.
court to fix, when, 350.
appeal, not required to give, 828.
evidence of title, certified copy of order approving, etc., 367.
failure to give, effect, 109, 350.
filed where, 109, 351.
joint or several, etc., 350.
recording of, how far notice, 367.
suits on, 351.
sureties approved by court, 351.
corporations may be, 350.
number of, 350.
value of property, etc., 350.
court to require evidence, 350.
time of giving, 350.
Business of bankrupt, when, conducted by, 211, 702.
Circuit courts, when suit by, in, 103.
Collect and reduce to money the estate, to, 354, 701.
Commissions of, 362.
Compensation of, 362.
apportionment of, 362.
withholding, 362.
who is an attorney, 138.
Composition can not object to, 685.
Compromise controversies, may, when, 354, 698, 716.
Concurrence of two, necessary, 356.
Condition of estate, to report when, 352, 717, 734.
Confirmation of composition, title upon, 369, 693, 696.
Contingent remainder pass to, 395.
Contracts, rights under pass to, subject to election, 417.
exceptions to, 419.
Controversies, arbitration of, 354.
Convey title, 605, 713.
Copyrights pass to, 378.
Corporations authorized to act as, 349.

References are to pages

Trustees (continued)—
Created by act, 349.
Creditors to appoint when, 348, 358, 698, 789.
when no creditor proves claim, 349.
Creditors' meetings, to make detailed statement at final, 734.
Crops pass to, 402.
Courtesy, trustee takes subject to, 396.
trustee takes bankrupt's right to, 395.
Death or removal, effect of, 358, 654.
Depositories, deposit money in, 353, 732.
disbursed by check on, 353, 732.
Devise, property by, passes to, 395.
Discharge of, 718, 734.
debts of, not released by, 773.
when may be set aside, 735.
Distribute estate, to, 351.
Dividends, to pay when, 356, 732.
Documents, etc., pass to, 377.
punishment for secreting, destroying, etc., 656.
Dower, trustee takes subject to, 396.
trustee takes bankrupts right to, 395.
Duties of, 351.
Elect to take incumbered property, may, 372, 704.
Election of, 273, 275.
Embezzlement by, 655.
Emblements, 402.
Encumbered property may be sold by, 601, 605, 704.
not bound to take, 371.
Equitable interest in land pass to, when, 395.
Equities, takes subject to, 368.
Equity of redemption pass to, 395.
Error, not required to give bond on, 828.
Estates pass subject to equities, 368.
merchantable form, may put in, when, 702.
to close up, etc., 354.
Examination, may apply for an order for, 616.
Exemption, property subject to does not pass to, 427.
for what purposes it may pass, 428.
to set apart, 428, 439.
Expenses, 362.
Failure to qualify creates a vacancy, 278.
Fee subject to an easement passes to, 395.
File decree of adjudication, must, 353.
Final accounts to file, when, 718, 734.
reports to make, 352, 718, 734.
Fixtures, when pass to, 402.
Foreign property, title acquired to, 367, 376.
subject to rights of attaching creditors, 377.
Franchises, pass to, when, 407.
Fraud of the act, property transferred in, passes to, 389.
property transferred in, passes to, 351, 381.
property purchased in, by bankrupt, does not pass to, 375.
Goods and chattels generally pass to, 403.
Good will, when passes to, 402.
Governed by whom, 352.
Information, to furnish, 353.
Inspection of papers, penalty for refusing, 125.
Insurance policies pass to, 408, *et seq.* (See INSURANCE.)
Interest, to pay, 354*n*, 717.
Inventory, when to file, 352.
Invest funds, when may temporarily, 354.

References are to pages.

Trustees (continued)—
Join to prosecute or defend suits, 359.
Lease, when passes to, 305, 306, 396.
contract to, when passes to, 401.
may elect not to take, 397, *et seq.*
takes subject to equities, 400.
surrender, may, 400.
waste, 401.
Legacies, pass to, when, 403.
Lien, subrogated to rights of holder of, 569, 600, 606.
Limitations as to suits by or against, 361.
must be pleaded, 361.
Memberships in exchanges, franchises, etc., pass to, 406.
Meetings of creditors, make statements before final, 734.
Money, deposit in designated depository, 353.
disbursed by check, etc., 353.
Negotiable instruments pass to, 407.
notice of dishonor, of, to be given to, 407.
Notice of appointment, 278, 350.
Notice of equities, takes with, 351.
Number of, 348.
Object to composition, can not, 685.
Offenses by, 655.
Office of, where, 349.
Officers of the court, are, 348, 351.
Official or general, can not be appointed, 349.
Partnership, creditors to appoint, 270.
how to administer an estate of, 255.
Patents, copyrights and trade marks pass to, 378.
issued after adjudication, 379.
Pay dividends, to, 356.
the taxes on estate, 354.
Payments to attorneys, re-examined by, when, 355.
Pensions do not pass to, 408.
Perishable property may be sold by, 711.
Personal property of, passes to, 394.
Possession, entitled to, 370.
constructive, 370.
of unscheduled property, 371.
Powers of appointment pass to, 379.
Preferences, voidable, to set aside, 355.
Property of bankrupt, to collect, 354, 668, 701.
transferred to preferred creditors, 385.
fraudulently transferred passes to, 381.
fraudulently purchased does not pass to, 375.
in hands of factor or agent, passes to, 403.
on which there is a valid lien, 562.
what passes to, 365. (See ESTATES.)
Prove claims of estate against other estates, 323, 355.
Punishment for offenses, 125, 655, 660, 663.
Purchaser at sale, can not be, 713.
Qualifications of, 348.
Real property subject to levy passes to, 395.
Recovery of property by, 355, 384, 605, *et seq.*
Reduce the estate to money, to, 351, 354.
Removal of, 356.
application for, 357
by judge only, 113, 357.
cause for, 356.
costs, 357.
does not abate any suit, 358, 654.

References are to pages.

Trustees (continued)—
Removal of, (continued)—
hearing and notice, 357.
new trustee appointed after, 358.
Rent, liability for, 305, 306, 397.
Reports, to make, 352, 717.
final, when, 718, 734.
Represent whom, 351, 606, 705.
Residents of, must be, or have office in district, 349.
Resignation of, 358.
Reversion with rent incident thereto passes to, 395.
Sale of property, power to make, 701. (See SALE.)
Schedule, copy of, to be filed for, 221.
Separate property of wife, does not take, 419.
Shares of stock pass to, 405.
may vote, 405.
Subrogation to rights of individual creditors, 356.
to rights of lienholders, 569, 600, 606.
Successor may prosecute or defend suit, 358.
Suits by or against, 77, 358.
appeal in, 359.
courts to be brought, in what, 81, 82, 360, 607.
how far bound by, 359.
leave of court, must obtain, when, 359, 360.
limitation of, by or against, 361.
on bond, 351.
to set aside preferences and fraudulent transfers, 605. (See SUITS.)
Summoned as witness by referee, can not be, 115.
Taxes, credited with, on receipt filed, for payment of, 354.
Third person, when property of, passes to, 373.
Title to property vested in, 365, *et seq.*
on revocation of discharge, 369, 789.
all kinds of property which may be applied to pay debts vests in, 376.
exempt property, 427.
extent of, 367, *et seq.*
holds, until conveyed or estate settled, 369.
what passes, 367.
Transfer void under state law, void under act, 393.
penalty for unlawful, 655.
Trade marks pass to, 378.
Trust property does not pass to, 411.
in which bankrupt has an interest passes to, 414.
what is, 412.
Two trustees must concur when three act, 356.
Unencumbered property may be sold by, 703.
Unpaid subscription on stock may be recovered by, 406.
Vacancy, appointment in case of, 348, 358, 789.
by failure to give bond, 350.
by failure to qualify, 278.
Vested with title to property on high seas, 376.
Vested with title to property, when, 365.
What passes to, 365, *et seq.*, 376, 709.
When appointed, 348.
Who may be, 349.

U.

Unclaimed dividends—
Disposition of, 733.

References are to pages.

Uniformity—
Uniformity required by constitution, 19.

Unincorporated company —
May be adjudged involuntary bankrupt, 141.

United States—
Bankrupt statutes of, history of, 6.
Discharge on debts due, effect of, 762.
Proof of claims by, 324.
Prove claims, failure of, to, 324.
Taxes of, discharge not to affect, 760.

United States commissioner—
Proceedings before, to remove bankrupt to another district, 648.

United States courts—
(See COURTS, CIRCUIT COURTS, CIRCUIT COURTS OF APPEALS and SUPREME COURT.)

Unliquidated claims—
Provable, when and how, 282.

Utah—
Exemption laws of, 538.
Territorial jurisdiction and time of holding courts in, 61.

V.

Vacancy—
Referee's office, in, 108.
court appoints successor, 107.
Trustee's office, in, on failing to qualify, 278.
on failure to give bond, 350.
how filled, 348, 358, 789.

Vacating orders—
(See SET ASIDE.)

Value—
Exemptions, of, to be set apart, determined by what law, 422.
Sale, no, for less than 75 percent of appraised, 713, 714.
Securities of, how determined, 705.

Verdict—
Court can not enter judgment contrary to, 231.
Directing, 233.
Setting aside, 231, 233.

Vermont—
Exemption laws of, 542.
Territorial jurisdiction and time of holding courts in, 61.

Virginia—
Exemption laws of, 545.
Territorial jurisdiction and time of holding courts in, 61.

Verification—
(See OATH.)

Vesting of title—
(See TITLE.)

References are to pages.

Violation of law—
(See OFFENSES.)

Void conveyances—
(See PREFERENCES.)

Voluntary bankruptcy—
Act of bankruptcy to file petition in, 169.
Adjudication, order of, 184.
Court in which petition filed, 174.
Dismissing proceedings, 187.
District in which petition may be filed, 174, 176.
time within, 175.
Enjoin proceedings in, state court can not, 173.
Filing petition, 182.
after assignment for benefit of creditors, 173
after involuntary petition filed, 173.
fees required, on, 182.
in two districts, 176.
How instituted, 176.
In forma pauperis, 183.
Partnership cases, 184, 246.
Petition, 176.
number of filed, 173.
who may file, 172.
Proceeding in, 172.
subsequent to adjudication, 188.
Reference, order of, 184.
Schedules, 178.
number of, to be filed, 178.
State court can not enjoin proceedings in, 173.
Subsequent to reference, proceedings, 188.
Void if court has no jurisdiction, 176.
Who may file petition, 141, 172.

Voters—
At creditors' meetings, 269, *et seq.*
Claim disallowed after voting, 273.
How to count votes, 277.
Referee can not be a, 273.
Secured creditor can vote, when, 270.

W.

Wage-earners—
Can not be adjudged involuntary bankrupts, 142.
Who are, 142.

Wages—
Entitled to priority, 726. (See LABOR CLAIMS.)
Payment of, not a voidable preference, 561.
(See also WAGE-EARNERS.)

Waiver—
Act of bankruptcy of, by consent of petitioning creditor, 191.
Appearance is, of service, 207.
Discharge, effect of, by new promise, 779. (See NEW PROMISE.)
estopped by consent to allege act against, 739.
right to oppose by not appearing to oppose in time, 741.
Examination before United States Commissioner, of, 649.
Exemptions, of, 433.

References are to pages.

Waiver (continued)—
Formal defects of, pleading to merits, 223.
Jury trial, of, 223, 226.
Set-offs and counter claims, 314, 317.

Want of prosecution—
Involuntary petition not dismissed for, 239.
Voluntary petition not dismissed for, 187.

Warrant—
Bankrupt, for removal of, 652.
for detention of, referee can not issue, 111.
Seizure of debtor's property, for, 216.

Washington—
Exemption laws of, 549.
Territorial jurisdiction and time of holding courts in, 62.

West Virginia—
Exemption laws of, 552.
Territorial jurisdiction and time of holding courts in, 63.

Widow—
Entitled to dower, when, 396, 437.

Wisconsin—
Exemption laws of, 554.
Territorial jurisdiction and time of holding courts, in, 63.

Withdrawal—
Appearance of, 221.
Of proof, 338.
Of written evidence of debt, when and how allowed, 330.
Proof of claim, of, 338.
Written evidence of debt, 330.

Witnesses—
Attendance before referee, 115, 343, 616.
Competency not regulated by state laws, 615.
Compulsory attendance to be examined, 614, 616.
Contempt for refusal to appear, etc., 619.
Court, how, are brought before, 232.
Evidence before referee may be used in civil suits to impeach, 626, 628, 630.
Examine, power of court to, 614, 616.
Examined, refusal of, to be, 622.
before a referee, 116.
Expenses of, indemnity for, 128.
Fees and mileage of, to be first paid or tendered, 619.
How examination of, is made, 619.
Irrelevant questions, need not answer, 627.
Privileged communications, 628.
Service of summons, 618.
without district, when, 619.
Sign depositions taken before referee, 623.
Summons by referee, 115.
to testify, 618.
Topics upon which, may be examined, 626.
Who are subject to service of process, 206.
Who may be summoned as, before court, 614, 616.
before referee, 115.

References are to pages.

Women—
Married, as involuntary bankrupts, 146.
Married, may file voluntary petition, 141.

Workmen—
Wages of, have priority, 726. (See LABOR CLAIMS.)

Writ—
Certiorari, of, to complete record, 797.
to remove case to U. S. supreme court, 799.
Error of in bankruptcy, 819.
in law cases, 790.
Seize, to, property of bankrupt, 216.
Subpœna, of, 203.

Writing—
Debts evidenced by provable, 293, *et seq.*
Filed, to be, with proof of claim, 330.
List of, included in schedule, 181.
Pass to trustee, what, 377, 407.

Written—
Admission, act of bankruptcy, when, 169.
Evidence of claim, how proved and withdrawn, 330.
Reports of trustee to court, 352.

Wyoming—
Exemption laws of, 557.
Territorial jurisdiction and time of holding courts in, 64.